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THE UNDERREPRESENTATION OF MINORITIES IN THE LEGAL PROFESSION: A CRITICAL RACE THEORIST'S PERSPECTIVE

Alex M. Johnson, Jr.*

Over the last four years, I have taught a course in Critical Race Theory at the University of Virginia School of Law three times. Although each course is different, given the interplay between the teacher and the students and the integration of new developments into the course, there has been one constant subject that the students and I address: Of what import is the development of Critical Race Theory for the legal profession and larger society? Can Critical Race Theory have a positive or any effect for those outside legal academia? This article represents an attempt to explore that question by focusing on the role that Critical Race Theory can have on the legal profession.

Part I analyzes an issue that is often overlooked in a discussion of our legal system: the continuing paucity of attorneys of color, in particular black attorneys,¹ in the legal profession. After demonstrating the lack of diversity in the legal profession, Part I explores the dissonance between what law and lawyers espouse when it comes to issues involving equality, civil rights, and the elimination of racism and oppression in American society (hereinafter collectively referred to as "liberal social issues"), and what lawyers actually do within the profession by paying singular attention to their hiring practices. In other words, I examine how it is possible that lawyers can so idealistically support liberal social issues, while at the same time maintaining a system of self-selection (and to a lesser

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1. A debate, waged largely in the footnotes, has raged over whether persons who were once classified as Negroes should be referred to as blacks or African-Americans and, if the former, whether "black" should be capitalized. See Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595, 1596-97 n.8 (1995). My current practice is to use the terms interchangeably although my preference is to refer to those individuals previously identified as Negroes as blacks. Indeed, in this Article when I refer to an individual as "black" I am referring to their racial identification. However, in keeping with my thesis that ethnicity rather than race should be emphasized, when I do refer to an individual as an "African American," I am referring to that individual's ethnic identity and not the individual's racial identity. See *infra* notes 128-29 and accompanying text.

degree, laws) that is rife with substantive defects attributable to the systemic effects of racism — disproportionately few minorities and women within the profession and unequal treatment of those individuals within the profession based on their racial identification and gender. If there is any occupation in which one would expect to see meaningful equality of opportunity and results, given the profession's lofty ideals and pronouncements, it should be the legal profession, but the reality is quite the contrary. In short, lawyers do not practice what they preach.

Part II explains the dissonance between the ideals and rhetoric espoused within the legal profession and the reality of practice through an analysis of group dynamics and the benefits associated with group membership. Building upon Richard McAdams's recent work in law and economics on relative preferences,² and on how intragroup and intergroup conflict are created,³ Part II contends that lawyers as a group gain self-esteem and power vis-à-vis other groups with their visible and vocal commitment to liberal social issues. Conversely, however, lawyers qua lawyers are situated as individuals as part of the larger group and, as a result, gain intragroup status by reproducing existing racial dynamics by oppressing minorities and enforcing subordination.

Part III represents an explicit return to Critical Race Theory by merging insights gleaned from Part I to address and remedy the issues identified in Part II. In particular, Part III presents two dissimilar solutions to the dissonance inherent in the legal profession concerning the underrepresentation of minorities within its ranks. The first remedy suggested — destabilizing racial identity — represents an attempt to construct an intragroup identity as attorneys or members of the bar that trumps the intergroup conflict that is predicated on distinct and differing racial identities. The second remedy embraces an equality of result model rather than an equality of process model, and calls upon the profession to recognize that racial differences — racial classifications and the identities they produce — do exist among its members, but that the only way to eradicate

2. See Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992) [hereinafter McAdams, *Relative Preferences*]. For further discussion of the economic theory of relative preferences, see *infra* notes 60-66 and accompanying text.

3. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995) [hereinafter McAdams, *Cooperation and Conflict*].

the illegitimate results created by these differences⁴ is to destabilize traditional notions of meritocracy.

In other words, Part III calls upon the legal profession to aggressively employ affirmative action to remedy the underrepresentation of attorneys at elite firms, notwithstanding the alleged causes of that underrepresentation. To situate this claim in the larger debate over the efficacy of affirmative action, Part III articulates a broad-based defense of affirmative action that is not limited to increasing the representation of minority lawyers at elite firms.

The first remedy suggested — destabilizing existing racial identities — is my ultimate goal and would obviate the need for affirmative action. Realistically, however, affirmative action is the more likely remedy given the intransigence of racial identification in contemporary American society and the difficult steps that would have to be taken in order to successfully destabilize racial identity.

I.

The racial composition of the legal profession and the identification of which and how many positions minority attorneys occupy within the legal profession may seem, at first glance, an odd topic to address. But this point of view demonstrates a problem that is quite understandable. The reader of this article is no doubt either a law student, lawyer, or law professor, and in this limited milieu, lawyers talking to other lawyers or law professors talking to other law professors, the existence of a nonlegal world in which law plays a symbolic and real role and in which the racial composition of the profession is viewed as a barometer of the profession's progress in racial relations is often ignored. How those outside the legal profession perceive those within the legal profession is, however, an important component of our legal system.

A. *The Plight of Minorities in the Legal Profession*

The numbers are startling and conclusive. Minority attorneys are underrepresented in prestigious corporate law firms. Before turning to the numbers, however, it is important to note what this means for the state of the profession. The paucity of minority attor-

4. The contention that these results are illegitimate is premised on the notion that there is no biological distinction between members of different races and that nothing in the way of intelligence, aptitude, or professional choices is correlated to race or racial identification. See Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 586 (1977) (decrying the fact that race is treated differently than eye color because people wrongfully associate attributes with one's racial identification); *infra* notes 115-16 and accompanying text.

neys in large corporate law firms is important because of what these firms represent. The perception within the profession is that these larger firms represent the elite practitioners of the private practice bar. Employment by one of these firms indicates that the lawyer so employed is part of the legal elite.⁵ Moreover these lawyers who practice in elite firms not only represent the elite of the profession, to a large degree they control the profession and its development.

What this means for the profession is that, if it is true to its ideals as the protector and guarantor of individual freedoms and liberties,⁶ then at least minority representation in the elite firms should be proportional to minority representation in the rest of the profession, unless there is a plausible explanation for their underrepresentation. In other words, if lawyers are committed to the advocacy of individual liberties, one would expect them to keep their own "house" in order. It would be hypocritical for elite lawyers as a group to "talk the talk without walking the walk." It would also be the height of hypocrisy for them to espouse one set of ideals while practicing something egregiously different.

Underrepresentation, if demonstrable, means little if it is inconsequential or if there is a plausible explanation for it. If, for example, there are fewer minority attorneys practicing in Salt Lake City than there are in a comparably sized city, little information can be gleaned from that fact given the lack of minority residents in the city both to service and from whence to draw potential employees.⁷ But the numbers do not lie. Minorities historically have been and continue to be severely underrepresented in these elite firms. In the most statistically valid survey to date of the career choices that lawyers make, Lewis Kornhauser and Richard Revesz conclude that

5. Lewis A. Kornhauser and Richard L. Revesz define elite law firms as the nation's 250 largest law firms based on data supplied by the *National Law Journal* since 1985. Kornhauser and Revesz thus correlate size with elite status. See Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 851 n.58 (1995).

6. See *infra* note 59 and accompanying text for an explication of this thesis.

7. According to the *1990 Census of Population and Housing*, the total population of Salt Lake City is 159,936 and the percentage of blacks is 1.7%. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING: POPULATION AND HOUSING CHARACTERISTICS FOR CENSUS TRACTS AND BLOCK NUMBERING AREAS, SALT LAKE CITY-OGDEN, UT MSA 97 tbl. 8 (1993). According to the *U.S. Bureau of Labor Statistics*, 123,060,000 members of the civilian noninstitutional population sixteen years old and over were employed in 1994. Of that total, 821,000 were lawyers. Only 3.3% of the lawyers were black. See BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, EMPLOYMENT AND EARNINGS 175-76 tbl. 11 (1995).

minorities, that is, blacks and Latinos, are severely underrepresented in elite firms.⁸

The [data] show[] that in 1981, while African-Americans and Latinos were 7.0% of the eligible pool, they constituted only 2.9% of the associates in elite law firms. This underrepresentation decreased slightly during the next decade. Between 1981 and 1991, the proportion of African-American and Latino associates in elite law firms increased by 48.2%. This increase was greater than the increase in the eligible pool . . . which rose only 24.3%. Nonetheless, in 1991, African-Americans and Latinos were still only 4.3% of associates at elite law firms, even though they comprised 8.7% of individuals graduating from law school between 1984 and 1990.

As in the case of women, the underrepresentation was even starker among partners. African-Americans and Latinos constituted only 0.7% of the elite law firm partners in 1981 and 1.7% in 1991.

. . . If the percentage of individuals in these groups among the attorneys promoted to partner in a given year is lower than their percentage among associates three to five years earlier, we deem these groups to be underrepresented among individuals promoted to partner. Between 1985 and 1987, 2.1% of new partners were African-American and Latino — a figure lower than the 2.9% of associates in 1981 who were members of these groups. Similarly, between 1987 and 1989, 2.1% of new partners were African-American and Latino, even though this group comprised 3.1% of associates in 1984. This pattern was reversed between 1989 and 1991, when African-Americans and Latinos constituted 5.3% of the individuals promoted to partner, as compared with 3.0% of the associates in 1985.⁹

Based on their analysis of the data, the authors conclude that blacks are overrepresented in not-for-profit jobs and considerably underrepresented in elite law firms, although that underrepresenta-

8. See Kornhauser & Revesz, *supra* note 5, at 862 tbl. 13. Two facts should be addressed initially. Kornhauser and Revesz, who employ a rigorous methodology to prove their points, divide their empirical study into two parts. In the first part, they undertook an empirical study of the legal profession and the economics of legal education. In the second part of their article, the authors limit their empirical study to an analysis of the career choices made by recent law school graduates of New York University Law School and the University of Michigan Law School, both characterized as having graduates with a wide range of career options. *Id.* at 891. Unless otherwise indicated herein, the data referred to are culled from the first part of the article in which the authors undertake an empirical study of the legal profession.

Second, the authors define minorities to exclude Asian-Americans for the following reason:

To perform this analysis [the representation of persons of color in the legal profession], we have broken these figures down into two groups: (1) Asian Americans and (2) African Americans and Latinos. In our analysis of job choice in Part III, we group Asian Americans with whites because of their relatively similar characteristics with respect to variables that are relevant to our empirical study, particularly law school performance and debt burden. Therefore, the remainder of this section focuses on African Americans and Latinos.

Id. at 861-62 (footnotes omitted).

9. *Id.* at 862-63 (footnotes omitted).

tion is decreasing in recent years.¹⁰ More recent data reveal that the trend the authors noted for the period 1989-1991 was fleeting and impermanent. The trend, instead, shows increased minority hiring at the associate level, but with a significant attrition following hiring. Hence, current practices continue to produce a minuscule percentage of minority partners at elite firms.¹¹

Other data support the authors' conclusion that minorities are underrepresented in elite law firms. In a study of recent Hispanic Stanford law school graduates, Linda Davila concluded that Hispanics were severely underrepresented in the partner and associate ranks at large corporate firms.¹²

Focusing on the plight of black lawyers at elite — defined in this case as law firms with over 100 lawyers — one commentator succinctly summarized the situation as follows:

There is much clamoring going on about affirmative action in law firm hiring on law school campuses. Law firm resumes advertise their

10. *See id.* at 865.

11. The data support the thesis that minority lawyers are being "churned" through elite law firms. That is, they are being hired, employed for a few years, and then leaving before reaching partner.

Despite an increase in *minority* associate ranks of 38 percent and *minority* partner ranks of 45 percent, the percentage of white partners at NLJ [National Law Journal] 250 firms dropped only from 97.6 percent to 97 percent during the past five years. A typical large firm has 31.8 times more white partners than up through the ranks rarities such as [African-American partners]. Firms in the survey can point with some satisfaction to the eye-popping percentage increases in total minorities since the last survey.

... But such percentages were large because the firms had such a small base of minority associates to begin with. In addition, the firms can hardly be satisfied with the attrition these expanded classes suffered. Down the winding road to partnership, young minority hires are leaving in significant numbers because of burnout, large firm job-hopping, alienation or offers from smaller firms or other job sectors.

...

The number of minority partners increased just 275 in the past five years, from 614 to 889. Those 275 amounted to only one-ninth of the total number of minority associates in 1991.

While such numbers are embarrassing to firms that want to be known for tolerance and merit-based hiring, they could result in something worse than bad publicity: They could cost firms millions of dollars in damages for illegal discrimination. Although the political tides are apparently turning against affirmative action, some courts are judging harshly law firms' historically slow progress in promoting minorities.

Ann Davis, *Big Jump in Minority Associates, But . . .*, NAT'L L.J., Apr. 29, 1996, at A1 (emphasis added).

12. Like blacks, Hispanics are woefully underrepresented in elite law firms.

Minority representation in the partner and associate ranks of large corporate law firms is even more dismal. In particular, Hispanic attorneys are represented in very small numbers in these firms. For example, in 1982 three-fourths of the nation's largest firms had no Hispanic partners and more than half of these firms had no Hispanic lawyers at all on their rosters. Although one may be tempted to attribute these figures to geographic factors, a survey conducted by the National Law Journal found that, in California, which has a larger Hispanic population than any other state, only two of the 530 partners in eight of the largest firms were Hispanic.

Linda E. Davila, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 STAN. L. REV. 1403, 1406-07 (1987) (footnotes omitted).

efforts to attract minorities, and most law students believe these advertisements. Unfortunately, we should know better than to believe everything we read. Whether as a result of benign reasons or malicious intent, large law firms find themselves at the top of the list of our nation's most egregious under-achievers in representative hiring and affirmative action implementation. While many of these firms advised their clients to hire a more representative group of employees, large law firms, themselves, made virtually no progress toward diversifying their own offices. Simply put, the record of the nation's largest and most prestigious law firms in hiring minority lawyers is one of continued failure.¹³

The picture is fairly clear: although the numbers of minority attorneys are increasing,¹⁴ and although their numbers are also increasing (although not proportionally) as associates in elite law firms, they are still underrepresented among the ranks of such law firms as associates and they are making little or no progress toward increasing their numbers as partners in these same elite firms.

What does this mean for the profession? It means that a profession that prides itself on promoting equal opportunity under the law is failing to adhere to its own standards. It means that a profession that gains prestige and relative preference over other occupations because of its identification as the promoter and guarantor of civil liberties will or should be at risk of losing that prestige when the reality of its abysmal hiring practices is publicized and becomes well-known to the outside world. It also means that a profession that is highly selective because of its perceived prestige may soon lose its advantage over other professions and become comparable to other well-paying professions like accounting or dentistry, which provide valuable services to society, but whose adherents are not regarded as special keepers and defenders of society's norms and values.

However, before focusing solely on the consequences of the failure to maintain a representative bar, especially in elite firms, and what can be done to remedy that failure, I first present an exegesis of how that failure — that dissonance — can occur. It is only when we grapple with the cause of such an anomalous situation — how it is that a profession that prides itself on the promotion of liberal

13. Daniel G. Lugo, *Don't Believe the Hype: Affirmative Action in Large Law Firms*, 11 LAW & INEQ. J. 615, 615-16 (1993) (quoting the ABA Commission on Opportunities for Minorities' denouncement of the legal community for its failure to give minority lawyers significant roles in large law firms).

14. In light of recent attacks on affirmative action exemplified by *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996) and *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), this trend may be short-lived.

social causes can itself fall prey to the ills it rails against — that productive steps can be taken to insure that the legal profession practices what it preaches.

B. *Traditional Theories Used To Explain the Underrepresentation of Minority Lawyers*

Lawyers gain tangible and intangible benefits as a result of their perceived role as the protector and guardian of individual and societal liberties.¹⁵ These benefits accrue both to those lawyers engaged in the actual protection and creation of liberties and to those who have little, if anything, to do with the creation and protection of liberty. Even private lawyers, normally reviled for their role as advocates for individual causes,¹⁶ gain external and internal rewards as a result of their positive association with their more altruistic and public-regarding peers. To the extent these lawyers enjoy any prestige outside the profession, that prestige accrues as a result of their membership in what is perceived to be a noble profession. Similarly, to the extent the attorney's self-image is positive and enhanced, it is a result of the attorney's internalization of her membership in a noble profession.

The question, of course, is why the ideals that cause these lawyers to be highly regarded by those outside the profession are not realized within the elite firms that control the bar.¹⁷ As one might imagine, there are a number of alleged reasons for the paucity of minorities in the elite law firms ranging from the evil — out and out racism — to the benign — economic factors. These explanations, however, are unpersuasive.

First, there is no evidence that lawyers are acting in a concerted racist fashion to minimize the presence of minorities at elite firms. Indeed, I assume for the sake of argument that lawyers are not disingenuous when they espouse principles of equality, although their practices result in an underrepresentation of minorities. Quite the contrary, I take as a given that lawyers actually do believe in the principles that create the favorable prestige of the profession. That is what makes the underrepresentation of minorities at these elite firms so puzzling and enigmatic.

There are other theories that explain the paucity of blacks in these elite law firms. One commentator, Jerold Auerbach, argues

15. See *infra* note 59 and accompanying text.

16. See *infra* notes 55-58 and accompanying text.

17. See *supra* notes 8-11 and accompanying text.

that these elite lawyers are representative of the bar to a greater extent than nonelite lawyers in that these elite lawyers, through their control of the bar, maintain control over the legal profession and its development. The fact that these elite lawyers, by defining qualifications for admission to the bar, serve as gatekeepers to the profession may in part explain why minorities are underrepresented in the profession generally as well as in the elite firms.¹⁸ Similarly, Auerbach contends that the elite group has a vested interest in the maintenance of the status quo which has caused them to structure the profession in a way that promotes certain political views antithetical to their public perception as champions of the poor and oppressed.¹⁹

One oft-stated cause of underrepresentation at elite firms is the subtle, discriminatory hiring practices allegedly employed at these firms.²⁰ According to this argument, the requirements that these firms use to select new members of the firm — stellar grades, law review membership, a prestigious clerkship — are not bona fide qualifications for employment at elite firms because they do not show a correlation between the attainment of these attributes and success within the firm as a practicing member of the bar. Moreover, even if the standards have some validity as screening mechanisms to select superior attorneys, they are not uniformly applied, but instead are waived for whites and applied discriminatorily to minorities to keep them outside.²¹ This argument mirrors the “pool argument” in law teaching — the argument that there are not enough qualified applicants to fill positions in academe.²²

These complaints have merit. Quite persuasive is the argument that these standards cannot be employed uniformly or rigorously given the rate at which large law firms hire and chew up new associates. It would be impossible for the top law firms to replenish their ranks employing the selective criteria they espouse for their ideal hire.²³

18. See JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 4 (1976).

19. See *id.* at 4-5.

20. See Lugo, *supra* note 13, at 624-30.

21. See *id.* at 627.

22. For a recitation of this argument, see Vance Knapp & Bonnie Kae Grover, *Can the Corporate Law Firm Achieve Diversity?*, *NBA NATL. B. ASSN. MAG.*, Mar.-Apr. 1994, at 8, 17-18.

23. As firms have grown exponentially, even the most elite firms have had to widen their nets to catch and hire neophyte lawyers who do not meet their traditional hiring requirements.

But these initial entry barrier requirements, however rigorously employed by elite law firms, cannot explain fully the paucity of minorities in elite firms, especially at the partnership level. Any complaint about hiring standards addresses only the entry barrier to being hired at a particular firm. It does not address the more problematic phenomenon of why minority attorneys hired as associates are not promoted to partner at the same rate as their white counterparts. It cannot adequately explain what is happening to minority attorneys once they have crossed the threshold and entered the world of the elite firm.

Any theory that attempts to explain the reasons for the underrepresentation of minorities in elite firms must address not only entry barriers, but what happens to minorities who successfully enter the profession at the elite level but do not make it through the pipeline to the rank of equity partner. This lacuna is especially troubling given the assumption that partners and others are not consciously acting in a racist or discriminatory fashion in their promotion decisions.

Another alleged cause of the underrepresentation of minorities in private or elite law firms is the history of discrimination that these groups have received in the legal profession.²⁴ The theory is

It is a mathematical impossibility for all persons hired by large law firms to measure up to their so-called hiring criteria. By definition of the percentages, there just are not enough people in the top 10% or 25% of the class to fill the hiring needs of all large law firms. In fact, after bids have been made for the top 10% of students at the top 20 law schools, thousands upon thousands of hiring decisions are made by hundreds of law firms. For the purposes of this article, large law firms have been defined as those firms that employ over 100 attorneys. In the U.S., there are 319 of these large law firms. If we estimate, on a low-average, that each of these firms will hire 10 new attorneys each year, we find that the large law firm group will hire approximately 3,190 new attorneys per year. Now, compare this to the number of top 25% law students available from the campuses of the top 25 law schools in the nation. Roughly, the average size of a class at a top 25 law school is approximately 305 students. Therefore, there are approximately 1,900 students in the top 25% of the class at the top 25 law schools. Clearly, there is a discrepancy, a discrepancy of over 1,000 jobs.

Lugo, *supra* note 13, at 626-27 (footnotes omitted).

24. Even though constitutional and other public interest lawyers have been in the forefront in fighting for equal rights for minorities, it is no doubt true that a significant percentage of lawyers, equal to their layperson counterparts, are hostile or apathetic to the plight of minorities in society.

Minorities have been able to gain limited access to the legal community but have never been welcomed wholeheartedly into the profession. Even those minority students who negotiate the [barriers to entry] face additional barriers once inside. White law professors often perceive minorities as less qualified than majority students and therefore have lower expectations for them. These messages are quickly perceived by students, with each group acting out their prescribed role. Studies show that in an environment where minorities are expected to perform above average and are encouraged, students have the confidence to succeed and are more likely to be in the top of their class. Unfortunately, those environments are rare. Moreover, even when minorities are able to survive law school and its discouraging atmosphere, the prospects for employment in private practice are sorely limited.

that the lingering effects of past racism creates the underrepresentation that persists in the elite firms today. Once again, although this theory has merit, it cannot explain satisfactorily why minorities are, to a certain degree, hired at a disproportionately high rate — over-represented at the point of entry into elite firms²⁵ — but nevertheless are severely underrepresented when the promotion to partnership decision is made. One would assume that the effects of racism, whatever their present impact, would be constant at the point of entry as well as at the time for promotion. Indeed, common sense leads me to assert that once the entry barrier is overcome, as it has been, the historical legacy of racism also has been overcome to a large degree and should not reappear at some subsequent point unless there are other unique factors at work in the legal profession that would explain why firms can hire but not promote these same minorities proportionately.²⁶

Others have advanced the counterintuitive argument that the environment at corporate law firms is not conducive to the promotion of minorities because affirmative action has resulted in the abandonment of objective standards.²⁷ The thesis is that affirmative action has resulted in the hiring of minority candidates who are not as well-qualified as their white peers. The corollary argument is that even those minority hires who are as well qualified as their white peers are penalized through the operation of affirmative action because those whites in power positions assume that any minority hired is an affirmative action product.²⁸

One can challenge the assumption that there is indeed a meritocracy at work in the hiring and promotion of minorities. More importantly, this argument must be rejected because even though it

Knapp & Grover, *supra* note 22, at 9 (footnotes omitted).

25. See *supra* text accompanying notes 9-10.

26. See *infra* notes 93-95 and accompanying text (asserting a theory of group dynamics and affiliations which may satisfactorily explain why minorities are hired proportionately but not promoted proportionately).

27. See, e.g., Knapp & Grover, *supra* note 22, at 16.

28. Aside from admitting that whites act in a racist fashion, that is, that whites are unable to judge minorities individually and instead stereotype them on the basis of skin color — which in a perverse way defeats the argument that there is no need for affirmative action — this argument is specious because it assumes that merit cannot be evaluated fairly or successfully within the firm and that the firm uses a proxy, in this case racial identification, in order to award promotions. For an examination of how firms monitor and promote associates, see Kevin A. Kordana, Note, *Law Firms and Associate Careers: Tournament Theory Versus the Production-Imperative Model*, 104 YALE L.J. 1907 (1995). Of course, this argument that affirmative action hurts the minority who does not need affirmative action is not novel to hiring and promotion decisions made by elite law firms. Professor Stephen Carter espouses the same view in his book, STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 47-62 (1991).

does provide a rationale for why minorities are hired — affirmative action — but then not promoted — affirmative action once again — the argument is seriously flawed in that it ultimately rejects the very notion of meritocracy that it attempts to embrace. It assumes that in a world without affirmative action, firms can make unbiased hiring decisions based on the qualifications of those in the pool. However, the argument assumes that the same merit-driven standard cannot be employed at the time of promotion to differentiate between those whose performance merits promotion and those whose performance does not merit promotion. The argument also suffers because it assumes that race affects decisions only at the time of promotion and not at the time of hire and thereafter.²⁹

Another recent theory put forth to explain underrepresentation in partnership is that minorities and women, since they were the most recent to break the ranks of large law firms, are natural (and nondiscriminatory) targets for layoffs and terminations when the legal economy sours.³⁰ This sort of “last-hired, first-fired” theory would have merit if those employed were engaged in an occupation in which seniority rules were adhered to formally or as a matter of custom or practice. Unfortunately, no evidence supports that view, and the empirical evidence, that minorities are hired at a rate that exceeds their percentage in the appropriate eligible population,³¹ belies the theory that the economy has resulted in the deflation of minority attorneys since the workforce is neither shrinking nor remaining constant.

A related argument is that the recent innovation of nonequity partners has had a disproportionate effect on minorities because of their relatively recent entry into the profession.³² Although there

29. See *supra* notes 9-11 and accompanying text.

30. In many professions and industries, it is often the last hired that is first fired.

There is concern that the troubled economy will further hinder the retention and progress of women and minority attorneys. Because a large percentage of the female and non-white attorneys have been hired in the past five years, they may be affected disproportionately by the layoffs caused by the recession.

Valerie A. Fontaine, *Cultivating a Diverse Workforce*, NATL. L.J., Jan. 10, 1994, at 25.

31. See *supra* text accompanying note 9.

32. It is interesting to note that as the bar's membership has become more diverse, traditional hiring and promotion practices have become destabilized, thus placing new entrants in less satisfactory career paths while protecting those “senior” partners who benefitted from the exclusively white, male domain at the time of their hire.

Large firms may also have the worry that courts and others may inquire into exactly what the term “partner” means. For the first time, this year's *NLJ* [*National Law Journal*] survey documented disparities in race and gender between equity and non-equity partners. Not only do black, Hispanics, Asians and Native Americans comprise a small slice of large-firm lawyers, the tiny minorities who make partner do so in name only.

Based on a breakdown given by some 60 firms of their equity and non-equity partners, the survey found that 46.2 percent of all minority partners were the non-equity

has been no empirical evidence to prove or disprove this thesis, anecdotal evidence does not support it.³³ Furthermore, the empirical data assembled and addressed herein, which was collected for the time period preceding the adoption of two-tiered partnerships tracks, similarly provides no support.

Another economic argument for the underrepresentation of minorities in elite firms, especially at the partnership level, is the assertion that an essential part of the partner's job description is to be a "rainmaker," that is, to attract paying clients who can provide enough work for the partner and the associates necessary to support the partner's salary.³⁴ The claim is that minorities have a harder time attracting clients because of their minority status and the majority (white racial) status of most of the sought-after clientele.

Some literature suggests that Hispanics also face greater difficulty getting clients. Bringing in business may be harder for Hispanics for several reasons. Clients generally make contact with lawyers in social circles, and because Hispanics are often excluded from these circles, they have fewer opportunities to make the contacts. Also, some lawyers feel that because they are Hispanic, the general public questions their legal skills and qualifications and, therefore, fails to seek them out as legal counselors when the need arises.³⁵

This assertion ignores two facts. First, many elite firms have institutional clients whose interests are served by partners selected by the firm. Although at one point some "rainmaker" partner may have generated the association with the firm, that rainmaker may be retired or deceased. However, the client remains with the firm

variety. Such partners draw salaries rather than sharing in firm profits. By contrast, only 30 percent of all white partners are non-equity.

....

The discrepancies can be explained in part by the youth of . . . minority partners. The two-tiered partnership is a relatively new invention that came into vogue in the late 1980s and early 1990s. Minorities and women, the subjects of more recent recruitment, are likely to be in the younger ranks of lawyers in large firms. They therefore are more likely to fall into the recently created non-equity tiers.

Davis, *supra* note 11, at A21.

33. Typical is the following sort of allegation:

Several minorities interviewed for this article . . . insisted that they hadn't seen black or Hispanic colleagues jump straight from associate to equity partner the way white lawyers had. "You get a promotion which, to the outside world, would look like a really positive move," says a black attorney at Katten [Muchin & Zavis, a firm that had a 2.5 million dollar judgment for race discrimination entered against it for failing to promote a black associate in March 1996,] who asked not to be identified. "But there are huge discrepancies [in salary and clout] between income and equity partners."

Katten reported four minority non-equity partners and one equity partner. White partners are split roughly 1-to-1 between the two tiers.

Id.

34. See generally Kordana, *supra* note 28, at 1924 (describing tasks of law firm associates).

35. Davila, *supra* note 12, at 1418 (footnotes omitted).

and the firm selects the attorneys, including the partner, who will work with the institutional client. Hence, many firms are selecting which partners work with which clients and the firms are failing to assign these clients to minorities.³⁶

More importantly, the assertion that minorities are unable to act as successful rainmakers ignores the increasing diversity of American society which will produce a minority-majority workforce within the next century.³⁷ Indeed, the pressure is on in the legal profession in general, and elite law firms in particular, by governmental and private entities to increase their hiring of minority lawyers in order to retain the business they have.³⁸

Another alleged reason for underrepresentation — especially in nonentry-level positions — is said to be minority attorneys' lack of comfort in these firms as a result of a hostile environment created by, among other things, a lack of mentors.³⁹ It is quite plausible

36. One minority partner at a prominent firm comments on the paucity of minority attorneys who service institutional clients: "Sidley's Mr. Jones says minorities are unlikely to inherit the institutional clients of the firm unless the clients insist that their matters be staffed by a diverse team of lawyers. 'Shame is not something that is likely to motivate law firms. Profits do,' he says." Davis, *supra* note 11, at A25.

37. As two commentators have noted:

Law firms should hire more minority attorneys, of course, out of simple justice. But powerful economic reasons exist as well: The U.S. Census estimates that by the year 2000, eighty percent of the U.S. work force will consist of minorities, women or immigrants. A business that focuses solely on hiring white males will find them in short supply. Minorities are assuming positions of authority in politics and corporations. The number of African-Americans holding elective office, for example, increased from 1,469 in 1970 to 5,606 in 1983.

Knapp & Grover, *supra* note 22, at 17 (citations omitted); see also Lugo, *supra* note 13, at 634.

38. If the firms will not take the initiative in using minority lawyers to service corporate clients, perhaps the impetus to employ minority lawyers must come from the clients.

According to the *ABA Journal*, the American Bar Association Minorities Commission has enlisted the assistance of corporate counsel at leading companies to inform firms that they want minority attorneys to work on their matters — thus helping to destroy the myth that corporate clients do not want to be represented by minority lawyers. These corporate counsel also have written letters to their outside law firms urging the hiring and promotion of minorities.

In addition, the federal government has established quotas for a certain amount of its work to be given to minority and female-owned firms. This policy has led to a number of "joint ventures" between majority-owned law firms and female- or minority-owned firms.

Fontaine, *supra* note 30, at 27.

39. See Davila, *supra* note 12, at 1417 ("Isolation may be enhanced by a lack of Hispanic mentors. Mentors serve as role models and advisors, and many attorneys feel that the lack of minority mentors injures their progress with the firm.") (footnote omitted). Knapp and Grover comment that:

Progress for minorities at corporate law firms has been slow. As A.J. Cooper, Jr., a partner in a Washington, D.C. law firm, National Bar Association Associate General Counsel and past president of the National Conference of Mayors, put it: "Law firms are among the most segregated institutions in America The Senate Judiciary Committee should not be asking judicial candidates if they belong to a segregated golf club, but whether they belong to a segregated law firm."

that the lack of minority role models has a negative impact on minorities' progress within elite firms. But there are three problems with this theory. First, white women, who were once as excluded from these firms as minorities, have made significant progress in achieving partnership rank within these firms even though they faced the same lack of mentoring.⁴⁰

Second, assuming that the argument has merit, it is unclear what can be done to resolve the problem short of simply promoting or hiring minorities as partners to serve as role models for those young associates who are entering practice in these elite firms. The problem, of course, is that if these lawyers are promoted or hired as partners without the requisite experience, they cannot truly serve as role models since they would have no base of information or experiences upon which to draw to advise their younger peers. Hence the role model argument fails to answer the question of what can be done to increase the number of minorities within these elite firms.

Third, there is something slightly odious about the claim that only minority attorneys can mentor other minority attorneys or that, similarly, only women can mentor other women. That sort of stereotyping, although consistent with human proclivities and current patterns of behavior, may be unproductive in the long run because instead of promoting equality and harmonious race relations, it assumes whites remain with whites and blacks with blacks. One theme of this article is that lessons imparted from Critical Race Theory demonstrate how to break down these racial barriers in order to eliminate racism and the subjugation of minorities.⁴¹

One interesting claim that has been made recently is that minorities may not be proportionately represented at elite law firms, either in entry-level or nonentry-level positions, because they choose not to work for predominantly white firms. Commentators

....
The environment for attorneys in corporate law firms is often chilly, an extension of the subtle and not so subtle racism minorities face in law school. Knapp & Grover, *supra* note 22, at 16 (footnote omitted). Another commentator observes that:

The lack of role models often is cited as a critical reason for the underrepresentation of women and minorities in the profession. A firm can help create positive role models by placing female attorneys and attorneys of color in high-visibility and influential roles within management. Mentoring is an effective strategy toward fostering role models. Fontaine, *supra* note 30, at 27.

40. Women are also underrepresented in the partnership ranks of large law firms but they fare better than blacks and other minorities. By one count, women make up 13% of the partners at large law firms. See Note, *Why Law Firms Cannot Afford to Maintain the Mommy Track*, 109 HARV. L. REV. 1375 (1996).

41. See *infra* Part III.

have characterized this phenomenon as "mutual deselection" in that the firms do not choose minority attorneys and qualified minority attorneys choose not to work for elite firms.⁴²

This assertion is as yet unsupported by empirical evidence. Furthermore, the thesis has explanatory power only if it is assumed that minorities have the option, the choice to go or not to go to these elite firms. That assumption, however, is contradicted by some of the earlier theories which place the blame for the underrepresentation of minorities in elite firms squarely on the shoulders of the firms.⁴³ Nevertheless if the thesis is correct, even only in part, it raises questions about why ethnic or racial status is perceived as a barrier at white firms — why minorities choose not to work at these firms, and what can be done to eliminate that deselection in order to increase that representation. More particularly, it is unclear how attorneys, white and black, can maintain the desire to work in environments in which the other attorneys look like themselves, even though they truthfully believe in their roles as protectors and guarantors of equal opportunity and individual social liberties in American society.

Another theory used to explain the underrepresentation of minorities in elite firms at the partnership level relies on the notion of unconscious racism.⁴⁴ This theory, although no doubt true, is a

42. As Davila notes:

Another commentator, Ed Cray, asserts that "assimilation of minority lawyers into prestigious firms has been slowed by mutual deselection." Cray uses this term to describe the phenomenon created by the tendency of minorities to choose to work where ethnic status is not perceived as a barrier *and* the tendency of lawyers in law firms to select attorneys "like themselves." When faced with a choice of assimilation with a white-dominated, establishment firm or separatism with a "hardy band of brothers," Cray asserts that a minority lawyer may be strongly motivated to go where he will not risk rejection by mere virtue of being different and will not have to cope with the daily pressure of being *the* Hispanic in the office. Cray surmises that these factors have compelled minorities to choose other career options. Minority firms may be smaller and pay less, but Hispanics "know they are welcome there." This process of mutual deselection has, of course, led to fewer minorities moving into established corporate law firms.

Davila, *supra* note 12, at 1414 (footnotes omitted) (citing to Ed Cray, *Blacks and Browns in Blue Chip Firms*, CAL. LAW., Oct. 1984, at 35).

43. See *supra* notes 18-38 and accompanying text.

44. One survey reveals the problems faced by Hispanic attorneys in corporate firms:

[T]he major obstacle Hispanics face within corporate law firms is overcoming perceptions. Thirty percent of the Hispanic respondents stated that a presumption exists that Hispanics are not qualified. This belief was reinforced by the fact that various nonHispanics, at firms with no Hispanic attorneys, responded that Hispanic attorneys probably face a problem in their ability to communicate due to deficiencies in the English language. This preconception is likely to occur because, as one respondent said, "Many minorities carry the extra baggage of racial stigma. That is, many colleagues assume that minorities get their jobs primarily because they're minorities." Another commented, "[There exist] distorted perceptions and misplaced generalities about Latino articulateness, intelligence, work ethics, etc."

Davila, *supra* note 12, at 1420-21 (footnotes omitted).

rather broad, catch-all argument, in which minority attorneys are allegedly at a disadvantage when compared to their white counterparts due to the omnipresent effects of racism. Hence, unconscious racism is usually cited when the allegation is made that white lawyers do not socialize with minority attorneys or expose them in social settings to their white clients.⁴⁵ Once again, however, the problem with relying on covert or subconscious racism as the explanatory cause of the underrepresentation of minorities is that although it makes perfectly legitimate sense to assume that attorneys, like other members of society, may act in a racist fashion due to either conscious or subconscious motivations, it fails to explain the dissonance that results when it is assumed that lawyers, unlike other citizens, are committed to the eradication of racism and the establishment of true equality in American society in which race is as irrelevant as eye color.⁴⁶

Moreover, a failure to comprehend how this discordant situation could arise and be maintained is ultimately destructive of any attempt to remedy the problem. It is only when the cause of the problem is identified that a solution can be proposed. The dissonance between the ideals espoused and, I am willing to concede, actually and truly believed by lawyers, and the reality of the manner in which they recruit and promote their younger colleagues, must be traced to the one fact that is implicit in all of the above explanations for the underrepresentation of minorities in elite firms: the lawyer is not only a member of a learned profession, the lawyer is also a member of larger society. Until that nested relationship is exposed and explored, little can be done to achieve proportional representation of minority lawyers within the elite law firms in our society both at the time of hire and at the time of promotion.

C. *The Janus-Faced Nature of the Legal Profession*

How lawyers and the legal profession are perceived by the public is important for two reasons, one external, the other internal. The public's perception of lawyers and the legal system they pro-

45. As one commentator noted, the social barriers to meaningful integration still exist in large firms:

A black partner who recently left one Wall Street firm for an even bigger one says he felt like a pariah at his former firm. Not once in his two years there did his partners invite him to their homes, though socializing was common. At first, the lawyer, who asked not to be identified, waited to be asked. As the months passed, he felt too awkward to take the lead and invite them to his home.

Davis, *supra* note 11, at A21-25.

46. See *supra* note 4 and accompanying text.

duce and regulate is important for common sense reasons having to do with the legitimacy that will be afforded to the system. My thesis is quite simple: Law and the legal system will not be respected or obeyed if the proponents of such a system are viewed as less than capable, honest, forthright, and intelligent individuals.⁴⁷ If those producing the laws — be it the legislature or the judges — and those most intimately familiar with its day to day machinations — lawyers — are viewed as knaves or fools by those external to the system, the power and force of the law likewise will be diminished.

Similarly, if the law appears to be a tool or instrument that can be used to achieve certain societal goals (a phenomenon I have characterized elsewhere as the “adaptive preference” model of law⁴⁸), its force as such a tool or instrument is largely dependent on the authoritative nature of the entity wielding the tool or instrument. The persuasive power of law as a tool to change or eliminate certain harmful or nonproductive behavior must, in part, be attributable to the respect and acquiescence afforded to the law and lawyers by those subject to it. It is illogical to assume that our legal system, which relies largely on voluntary compliance,⁴⁹ dismisses those who are viewed as gatekeepers to the system as mere charlatans and quacks not worthy of considerable respect and envy. Hence, the development of law and its practice as a noble profession rather than as a trade or occupation.⁵⁰

This is not to say that lawyers’ reputation is without blemish. Although the legal system may have progressed from a trade or occupation to a noble profession, entry into which its members pride themselves for accomplishing,⁵¹ it is also clear that a signifi-

47. I am not so naive as to ignore the fact that lawyers are often derided as money grubbing opportunists whose elimination from society would benefit society. Hence, the oft-repeated aim of Shakespeare’s *Dick the Butcher*: “the first thing we do, let’s kill all the lawyers.” WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc.2. Indeed, recent public opinion polls can be used to support the proposition that lawyers occupy one of the most hated and despised professions and are among the most untrustworthy individuals in our society. See Matthew Kauffman, *Spirit of Lawyer Gags Have Some Attorneys Feeling Glum. How Many Lawyer Jokes Does It Take to Upset a Lawyer? Do You Care?*, HARTFORD COURANT, Jan. 3, 1994, at A1 (“Public-opinion polls show lawyers consistently sharing the cellar with such long-reviled professions as funeral directors, used-car salesmen and . . . journalists.”).

48. See, e.g., Johnson, *supra* note 1, at 1630-32.

49. See *Jacobson v. United States*, 503 U.S. 540, 551 (1992) (“There is a common understanding that most people obey the law even when they disapprove of it.”).

50. See, e.g., ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s*, at 3-10 (1983) (detailing the legal profession’s evolution from a trade to a noble and highly regarded profession).

51. For further discussion of how lawyers view their role within the legal system and the benefits they obtain therefrom, see *infra* notes 60-69 and accompanying text.

cant percentage of those outside the legal profession view lawyers as dishonest opportunists at best, and as crooks at worst, who are willing to sell their souls (if not a near and dear relative) to the devil himself for the almighty dollar.⁵² In this role, lawyers are seen as occupying not the noblest profession, but the oldest profession — as individuals who will prostitute themselves or their ideals for the coin of the realm.⁵³

What I find illuminating is how both visions of lawyers can be maintained simultaneously by a large segment of society. And here I do not refer to a phenomenon in which one's own individual lawyer is viewed as revered and the opponent's is reviled. Quite the contrary, I refer to a situation in which individuals maintain dichotomous opinions of lawyers in which they consistently believe that lawyers benefit society while at the same time holding the view that lawyers are harmful and destructive to society — a view epitomized by the lawyer jokes which seem endemic in contemporary society.⁵⁴

The solution to the mystery of how lawyers can be both simultaneously revered and reviled is found in how the public perceives lawyers in their disparate roles. Lawyers, it is safe to assert, wear many hats. In one capacity, that which I will simplify and characterize as "private," lawyers represent individuals or entities either in negotiations or in litigious circumstances. In this private role, the lawyer acts as an advocate, not for a cause, but for a client with

52. See Max Boot, *Rein in Robin Hood*, WALL ST. J., June 27, 1995, at A16; see also Thomas W. Overton, *Lawyers, Light Bulbs, and Dead Snakes: The Lawyer Joke as Societal Text*, 42 UCLA L. REV. 1069 (1995); Janet Dunphy, *Lawyers; Their Profession Remains Largely Misunderstood, They Say, Creating a Love — Hate Relationship With the Public*, VIRGINIA-PILOT, Nov. 7, 1994, (Business Weekly), at 10, available in LEXIS, News Library, Papers File; Matthew Hall, *Lawyers: People the Public Loves to Hate*, BUSINESS FIRST — COLUMBUS, Nov. 15, 1993, § 1, at 17; *Some Good Lawyer News*, BOSTON HERALD, Mar. 9, 1996, at O12.

53. See Daniel J. Kornstein, *The Devil and the American Lawyer*, N.Y.L.J., Mar. 17, 1994, at 2; see also Vanessa Alexander, *Pro bono Law*, CHI. TRIB., Aug. 5, 1990, at A2; Joe Fitzgerald, *No Doubt About It: Simpson Has No Sense of Decency*, BOSTON HERALD, Nov. 2, 1995, at A4; Dick Polman, *Three-Dimensional Pictures of Nixon the Man*, THE RECORD, Nov. 27, 1989, at B3.

54. Here's a lawyer joke with which most should be familiar and I provide it because it demonstrates the spirit of the public's view of lawyers. "Question: What do you call 100 lawyers at the bottom of the sea? Answer: A good start." The fact that there exists several Internet addresses which are maintained as a repository of lawyer jokes is further indicia of the public reputation of lawyers. A partial list of those addresses, as of December 1996, follows:

Lawyer Jokes (last modified Nov. 12, 1996) <<http://rever.nmsu.edu/~ras/lawyer.shtml>;

Lawyer Jokes <<http://www.cs.vu.nl/~fmdvries/lawyer.html>;

Lawyer Jokes <<http://www.cs.cmu.edu/People/doughb/duff/115.html>>

Lawyer Jokes <<http://www.ifi.uio.no/~thomabe/text/lawyerjokes.html>; and

Canonical List of Lawyer Jokes <http://fub46.zedat.fu-berlin.de:8080/~stummell/LAWYER_JOKES.html>.

respect to a specific issue. In this capacity, the lawyer must serve as a zealot for her client by doing all that is ethically permissible to insure that her client's point of view prevails.⁵⁵ This is the situation or position that lawyers occupy when they are reviled: the lawyer who zealously advocates a run of the mill divorce case in which no quarter is given, no opportunity for attack spared; the criminal lawyer who manipulates the system to achieve the release of his client, notwithstanding public perception that the client is guilty; and the overreaching advocate who discovers and exploits every loophole in the system or in a contract.⁵⁶

One concrete situation demonstrates my point. For years lawyers have contended that real estate brokers and others, including title insurers and banks, have engaged in the unauthorized practice of law when they assist buyers and sellers in the purchase and sale of real property.⁵⁷ Indeed, the American Bar Association has weighed in with its view that lawyers should be employed in real estate transactions to fill in mundane documents such as contracts for sale and deeds and that to allow brokers to accomplish the same represents the unauthorized practice of law.⁵⁸ What the debate obscures is the public's preference to exclude lawyers from this transaction and to rely on laypersons to complete the most complicated, expensive and important financial investment of their lives. My opinion is that this preference stems from the view that lawyers acting as lawyers inevitably complicate deals because of their combat-

55. "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROFESSIONAL CONDUCT Preamble at 5 (1995). Any attempt to give an all inclusive detailed list of the situations in which individuals normally seek counsel would be exhausting, if not impossible. Suffice it to say, most people will seek legal representation, indeed, would be viewed as abnormal if they failed to do so, in situations ranging from the mundane — when buying a house, seeking a divorce, probating a will, pursuing a tort claim following an automobile action and filing for bankruptcy — to what some would view as extreme — being charged with a crime. I call this "extreme" because when one thinks of the typical situations requiring a lawyer, there is an element of choice involved, whereas most individuals charged with crimes and requiring legal counsel would prefer not to be in those situations to begin with. But perhaps being charged with a crime is not as extreme a situation as it once was, since by recent reports three out of every 100 Americans is either in jail, or on probation, or has some other connection with the criminal legal system. See David Nyhan, *Our Lock-em-up Attitude is Breaking the Bank*, BOSTON GLOBE, July 12, 1996, at A17.

56. See Mike Tolson, *Attorney Fees: How Much is Too Much? Judge Expected to Rule on Lawyers Claim to Eyebrow-Raising Sum*, Hous. CHRON., Oct. 21, 1996, at A13.

57. See, e.g., GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 267-72 (4th ed. 1992).

58. See Special Committee on Residential Real Estate Transactions, American Bar Association, *Residential Real Estate Transactions: The Lawyer's Proper Role-Services-Compensation*, 14 REAL PROP., PROB. & TR. J. 581, 594 (1979).

ive nature or, failing that, charge exorbitantly for the rendition of mundane services.

Compare, however, when the lawyer is viewed as an advocate for a cause or an issue and not for an individual. It is in this capacity as the guardian and protector of individual freedoms and civil liberties that the lawyer is revered.⁵⁹ The lawyer, in what I characterize as her "public" persona, is not viewed as a rent-seeking opportunist. What separates the reviled private lawyer and the revered public lawyer is the nature of the client and the services provided. The public lawyer's client, even if localized in one individual representative of a larger group, is society. The spillover effect of that client's representation, be it a test case, a class action, or the advocacy of new laws that initially benefits only one client, represents the focal point of the lawyer's advocacy. The lawyer seeks to benefit a class or group in society whose harm cannot be remedied through individual lawsuits. Conversely, the private attorney's sole point of advocacy is the interest of one client or group to the exclusion of the interests of other groups or individuals. If external individuals are benefitted, so be it, but external benefits or beneficiaries are not the objective of the private attorney acting as an advocate for a private litigant.

Externally, then, lawyers may be considered Janus-like when viewed by the public. On the one hand, when acting for private interests, lawyers are vilified and excoriated as hired guns willing to do whatever is necessary to achieve success short of committing crimes and ethical violations. On the other, lawyers are revered as champions of causes that benefit the public through the creation and protection of rights and liberal social issues. What does this

59. I willingly concede that not all in the public or not even all lawyers are in favor of the creation and expansion of all civil liberties or the promulgation of liberal social issues. No doubt, segregationist lawyers and others viewed those lawyers pushing for the adoption and expansion of civil rights laws as wrongheaded fools. A modern analogy involves the legality of same-sex marriages with some attorneys and academes in favor, see WILLIAM N. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996), and others opposed, see *Same Sex Marriage*, HAW. B.J., Feb. 1995, at 48; Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 26-38 (arguing that there is no constitutional right to same-sex marriage). The point is that although the issues are divisive, the lawyer's role in either supporting or opposing those issues is not. That is what lawyers are supposed to do. Hence the rise of conservative public interest lawyers like those employed by the American Enterprise Institute or the Rutherford Institute for Religious Freedom who believe that they too are fighting the good fight to preserve the morals and political integrity of American society. Consequently, although the focus of this portion of the article is on lawyers who espouse what are perceived to be liberal causes, one should not lose sight of the fact that the same position can be taken for those lawyers who argue for the contraction of such rights as advocates in the public arena.

dual perception mean for lawyers? It means that lawyers can internalize the positives associated with their profession and distance themselves from the negatives associated with the private actions of lawyers. Lawyers can, to some extent, enjoy the trappings of public virtue and the notion that they produce public goods, and hence shield themselves from scrutiny as they ply their trade as private lawyers.

More importantly, it means that lawyers create a positive self-image, internalized even by those acting for private clients, that they are perpetually fighting the good fight. That private lawyers, even if engaged in the nefarious private transactions that create ill repute, consider themselves members of a nobler profession, where that profession must in the service of its clientele per its cannons act in a fashion that produces revulsion on the part of the public, speaks to the power of lawyers' reputations as guardians of liberty. Lawyers, I contend, internalize the dichotomous perception of their profession in order to gain prestige, or if you will, preference over others in society. That is, lawyers gain positive benefits from those outside the legal profession as a result of public perception that lawyers are employed in a noble profession in which ideals and principles are prized over money and win and loss records.

II.

A. *How Lawyers Produce Status*

In a recent article⁶⁰ Professor Richard McAdams makes a compelling argument that individuals are motivated to achieve both material gains and immaterial gains such as status, prestige and distinction, not only in absolute terms, but also to an extent greater than their peers.⁶¹ In addition, he sets out the concept of relative preferences — a concept that is important to understanding the benefits that flow from the dichotomous reputation of lawyers. Indeed, this article contends that lawyers as a group are able to avoid the negatives associated with the private practice of law and instead

60. See McAdams, *Relative Preferences*, *supra* note 2, at 3.

61. Professor McAdams's theory of relative preferences focuses on one's position vis-à-vis one's peer group.

But the thesis of this Article is that behaviors such as these [a mother's attempt to arrange for the death of her daughter's rival for selection to the cheerleading squad and the fact that in Japan a significant number of individuals work themselves to death] are related, and reveal an important and often-neglected aspect of human motivation. In both cases, the psychologically richer description is that the actors seek not an absolute end, but *relative position* among peers

Id.

gain prestige and preference over other groups and occupations by identifying with the positive attributes of the subgroup I call public lawyers.

A comparative analysis buttresses the thesis I have put forth. It is mystifying to some that our society has so many lawyers when other societies by comparison have so few. The growth of the American legal profession is phenomenal when compared to that of other societies.⁶² In Japan, for example, there are only approximately 13,000 lawyers in an highly industrialized and modernized society that is viewed as economically comparable to the American economy.⁶³ And although there are many reasons for the large number of lawyers in the United States, ranging from the mundane — increases in the financial return on a legal education relative to the return on a college education — to the admirable — the increase of women in the workforce and the concomitant increase of women in the legal profession⁶⁴ — and the small number in other industrialized societies like Japan — a different cultural milieu in which conflict is avoided and viewed negatively — I contend one often overlooked justification for the disparity in the numbers of lawyers as a percentage of population is directly attributable to the prestige associated with the occupation of lawyer in the different societies.

In the United States, due to its heterogeneous and pluralistic culture and history, lawyers promote themselves as guardians of freedom and liberty, as noble servants to the "Law" with a capital "L," in order to obscure the negative reputational effects of the profession, and in order to gain prestige in society relative to other

62. On the growth of the American legal profession, one commentator has noted:

Since World War II, the legal profession has grown not only in absolute numbers but also relative to the population as a whole and in terms of value added to the gross domestic product. The number of lawyers in the United States grew from about 222,000 in 1950, to 286,000 in 1960, to 355,000 in 1971, to 542,000 in 1980, and to 806,000 in 1991. . . .

The ratio of lawyers to the population of the United States also increased markedly. Between 1950 and 1991, the numbers of lawyers almost quadrupled, but the size of the population did not even double. Thus, while there was one lawyer for every 679 people in 1950, by 1991 this ratio stood at one lawyer for every 313 people. Moreover, the share of gross national income attributable to private legal services tripled in four decades. It rose from 0.47% in 1950 to 0.52% in 1960, 0.65% in 1970, 0.81% in 1980, and 1.43% in 1991.

Kornhauser & Revesz, *supra* note 5, at 835-37 (footnotes omitted).

63. Kenneth L. Port reports that "there are about 650,000 licensed lawyers in the United States and only about 13,000 *bengoshi* (licensed litigators) in Japan." KENNETH L. PORT, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 285 (1996).

64. Both theories, the mundane and the sublime, are put forth in Kornhauser & Revesz, *supra* note 5, at 837-38.

professions or occupations.⁶⁵ This contention, which represents an extension of Professor McAdams's theory, merits further discussion in two respects. First, I have focused on lawyers' efforts vis-à-vis other groups to attain nonmaterial benefits, even though discussions of relative preferences usually focus on an individual's consumption of a material good relative to others' consumption of the same good.⁶⁶ Second, I have focused on the group's production of status vis-à-vis other occupations, instead of individual consumption.

Addressing the latter point first, groups are the perfect reservoirs for the production of status or self-esteem, that is prestige. And it is one's membership in a group that serves as a focal point in the thesis of relative preferences.

The ubiquity of social groups says something of their importance: groups include not just firms, trade associations, and families, but groups based on demographic traits such as race, gender, or age, and those based on membership, such as [membership in a state or local bar association,] fraternities or sororities, amateur sports teams, gangs, the Rotary or Elks Clubs, or private lunch clubs. Undoubtedly, some or all of these groups, like the firm, serve the individual's interest by minimizing the transaction costs she incurs while acting to satisfy her preference for whatever interest or function the group facilitates. . . . My thesis is that a material view of human motivation underestimates both the level of cooperation that groups elicit from their members and the level of conflict that groups elicit from each other. A single group dynamic connects these added increments of cooperation and conflict: groups achieve solidarity and elicit loyalty beyond what economic analysis conventionally predicts, but solidarity

65. According to Professor McAdams the attainment of status or prestige is an end that individuals seek:

Whether it is termed "status," "prestige," or "distinction," people sometimes seek — *as an end in itself* — relative position; they measure their income against the prevailing "standard of living" of their society or their peers, suffer indignity at failing to "keep up with the Joneses," and generally gain or lose satisfaction according to how well they do compared to others. . . . Much less has been said about the extent to which preferences are *negatively* interdependent, and the economic consequences of such preferences. One way that preferences may be negatively interdependent is when a person seeks *as an end* a position that is relatively superior to that held by others.

McAdams, *Relative Preferences*, *supra* note 2, at 3 (footnote omitted).

66. Professor McAdams provides a synopsis of his thesis on negative relative preferences.

[T]his Article addresses *negative* relative preferences — preferences for approaching or surpassing the consumption level of others. These preferences are relative because their satisfaction depends on the ratio of SC [selfish consumption — one's own consumption] to OC [others' consumption or the average of several others]; the preferences are negative because, within this ratio, their satisfaction varies inversely with OC. A negative relative preference is therefore a preference for a consumptive position that is favorable in comparison to that of others. "Consumptive position" may refer to the quantity or the quality of particular goods, including intangible goods such as prestige, or it may refer to the sum of all goods, i.e., wealth. The "others" may include an individual, a group, or all of society.

Id. at 9.

and loyalty within groups lead predictably, if not inevitably, to competition and conflict between groups. The connection is the desire for esteem or status. Groups use intra-group status rewards as a non-material means of gaining material sacrifice from members, but the attendant desire for inter-group status causes inter-group conflict.⁶⁷

As to the first point, Judge Posner has demonstrated that "reputation" is a valuable right worthy of production and protection once established:

Reputation — the opinion others hold of one as a candidate for business or social transactions — has important economic functions in a market system, indeed in any system where voluntary interactions are important. It reduces the search costs of buyers and sellers and makes it easier for the superior producer to increase his sales relative to those of inferior ones. In these ways it helps channel resources into their most valuable employments — a process at the heart of the market system. This role is not limited to explicit markets. It is just as vital to the functioning of the "marriage market," the market in friends, the political market, and so on.⁶⁸

Lawyers who are not engaged in that aspect of the practice from which public beneficence and rewards flow are nevertheless able to free ride on the positive reputation engendered by those lawyers engaged in this highly regarded segment of practice. Second, and just as importantly, lawyers also internalize the positive attributes associated with their more revered peers who work in the public interest and convince themselves that they are likewise engaged in a noble pursuit within a noble profession, even if that pursuit is only the venal pursuit of cash. Indeed, there may be a cyclical effect such that society places value on the public perception that lawyers are members of a noble profession (rather than a trade), which results in lawyers being paid a premium when they perform mundane legal services as opposed to work involving the pursuit or protection of liberty and freedom.

Consequently, one can make a credible argument that lawyers, those practicing in the public and in the private sphere, gain benefits, material and nonmaterial, from the perception that lawyers are members of a noble profession that zealously guards and protects equality and individual freedoms. As guardians of these individual liberties, lawyers receive a reputational premium that may explain, in part, why bright young people flock to the profession.⁶⁹ If that is indeed the case, imagine the consequences that would flow from

67. McAdams, *Cooperation and Conflict*, *supra* note 3, at 1007 (footnotes omitted).

68. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 287 (1981) (footnotes omitted).

69. See *supra* note 64-65 and accompanying text for a discussion of the reasons why an increased percentage of the population continues to choose law as a profession.

the assertion, if proved, that lawyers, instead of protectors and guarantors of equality and individual freedoms, are defilers of those very ideals in their day-to-day practice.

B. *Why Minorities Are Underrepresented in the Legal Profession:
The Effects of Membership in Multiple Groups*

I have addressed previously the notion that lawyers gain some prestige, some preference, over members of other occupations due to their adherence to liberal social causes and the public perception that lawyers, when acting in the public sphere, are worthy of respect and prestige as guardians of liberty and equality.⁷⁰ What I ignored then and will address now are the two negative side effects of that group affiliation. First, implied as part of the theory of relative preferences is the notion that there are multiple subgroups competing for prestige within the larger group and that the competition among these subgroups inevitably leads to conflict. Second, and more important, is the notion that one can belong to multiple groups and that membership in one group does not necessarily eradicate the conflicts that arise as a result of one's membership in other groups. Each point will be addressed in turn.

As indicated above, Richard McAdams has developed a theory that attempts to explain how prestige is created through the operation of relative preferences. Integral to his theory is the notion that groups form and generate esteem and social status among their members which induces members to make contributions to the groups' welfare, and that this intragroup cooperation, secured through the production of esteem, leads to intergroup conflict.⁷¹ The notion that lawyers are members of multiple groups is integral to my thesis that lawyers have failed to integrate their profession successfully, at least as it pertains to elite firms. An individual lawyer's membership in multiple groups creates conflict between the positive ideals she espouses that produce the relative preferences and the benefits she gains as a member of one favored group — the bar — and her membership in yet another dominant (favored) group, the white racial majority, which gains esteem and relative preference by subordinating minority group members in society. Before I can explicate this thesis, however, a brief synopsis of Professor McAdams theory is necessary.

70. See *supra* notes 64-65 and accompanying text.

71. See McAdams, *Cooperation and Conflict*, *supra* note 3, at 1019-33.

I start with the presumption, as does Professor McAdams, that groups emerge or form based on viable distinctions that are self-generated and policed by the groups. In other words, neither I nor Professor McAdams puts forth a thesis explaining why and how certain groups form or emerge and are subsequently distinguished from other groups.⁷² We take as a given that certain groups exist, and are recognized and distinguishable. Moreover, although Professor McAdams focused on racial groups and the conflict generated thereby, I also am going to take as a given that an individual's occupation can and does identify the individual as a member of a group comprised of all those who are members of that occupation.⁷³ In this context, I assume throughout that the bar is a trade association that is identified as a group both by its members and by those external to the group, and that this group "serve[s] the individual's interest by minimizing the transaction costs she incurs while acting to satisfy her preference for whatever interest or function the group facilitates."⁷⁴

What is addressed more fully herein is how membership in a group like the bar induces the cooperation that produces the esteem that members in the group seek from other members in the group and those external to the group and how that production of esteem leads to conflict with members of other groups. Following that I will address one issue that is not a focal point of Professor McAdams's article: the theory that one can belong to multiple groups that overlap and that this multiple membership in groups can lead to intra- and intergroup conflict. I contend that an individual, a lawyer, can belong to multiple groups consistent with his or her persona and that these multiple group affiliations, although not personally destructive, can cause the individual who is the member of one group to slight members internal to that group

72. For example, although Professor McAdams's article addresses the intergroup conflict that results from group identification and membership based on racial identification, *see id.* at 1033-84, he makes no attempt to explain how it has come to pass that individuals identify and group themselves according to visible characteristics such as the amount of melanin in their skin, the texture of their hair, the size of the nostrils of the nose, and so on. Anthony Appiah characterizes these observable physical characteristics as the "grosser morphology" of an individual, *see* KWAME ANTHONY APPIAH, *IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE* 36-37 (1993). Nor does McAdams state whether that is a rational basis to form groups. In a similar vein, I make the argument that the existing structure of racial identification is largely an historical accident that should be jettisoned in favor of ethnic identification that has more meaningful characteristics. *See* Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 910 & n.89 (1996).

73. *See supra* text accompanying note 67.

74. McAdams, *Cooperation and Conflict*, *supra* note 3, at 1007.

to gain self-esteem from those members in a dominant, overlapping group. In essence, I propose a hierarchical view of group affiliation or membership. Within this hierarchical framework, an individual's membership and allegiance to one group may be trumped or negated by the membership in another group, although this individual's dual membership status does not have the effect of negating the subordinate's group membership and identification.⁷⁵

At base, Professor McAdams's theory is that individuals within a group produce status for their group's members by discriminating against members of other groups.⁷⁶ In race relations that is a fairly easy concept to comprehend. In this society, with our racial history, Professor McAdams' theory is epitomized by the idea that whites discriminate against blacks and other persons of color in order to gain prestige or esteem as whites and in order to feel superior to those "other" persons of color.⁷⁷ However, the concept of status production and intergroup discrimination is somewhat harder to comprehend when referring to attorneys as the constituents of the group who gain prestige by practicing discrimination. A few examples should suffice.

Lawyers discriminate against nonlawyers in many different ways. Lawyers discriminate most obviously through the licensing requirement that allows one to enter into the trade or practice of law. That licensing requirement, which gives to lawyers the exclusive right to practice law in a given geographical region, discriminates against nonlawyers by precluding their performance of services that are deemed included in the practice of law.⁷⁸ Moreover, lawyers are the only individuals who may represent other individuals in a court of law. Lawyers, of course, are also the only individuals who may join a bar or other trade association to which access to services and information is provided.⁷⁹ In a myriad of dif-

75. What I mean by this last phrase is that, except on the margins with individuals who pass, one cannot be a member, in this society, of both the white and black race. The two are deemed to be mutually exclusive groups. For a discussion of "passing" in which individuals who would be racially classified as black under the "one drop of blood rule" pass for white because they are viewed phenotypically as white, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

76. See McAdams, *Cooperation and Conflict*, *supra* note 3, at 1007.

77. See *id.* at 1044-63.

78. See *supra* notes 57-58 and accompanying text for a discussion between lawyers and realtors regarding the unauthorized practice of law as it pertains to the provision of services associated with a purchase and sale of a residential dwelling. Lawyers themselves are prohibited from assisting with the unauthorized practice of law by the *Model Rules of Professional Conduct*. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1995).

79. To become an attorney member of the ABA, one must graduate from an ABA approved school and be sworn in as a member of either a state bar or a bar of one of the

ferent ways, lawyers are treated differently, that is, positively, when compared to their nonlawyer peers.⁸⁰ This exclusive license to partake of certain societal privileges, to represent others, to appear in court, and to become a member of the local bar association, clothes lawyers with a distinction that discriminates against nonlawyers. Although there are many reasons, valid and invalid, why attorneys have these exclusive privileges, one reason has to be the production of self-esteem or status among the members of the profession. To allow anyone to perform the task that only lawyers are allowed to perform may have many consequences, but one certain consequence would be the reduction in the prestige associated with the profession.

Consequently, although this is not the place to play out this debate in its entirety, one can argue that the bar examination and licensing requirements associated with the practice of law should be abolished. If those who acquire unique knowledge by attending three years of law school and passing a two or three day test administered by the state or some other entity is a sign of competence or superior ability, then the market should reflect these preferred attributes irrespective of a licensing requirement; savvy individuals would seek out those other individuals who possess the necessary qualifications when needed. For certain matters that are deemed legal — filling out a purchase and sale contract or a deed in a typical residential real estate transaction — the individual desiring the service may feel a realtor or third party can provide the service just as efficaciously, but at a lower price. Hence, there is a plausible argument that the market can successfully regulate the practice of law and that no external forces are needed to create entry barriers.⁸¹

territories of the United States. See Telephone Interview with John Moore, Member-Services of the American Bar Association (Jan. 17, 1997).

80. This, of course, does not mean that individuals cannot provide legal services for themselves. It is quite common for an individual to represent herself in any number of different transactions, ranging from the common to the extreme, that could call for the retention of a lawyer. However, it is important to note that only lawyers can represent other persons. Hence, a spouse cannot represent a spouse in a trial setting no matter how closely aligned the spouses' interests are. Similarly, a nonlawyer parent cannot represent a child no matter how close the relationship.

81. The counter-argument is that those consumers of services, the lay public, are either too stupid, too lazy, or too shortsighted to do their homework with respect to the provider of these services and that the regulator — the bar examiners — serves as a guarantor of the minimum threshold for the quality of services provided. Again, this is not the place to rehearse this debate, but I cannot resist noting that that rationale is both over and underinclusive. It is overinclusive to the extent that it includes all legal services no matter the complexity. Hence, the debate over the unauthorized practice of law with respect to real estate agents. See *supra* notes 57-58 and accompanying text. It is underinclusive to the ex-

But these entry barriers do exist and result in discrimination against those who are nonlawyers. More important for the purpose of this article and Professor McAdams's theory, this discrimination does produce status for members of the profession. Lawyers' uniqueness, their unique ability to practice law and represent others, has created a prestige, a panache of power, intelligence, and suaveness — some would say bordering on unctuousness — that is not found in any other profession. I could point to many examples of the public's perception of lawyers that support my position that lawyers are viewed as occupying an elite, prestigious position,⁸² but one recent article in the popular press sufficiently exemplifies this point metaphorically. In the article, the author compares the public's perception of ospreys to its perception of bald eagles, after ospreys attacked and almost killed a bald eagle that President Clinton had released on the Fourth of July as a symbol of the nation's environmental purity and national renewal:

Ospreys are the bikers of the bird world — essentially blue-collar outlaws with attitude. From their punk-rock head plumage to their merciless working hours to their low-rent housing on bell buoys, channel markers and other rarely private waterfront locales, they nurse and display a certain avian resentment.

Bald eagles, on the other hand, are the lawyers of the bird world. They dress in power tones, build ostentatious nests, strike pretentious

tent that the bar examiners typically provide entry barriers only and do not continue to test the competence of the provider of services once entry is gained. One can quibble about the effect of the recent movement to impose continuing legal education (CLE) requirements on attorneys through the Bar Association, but no one would argue seriously that this sort of requirement ensures that the public is provided with competent service from wise practitioners.

Another common argument related to the one just discussed is that the cost of letting the market operate in this area is too high. That is, the error costs associated with selecting a competent individual are too great. An individual may not be able to tell whether he or she has selected a competent practitioner until it is too late, until the damage is done. Given the rise in malpractice litigation and the dissatisfaction with lawyers generally, I am not sure a regime in which individuals must take that risk is any worse. See Johnathan M. Epstein, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011, 1012 (1994) ("In addition, in recent years, the legal profession has seen a growth in the number and size of awards for legal malpractice."); RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 1.6 (4th ed. 1996) (setting out statistical data concerning the increases in malpractice claims and awards). In fact, a case could be made that licensing requirements provide a safe haven for incompetents and reduces the due diligence that would otherwise be undertaken by the unsuspecting public if they knew how little being licensed means when correlated with competency to perform a given task. In effect, the bar examiners and other requirements may have created a world in which those with the wherewithal to investigate, hire, and monitor competent attorneys do so, and those without, lulled into complacency as a result of the erroneous belief that "licensed" equals competent, take their chances.

82. See Kenneth Anderson, *A New Class of Lawyers: The Therapeutic as Rights Talk*, 96 COLUM. L. REV. 1062, 1066 (1996).

poses and spend much of their lives stealing fish caught by other birds, frequently ospreys.⁸³

What is interesting is how the lawyer's exclusive control of legal matters, and hence the prestige generated by that status, is maintained in a world in which someone who has attended law school and passed the bar examination could easily transmit information to nonlawyers to enable those nonlawyers to represent themselves. In other words, since we allow individuals to represent themselves in just about every facet of what is considered legal representation, it is unclear how lawyers have maintained a monopoly over the delivery of those services to the public. Why hasn't the market operated to convey the information from the experts, the lawyers, to the lay public? Indeed, if the public realized how mundane and simple many legal tasks are — for example, the preparation of documents for a real-estate closing⁸⁴ — they would demand that lawyers reduce the exorbitant fees they charge to handle these tasks.⁸⁵

More important, why don't lawyers take advantage of their unique position and knowledge of the routine nature of certain transactions by notifying the public of that aspect? Better yet, why doesn't an individual attorney profit from that knowledge by, for example, setting up a nationwide network of paralegals, all of whom do the routine legal work under the attorney's supervision, to evade the bar's restriction on the unauthorized practice of law? Assuming the attorney is licensed in each state and does not run afoul of any ethical or other restriction, why doesn't the lawyer maximize her profit by providing cut-rate legal services when the services of a trained lawyer truly are not required?⁸⁶

83. Ken Ringle, *The Surly Bird — Ospreys, Tops in Nature's Talon Show*, WASH. POST, July 9, 1996, at C1.

84. In many states, such as Virginia, it is common practice for these tasks, including the title search, to be performed by a paralegal, not a lawyer. Yet the paralegal can provide these services only through a lawyer. She cannot hang out a shingle on her own because that would constitute the unauthorized practice of law. See *supra* notes 57-58 and accompanying text. See generally Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 573 (1994) (discussing the use of paralegals by firms operating a high volume practice in such areas as real estate closings); Dale H. Seamans, "Do-It-Yourself" Lawyering; *The Bar Debates How to Respond to Companies Engaging in the "Unauthorized Practice" of Law*, MASS. L. WKLY., July 15, 1996, at B1 (discussing lack of clarity in the term "unauthorized practice of law").

85. Indeed, the battle between the bar and realtors over their respective roles in the real estate closing is a product of the public's dissatisfaction and fear of lawyers.

86. Of course, this type of challenge to the ethos of the profession has happened to some degree already. The rise of firms such as Jacoby & Meyers, which provide law services to the masses, is an example of the delivery of legal services of the type I describe. See Edward Felsenthal, *Hard to Do: The Messiest Divorce That Jacoby & Meyers Ever Handled: Its Own*, WALL ST. J., Jan. 23, 1996, at A1; Randy Kennedy, *Changes for Jacoby, Meyers*, L.A. DAILY NEWS, May 14, 1995, at B3. Similarly, the creation and popularity of Nolo Press, which pro-

More generally, why do lawyers adhere to standards promulgated by state bar associations regarding the practice of law that limit their opportunity to maximize their wealth through multiple representation,⁸⁷ solicitation,⁸⁸ and the generation of legal work-product by unsupervised individuals?⁸⁹ The question is even more intriguing when one recognizes that it is lawyers, not the public, who impose limits on their own ability to generate the maximum number of benefits as a result of their knowledge of the law. Lawyers, through either the bar association, the supreme court of the state in which the lawyer is admitted, or a combination of both, control both the entry and activities of the profession's practitioners.

Although it is difficult to think of a historically established group like lawyers as having a collective action problem since their practices are so ingrained in society that they seem "normal," in a society in which the lawyer's monopoly over the delivery of services did not exist one could hypothesize a collective action problem in getting those with legal expertise to deliver their services according to the rules of a restrictive bar.⁹⁰ Even in a world in which restrictive rules are already established, collective action problems abound. There are many situations in which selfish but rational behavior by the individual lawyer would, if undertaken collectively by all or most lawyers, lead to suboptimal collective outcomes — eventually, perhaps, the elimination of lawyers and lawyering as a profession.

What precludes this disastrous outcome — the destruction of the prestige that is associated with the group through the destruction of the group — is the production of intragroup status. As indicated above, lawyers gain status, or prestige, relative to other

vides legal documents drafted by lawyers to laypersons with instructions on how to prepare simple documents such as wills and deeds, is testament to this trend. For an example of what Nolo Press offers, see <<http://www.nolo.com/>>.

87. Multiple representation is prohibited in many cases by the *Model Rules of Professional Conduct*. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995).

88. Direct solicitation is limited by the *Model Rules of Professional Conduct*. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1995).

89. The *Model Rules of Professional Conduct* outline the responsibilities of nonlawyer assistants. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1995).

90. "Collective action problem" is a term used by game theorists to describe the difficulties groups face in procuring the cooperation of their members. "In contrast to Adam Smith's 'invisible hand,' which guides society to desirable outcomes though individuals are selfishly motivated, game theory describes 'collective action problems' — situations in which individually rational decisions lead to sub-optimal collective outcomes." McAdams, *Cooperation and Conflict*, *supra* note 3, at 1009 (citations omitted).

groups as a result of their membership in the group.⁹¹ That type of prestige or status can be characterized as "external-regarding" prestige, or status that is relative to other groups. In addition, this external-regarding prestige adheres to and is uniformly applied to all members of the group without discrimination. Thus, there is a minimal amount of prestige accorded to each lawyer simply as a result of that individual's status as a lawyer. But what allows for the creation of the group and its maintenance, notwithstanding collective action problems, is a form of internal or intragroup prestige, referred to as "esteem" to differentiate it from the external-regarding prestige accorded to lawyers as a group. Internal esteem builds upon the external prestige that lawyers, within and without the public sphere, internalize as part of their reputational persona.⁹²

As Professor McAdams notes:

If neither material self-interest nor altruism explains the residuum of cooperation, what can? . . . [I]ndividuals behave selfishly, not altruistically, but their selfish end is the production of the non-material good of esteem. If individuals seek such non-material ends, members of social groups have another means of solving collective action problems, by allocating esteem to induce members to make contributions to the group welfare. Once we add esteem consequences to the material payoffs of individual decisions in such settings, we can explain both the fact and the nature of residual cooperation.

. . . Individuals derive status from groups in two ways: first, individuals gain esteem from strangers based on visible group memberships; and second, within a socially connected group, individuals are especially concerned with the esteem of fellow members. In each case, though for different reasons, status production creates a non-material incentive for group cooperation.⁹³

The puzzle, given the existence of intragroup cooperation that produces esteem for members of the socially connected group, is how racial discrimination can exist within the group of lawyers who gain prestige externally from their reputation as defenders of liberty and equality. Assuming lawyers are not being venal or disingenuous with respect to their adherence to these ideals, why hasn't intragroup cooperation led to the eradication of racism within elite firms of the profession? That is, if lawyers truly believe in the principles they espouse, and those principles result in the creation of a reputation that is positive relative to other professions, would not these same lawyers internalize the benefits that accrue as result of

91. See *supra* notes 65-69 and accompanying text.

92. See *supra* notes 55-59 and accompanying text.

93. McAdams, *Cooperation and Conflict*, *supra* note 3, at 1019.

that reputation and reward those within the group who adhere to those principles with even more esteem? Is it not contradictory to discover that instead of being the most successful practitioners of the principles espoused, elite firms are the worst adherents? What causes this divergence? Indeed, one can argue that additional esteem is allocated to elite firms as a result of the paucity of minority lawyers at those firms, even though this paucity contradicts their public perception as adherents to equality and liberty.

The confusion is resolved when we recognize that individuals, even lawyers, belong to multiple groups and gain both intra- and intergroup status as a result of the multiple memberships. The puzzle of the paucity of minority lawyers at elite firms is explained by the intersection of two memberships by those individuals in power at elite firms: membership in the profession and membership in racial groups. A white lawyer at an elite firm, although a lawyer with all of its attendant consequences, is still white, and in this society, given our shared history and conceptions, one's membership in a racial group usually trumps one's identification or membership in the occupational group of practicing lawyers.

Although lawyers gain status relative to other occupations in society because of their reputation as protectors and guardians of social and individual liberties, and, indeed, reward with intragroup status those who make sacrifices on behalf of the group and increase the group's welfare within larger society — that is, those who forego high income positions within the profession to promote the image of lawyers as protectors and guardians of social and individual liberties⁹⁴ — predictably there remains intergroup com-

94. Given space constraints, I have given short shrift Professor McAdams's exploration of why individuals make material sacrifices on behalf of the group to gain self-esteem and why individuals within the group concomitantly reward those individuals with esteem. However, for those interested in a thorough exegesis of this point, see McAdams, *Cooperation and Conflict*, *supra* note 3, at 1023-29. My precise point as it applies to lawyers is that lawyers who perform pro bono work or who actually work in what I have characterized as the "public sphere" to protect social and individual freedoms are highly regarded within the social group of lawyers and are compensated, not through dollars — those engaged in this sort of work are among the lowest paid lawyers, see Kornhauser & Revesz, *supra* note 5, at 865-74 — but through these intragroup esteem payments. For example, Elaine Jones of the NAACP or noted late civil rights attorney William Kunstler receive great respect within the profession and some of that respect has to be generated as a result of these intragroup esteem payments. See Richette L. Haywood, *CBCF Convenes 26th Annual Legislative Conference in Nation's Capital*, JET, Sept. 30 1996, at 4 (describing conference by Congressional Black Caucus Foundation); Carrie Johnson, *Honors and Appointments*, LEGAL TIMES, Oct. 7, 1996, at 17 (noting that Elaine Jones, director of the NAACP Legal Defense and Education Fund, was presented with the George W. Collins Award by the Congressional Black Caucus Foundation and also received an honorary Doctor of Laws degree from Harvard University); William Kunstler, *Radical Lawyer, Dies*, INTL. HERALD TRIB., Sept. 6, 1995 (contending that William Kunstler's "admirers" saw him as "a brilliant lawyer, and a skillful and courageous litigator, while his critics saw him as a showoff and publicity seeker"). Indeed, the allure of pro bono work for

petition among occupations which causes lawyers to raise their prestige by lowering the prestige of other groups or occupations.⁹⁵ This theory of intragroup rewards and intergroup competition reflects the conflict that occurs when one is simultaneously a member of a group — lawyers — that gains esteem through the promotion of ideals and principles and a member of another constituent group — white males — that holds ideals and principles antithetical to the first group. In that situation, I hypothesize that the individual may espouse one thing in one group in order to gain esteem and espouse something completely different in the other group. Moreover, when the actor who is a member of multiple subgroups is faced with these conflicting principles, I likewise hypothesize that because it is more difficult to do and not do the same act simultaneously, that although principles and ideals may be articulated, those principles and ideals may not be acted upon if that action causes a greater loss in esteem in one group — white males — than a gain in another group — lawyers.

Professor McAdams's thesis on group cooperation works optimally when an individual can only be a member of one relatively homogenous group.⁹⁶ When that assumption is relaxed, however,

students may be attributable in part to the esteem payments these jobs produce vis-à-vis corporate or law firm jobs which lack such esteem. One anecdotal point may demonstrate this point more clearly. I have a former student who left his well-paying partnership job in a relatively large law firm in a large city to become a general district court judge, taking a tremendous pay cut, during the prime of his career. In other words, this was not a case of attorney burn-out or semi-retirement. When I asked my former student how he could walk away from something he has worked so hard to construct, his response was the pride and honor his colleagues bestowed upon him when he was nominated to become a judge and how that distinguished him from the other attorneys and partners in the firm he left. According to my former student, it made the opportunity to serve the public too great to pass up. *See also* Ken Myers, *Despite Debt and Lure of Firms, Pro Bono Work is Catching On*, NAT'L L.J., Oct. 16, 1995, at A18; Travis E. Poling, *Legal Aid: Pro-Bono Services in Greater Demand Than Ever*, SAN ANTONIO BUS. J., Feb. 17, 1995, at A1.

95. *See* McAdams, *Cooperation and Conflict*, *supra* note 3, at 1031-32.

96. Professor McAdams recognizes that one can belong to an occupational group and achieve status through that occupational group even though race is typically the most observable and visible characteristic one first observes and uses to categorize:

Indeed, intra-group esteem production, and social norms based on such esteem, may provide the only explanations for the success of very large groups in lobbying despite powerful incentives to free-ride. Judge Richard Posner has conceded some uncertainty, for example, in explaining how farmers cooperate in legislative activities. I propose that the answer is the same for farmers as it is for the ranchers Ellickson studied in Shasta County. Although the occupational status of farmers or ranchers is not as observable as, for example, their race, it is one of the first things strangers detect about them. And within a geographic area, farmers and ranchers tend to be socially connected. Thus, farmers and ranchers have an interest in the status generally accorded their occupation and a means of inducing contributions to that status. Intra-group esteem allocation elicits material contributions to group material welfare, such as monetary contributions to lobbying efforts.

Id. at 1030 (footnotes omitted).

not only is intergroup competition increased, but the theory of intragroup cooperation must internalize the reality of multiple memberships insofar as multiple memberships affect the attainment of and the reward for intragroup status.

To some extent, the creation of many heterogeneous groups to which members simultaneously belong may go a long way to explaining something, that, at first glance, seems hypocritical — the articulation of one set of beliefs alongside a hiring practice that undermines those beliefs. But if lawyers do not correct these contradictory positions, they ultimately will lose the group status they gain as a result of their reputational caché as protectors and guardians of individual and social liberties.⁹⁷

Professor McAdams does not ignore the fact that one can belong to many different groups simultaneously, a concept that he characterizes as “cross-membership” in groups.⁹⁸ One premise put forth as the basis for antidiscrimination law is to increase the incidence of cross-memberships which will allegedly result in less racial discrimination:

Laws forbidding race discrimination may increase the occurrence of cross-membership and thereby undermine the effectiveness of racial subordination as a status strategy. Race has been and remains highly correlated with other demographic factors. If a white individual lives in an all-white neighborhood, attends an all-white school, works in an all-white firm, worships at an all-white church, belongs to an all-white amateur sports league, and patronizes all-white hobby clubs, she will never face the problem of cross-membership. If, however, anti-discrimination laws were to integrate neighborhoods, schools, firms, and private clubs, more whites would find themselves in a position in which racial minorities belong to some of *their* groups. Consequently, racial subordination would lower the status of these integrated groups. One response will be for whites to flee the groups that become integrated, but if the costs are too high, as when the law integrates a number of social groups at the same time,

97. See *supra* notes 58-60 and accompanying text.

98. Professor McAdams notes that an individual's membership in multiple groups lessens the investment in status production that creates discrimination:

[A]nti-discrimination laws may lower the investment in status confiscation by increasing the incidence of “cross-membership.” *Ceteris paribus*, an individual prefers subordinating a group to which she does not belong to subordinating a group to which she does belong. An individual always bears a cost from subordination of her own group and that cost gives her an incentive to avoid such behavior. In fact, an individual who is a member of group *A* and group *B* might find it in her interest to invest in efforts to prevent members of group *A* seeking to subordinate group *B*. Therefore, the more “cross-membership” between two groups, the fewer the resources that will be invested by the two groups in subordinating each other.

McAdams, *Cooperation and Conflict*, *supra* note 3, at 1080 (footnotes omitted).

the effect might be to lower the effectiveness of racial subordination as a status strategy for many whites.⁹⁹

What should be added, however, is the effect of cross-membership when the principles and ideals espoused by the multiple groups are inconsistent, opposite, or divergent. Instead of hypothesizing a lessening of racial subordination as a result of cross-membership — a plausible outcome for some members of the dominant racial group — I predict a possible alternate outcome: the articulation of a set of views and ideals consistent with one group's (lawyers') ideals and principles (the furtherance of individual and social liberties) and the maintenance of a reality (the racial composition of the profession) that is largely consistent with and is reflective of the other group's (whites') ideals and principles. Such a state of affairs may represent a natural stage of development in which cross-membership presents an individual with two competing sets of beliefs and ideals, one that is historically dominant and relatively fixed and one that is either relatively recent or, more important, societally subordinated — the paradigm of racial equality. What this means is that one's racial identification, clearly more visible and more defined in this society,¹⁰⁰ currently dominates in most contexts for most people over one's identification and group affiliation based on occupation.¹⁰¹

Thus, if the cross-membership in groups produces conflicting principles or ideals, a resolution that falls short of the eradication of the conflicting principle or ideal would be the sublimation of the conflicting principle or ideal in a way that most efficaciously creates

99. *Id.*

100. See *supra* note 96 and accompanying text; see also Johnson, *supra* note 72, at 911 (describing how visible morphology is commonly used to stereotype people).

101. McAdams provides the following explanation of why race and racial identification is a predominant group as it pertains to status production:

Only visible distinctions affect the level of esteem one receives from strangers. Consequently, individuals care greatly about the status associated with their visible characteristics. To produce status, one can invest in acquiring visible traits that others consider desirable, or one can invest in making others consider one's existing visible traits desirable. One may pursue this latter strategy directly, by accumulating accomplishments that enhance the trait's status, or indirectly, by lowering the status accorded the traits of others. When members of a group pursue the indirect production strategy of lowering the status accorded other traits, they engage in "discrimination."

Race defines a "shared-trait" group because it is constructed around observable traits. Race discrimination is thus a means by which people who share certain roughly similar and observable traits that come to be known as "race" produce social status for themselves. Status production does not explain why the particular visible characteristics we associate with race become important to status production, but once they are salient, the theory explains why they remain important. Not only do people compete for esteem by investing in subordination of previously defined groups, but people invest in preserving group boundaries to maintain their position in a high-status group.

McAdams, *Cooperation and Conflict*, *supra* note 3, at 1045 (footnotes omitted).

status for the individual situated in the multiple groups. Indeed, this could be the optimal strategy from an efficiency standpoint when ideals are in flux and there is no consensus within the more dominant group to obviate principles that conflict with principles generated by the other groups to which its members may belong.

This sort of cognitive dissonance occurs in other settings and there is no reason to believe that it does not occur with attorneys who espouse one thing, yet do another. For example, elsewhere I have described the cognitive dissonance that occurs when a black male does not conform to the stereotypes associated with him.¹⁰² If a black male is a rather meek and ineffectual looking academic who teaches law, that individual is "fenced off" from the rest of black society and the stereotypes associated with black society so that those very stereotypes may be maintained in the face of this conflicting data.¹⁰³

The challenge, then, once the conundrum is explained, is to hasten cross-membership with the concomitant reduction or elimination of racial subordination as a status strategy for white lawyers who gain benefits from their position as lawyers championing egalitarian ideals, while consciously or subconsciously maintaining the racial status quo by failing to hire and promote minority lawyers proportionate to their representation in the bar. I now turn to two strategies, both of which originated from and find credence in critical race theory: the "equality of result model,"¹⁰⁴ which can be used to remedy the deleterious situation in which attorneys find themselves; and the "destabilizing of racial identity model,"¹⁰⁵ which, if achieved, can eliminate existing racial identities and any impermissible benefits that flow from existing patterns of racial domination.

III.

Part III turns to remedies for the underrepresentation of minorities in elite firms, which assume that that underrepresentation is due in large part to the lawyer's membership in multiple groups, which causes lawyers to adhere to one set of principles — the promotion of racial superiority based on skin color — to the detriment of other oft-espoused principles such as the promotion of equality

102. See Johnson, *supra* note 72, at 923-24.

103. See *id.* at 924.

104. See *infra* notes 136-68 and accompanying text.

105. See *infra* section III.A.

and social liberties. One remedy is to require the legal profession to take the affirmative steps it has imposed on other groups in society to correct the racial imbalance that exists in elite firms — in other words, affirmative action. Consequently, I present a philosophical justification for the use of affirmative action in the legal profession that focuses on the equality of result rather than equality of opportunity.¹⁰⁶

The use of affirmative action to alleviate the underrepresentation of minority attorneys in elite firms is not necessarily new or innovative, and, although I am a staunch advocate of affirmative action — having gone so far as to advocate the use of quotas in certain situations¹⁰⁷ — I have recently concluded that for political¹⁰⁸ and jurisprudential reasons,¹⁰⁹ affirmative action has a limited chance of succeeding in the current climate in which whites view any gains by minorities, and particularly blacks, as a zero-sum game in which they are the losers.¹¹⁰

Affirmative action was never intended as a permanent solution to this society's racial ills. Affirmative action is best viewed as a transitory vehicle that ultimately becomes unnecessary with the

106. See *infra* section III.A. It should be noted that this focus on equality of result rather than equality of opportunity is indeed a central tenet of critical race theory. In particular, see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1381-84 (1984).

107. See Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043.

108. One particularly egregious case of race-baiting occurred when Jesse Helms used affirmative action to appeal to racial fears during the 1990 U.S. Senate race in North Carolina in which he defeated a black Democratic challenger, Harvey Gantt. See Eleanor Clift, 'Going for the Gut': How Ads Play on Race, NEWSWEEK, May 6, 1991, at 24, 24-25. A more recent example of a white Republican trying to make political hay by playing the race card occurred when Governor Pete Wilson of California entered the 1996 political race for the Republican nomination for President and used as the centerpiece of his campaign the elimination of affirmative action in California. See Marc Cooper, *Making Waves for a Wilson Wipeout*, THE NATION, Sept. 18, 1995, at 266; John Harwood, *California Republicans Debate the Pros and Cons of Targeting Immigrants and Preference in Fall*, WALL ST. J., Mar. 26, 1996, at A20 (discussing Pete Wilson's appeal to "angry white males"); Philip J. Trountine, *Affirmative-Action Rebuke Boosts Wilson*, ORANGE COUNTY REG., Aug. 5, 1995, at B6. Similarly, the Governor's political ally, Ward Connerly, a black man who is a University of California Regent, led the recent effort to enact a new provision of the California Constitution that outlaws the use of affirmative action in the state. This amendment was passed by the voters on November 5, 1996. See CAL. CONST. art 1, §31. (forbidding racial preferences by any state entity, except where mandated by federal law, including state institutions of higher education).

109. The Supreme Court recently struck down predominantly minority voting districts in Texas. See *Bush v. Vera*, 116 S. Ct. 1941, 1950-51 (1996) (holding unconstitutional two predominantly African-American and one predominantly Hispanic voting districts). Affirmative action and the use of race in any jurisprudential context also suffered a setback in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

110. See, e.g., Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 858 (1995) (discussing political trends unsympathetic to affirmative action).

passage of time.¹¹¹ This has caused me to search for a permanent solution to America's racial problems. The recent colorblind jurisprudence emanating from the Supreme Court and other courts has lead me to consider a novel approach to eliminating the underrepresentation of minority attorneys in elite firms: the eradication of existing racial identities based on the infamous "one drop of blood" rule by which the races are divided into white and others.¹¹²

Obviously, one way to eliminate the deleterious effects created by the paucity of minority attorneys that results from lawyers' identification with their racial group rather than their occupational group is to eradicate racial identification. That eradication will leave only occupational group identification as a viable vehicle for group identity and the creation of prestige and esteem. It is to that concept that I first turn.

A. *Destabilizing Racial Identification*

My proposal to destabilize racial identification as a vehicle to eliminate racial categorizations in order to improve race relations and eliminate the subordination of minorities by whites is itself the subject of a full length article that I will not duplicate here.¹¹³ The import of that theory in this article is that if we destabilize racial identification then lawyers will no longer be able, consciously or subconsciously, to rely on their racial identities and the privileges and principles that flow from those identities to repudiate or act in contradistinction to the principles and ideals they espouse as legal professionals. In other words, if race is eliminated as a viable group characteristic all that will remain is an occupational group characteristic that will cause those in the legal profession to adhere more fully to the ideals that they espouse.

111. Indeed, one argument that can be made in favor of those opposed to affirmative action is that affirmative action has operated for the last quarter century or more and it has not lead to a material improvement in race relations or the position of African-Americans in society and therefore should be jettisoned. For a discussion of the lack of progress that African-Americans have made since *Brown v. Board of Education*, 347 U.S. 483 (1954), see Johnson, *supra* note 107, at 1046-54. Of course, what this attitude belies is the fact that whites were able, as beneficiaries of de jure and de facto racial privileging, to countenance 400 years of racial oppression without too much discomfort or vocal opposition, but that they cannot abide by 25 years in which race and racial identification are used to provide what at best would be characterized as marginal benefits to another group.

112. See Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595 (1995); see also Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the Census*, 95 MICH. L. REV. (forthcoming 1997).

113. See Johnson, *supra* note 72.

I briefly sketch here the points and arguments that I made more fully in my earlier article and encourage the reader to visit that article for further explication of those arguments.¹¹⁴ I start with the assumption, which pretty much stands unchallenged, that racism is illogical, and that nothing should turn, no benefits, no detriments, on an individual's racial identification — that is, one's skin color, bone structure, and hair texture.¹¹⁵ Given this assumption, why does racial classification and identity continue to matter so much in American society?

This fact is even more puzzling when it is recognized that racial identification and the group identity it fosters is largely socially constructed.¹¹⁶ Hence, I remain intrigued about the persistence of the dichotomous racial classification in American society into white and others or minority. American society is unusual in that it is one of the few societies in which, as a result of the "one drop of blood rule," it can be neatly divided into two racial camps: white and black.¹¹⁷ That racial dichotomy is largely explained by the concept of whiteness as a property right,¹¹⁸ and the concomitant protection of that valuable property right by whites who preclude the development of multiracial categories in American society. I contend that racial classifications function most effectively as vehicles for discrimination and domination when they can be manipulated to maintain a duality that effectively entrenches the notion of "otherness" in anyone who is not white. Consequently, the notion of otherness is established by using a baseline of white racial purity.¹¹⁹

By defining our racial categories as simply white and black, with white viewed as dominant and superior and black viewed as inferior and different, whites and blacks have relied on ostensibly stable racial classifications that benefit whites at the expense of persons of color and blacks in particular. Whites are able to relegate all persons of color to subordinate status by reference to what they are

114. *See id.*

115. Kwame Anthony Appiah has characterized such attributes as the "grosser morphology." *See Appiah, supra* note 72, at 36-37.

116. Noted legal commentators concur in the assessment that race is socially rather than biologically constructed:

Racial and ethnic groups, in contrast, are socially constructed. Even though some physiognomic and other genetic group differences may exist, they are largely inconsequential for everyday life and public policy. Their importance lies, rather, in the salience we choose to attribute to them. That being said, societies often do treat race and ethnicity as important.

Brest & Oshige, *supra* note 110, at 860 (footnotes omitted).

117. *See Johnson, supra* note 72, at 889.

118. *See Harris, supra* note 75.

119. *See Crenshaw, supra* note 106, at 1384-87; Johnson, *supra* note 72, at 903-05.

not: white. Whiteness then becomes the defining, driving category by which others are measured.

In order to deconstruct this harmful racial dichotomy that creates otherness and subordination, I contend that society should embrace, as a transitory vehicle, multiple racial categories and expressly recognize and acknowledge products of mixed-race unions as distinct from both blacks and whites.¹²⁰ This, I argue, will create a type of "shade confusion" that will eventually — and it may be a long, arduous process — destroy the black-white dichotomy that currently exists, ultimately reducing race to a meaningless category, as it should be. I allege further that if racial categories are destabilized and destroyed, then ethnic categories, which should be viewed favorably when compared to racial categories because of their fluidity and positive attributes,¹²¹ will rush to fill the void created by the absence of racial categories.

The current racial typology, however, can and will be eliminated only if multiracial categories are recognized and allowed to flourish. To destroy the existing racial typology I turn to the efficiency rationale for trademarks and trademark law and explicate its analogue to racial identification and typology. In effect, I view racial identification or typecasting and the designation of one as black — or for that matter, Asian, Native American or Hispanic — as a "mark" like a trademark that heretofore has been maintained by whites in order to protect their property right in the attribute or resource of whiteness.

120. The move to create and recognize multiple racial categories is driven largely by a desire of parents of mixed-race or biracial children to have a "mixed-race" box placed on the census for the year 2000. See Linda Mathews, *More Than Identity Rides On a New Racial Category*, N.Y. TIMES, July 6, 1996, at A1, for a discussion of the movement for a new racial category:

In the past decade, interracial couples have emerged as a political force. They have organized political groups, both at the local and the national level, founded magazines and businesses that cater to the needs of families like theirs and established web pages and chat groups on the Internet.

Specifically, the goal for many of these groups is official recognition for multiracial Americans as separate from the four racial categories the Census Bureau has used since 1977: white; black; American Indian and Alaska native, and Asian and Pacific islander. The 1990 census also listed another category called "other," and separately asked Americans whether they were of "Hispanic" or "Spanish" origin.

Id. at A7; see also Michel Marriott, *Multiracial Americans Ready to Claim Their Own Identity*, N.Y. TIMES, July 20, 1996, at A1 (discussing the struggles of multiracial people).

121. Individuals who identify with an ethnic as opposed to a racial group do so on the basis of a shared history and value system, rather than appearances. Indeed, ethnicity is viewed as the cultural transmitter of positive values. For further discussion of this issue, see Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1414-22 (1993).

By destroying the exclusivity and meaning of the racial mark through the development of multiracial categories, I hope to make generic any sort of racial identification and to create a type of "shade confusion."¹²² I acknowledge that in the short run, this deconstruction of racial identification may have a splintering effect on people of color and especially blacks.¹²³ It may be true that blacks will subdivide into smaller subgroups based on things such as skin color — from light to dark — and other morphological traits. This deconstruction, moreover, may have the effect of destabilizing such race-based programs as affirmative action or racial redistricting that depend on stable racial definitions in which all blacks who are characterized as such by the one drop rule are eligible for the benefits of such a program irrespective of the hue of their skin.¹²⁴ In the long run, however, I predict that any such splintering effect among blacks will also have a spillover effect on the definition of white and will destroy the dichotomy that has driven racial relations in this country for centuries.¹²⁵

To demonstrate the benefits created by shade confusion and a society in which a multiplicity of racial categories exist premised predominantly on ethnic rather than a binary racial classification, I shift the focus to another racial-ethnic group, Hispanics, who occupy a relatively unusual position in the racial hierarchy of the United States.¹²⁶ As currently constructed, "Hispanic" denotes an

122. See generally Jeffrey M. Samuels & Linda B. Samuels, *Color Trademarks: Shades of Confusion*, 83 TRADEMARK REP. 554 (1993) (discussing the doctrine of shade confusion in the trademark context).

123. Typical is the following:

The multiracial campaign has drawn the support of some people who are actively involved in civil rights issues. . . .

But the [census] proposal . . . has drawn fire from other civil rights groups, including the National Urban League, the National Association for the Advancement of Colored People, the National Council of La Raza and the Lawyers Committee for Civil Rights Under Law.

Their objection, spelled out in letters, public testimony and journal articles, is that the availability of a multiracial category would reduce the number of Americans claiming to belong to long-recognized racial minority groups, dilute the electoral power of those groups and make it more difficult to enforce the nation's civil rights laws.

Mathews, *supra* note 120, at A7.

124. Although the potential loss of such programs or the potential difficulty in maintaining them represents legitimate objections to my plan to destabilize racial identity, query whether these arguments have any force given recent Supreme Court jurisprudence dismantling affirmative action and racial redistricting among other things? See *supra* note 14 and accompanying text. In effect, what I am arguing is that if we are truly going to be a color-blind nation with respect to laws and their enforcement — something I find hard to imagine because of my context and life-horizon — let's go all the way and eliminate the "meaningless" and harmful racial categories that continue to persist.

125. See Johnson, *supra* note 72, at 928.

126. See *id.* at 935-36.

ethnic group that consists of people of all racial types. Unlike white or black, Hispanic as a racial category is meaningless because a Hispanic can be of any race. Hence, being identified as Hispanic imparts no racial identification — and, relatedly, no racial stereotypes. To a large extent, the designation “Hispanic” represents a fluid and rather large ethnic group consisting of many subgroups or types. These subgroups or types are linked loosely to each other, and they are grouped not by reference to a racial division, but by a common language or heritage.¹²⁷

Hence, a lesson is learned and a paradigm is embraced that originates from the treatment of Hispanics as an *ethnic* group. Consequently, I contend that the ethnic group of “blackness” or African-American should and will develop to fill the void created by the destabilization of racial categories.¹²⁸ Given the “black experience” and this country’s history of *de jure* and then *de facto* segregation, African-Americans have developed as a people or ethnic community into a nation within a nation with their own unique ethnic identity. Hence, I conclude that maintaining African-American as an ethnic definition, while destabilizing racial classifications, will have a positive and rewarding effect.

This proposal for destabilization of racial categories relates to the thesis of this article as follows: I contend that such a destabilization of racial identity and its substitution with ethnicity will lessen the conflict between the ideals espoused by members of the legal profession — the ideals of liberty and equality — and the maintenance of the largely white law firms, which reflects the flow of benefits to attorneys because of their racial identification as whites. I anticipate, however, that many readers will object to the supplantation of race with ethnicity on the ground that the problems with group affiliation or identity that lead to the underrepresentation of minority attorneys at elite firms will not be reduced as a consequence.

Although this contention represents a legitimate counterargument, it is overcome by the observation that we view and respect

127. Because the term is broadly defined, many people are able to claim Hispanic origin or heritage. The only common denominator appears to be a connection with a Spanish-speaking ancestor from North, South, or Central America.

128. The ethnic definition of “African American” is not synonymous with the racial identification of blacks as currently socially constructed in American society. Quite the contrary, pursuant to the ethnic definition of African American that I envision, individuals who are phenotypically white may be ethnically African American and conversely not all individuals who are phenotypically black will or should be considered ethnically African American. For further discussion of this important point, see Johnson, *supra* note 72, at 936.

ethnicity in a positive manner when compared to race. In a perfect world, neither race nor ethnicity would exist as a vehicle to brand and label people as "other." However, the positive aspects of ethnicity, the "nomos" created by ethnicity, would be lost.¹²⁹ As we do not reside in a perfect world, I believe the emphasis on ethnicity should be embraced, and the social construction of race rejected because it is much easier to mask one's ethnicity and, if necessary, reconstruct one's ethnic identity to avoid the costly effects of being labeled "other" or disapprovingly different. Consequently, there is an illusory feature of ethnicity that does not exist for race; ethnicity, I argue, can be manipulated to extract positive benefits and reduce the negative consequences or costs.

Hence, I believe that if ethnicity, rather than race, is embraced societally as the vehicle pursuant to which identities are characterized, lawyers will, like other citizens, be able to mask and manipulate their identity to their benefit. Ethnicity, rather than race, gives the individual control over whether she reveals her true identity or, failing that, constructs a false ethnic identity to benefit herself. This may seem implausible in the world that currently exists, but I believe that skepticism is more a product of our current context than a true sense of whether such a world can exist.

To prove my point I will provide one example: Throughout this article I have referred to the distinction between white and black attorneys and the underrepresentation of blacks in elite firms. I have not referred to or addressed the practice by some firms not to hire Jews.¹³⁰ This refusal was once a common practice. However, ask yourself what would happen if that same odious practice reappeared at some firms? How successful would these firms be in policing this odious barrier? How successful would they be in identifying those who do not self-identify themselves as Jewish?¹³¹

129. For an extended definition and discussion of "nomos," see Johnson, *supra* note 121, at 1419-20. Robert Cover defines nomos as a community's "normative universe," the "commonalities of meaning that make continued normative activity possible." Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 14 (1983).

130. See Jerome Hornblase, *The Jewish Lawyer*, 14 CARDOZO L. REV. 1639, 1641 (1993) (discussing discrimination against Jews by New York law firms practicing corporate, patent, and maritime law); Note, *The Jewish Law Student and New York Jobs — Discriminatory Effects in Law Firm Hiring Practices*, 73 YALE L.J. 625 (1964).

131. Perhaps an argument can be made that in some instances Jews can be identified — although I am not sure how. I assume that if an individual is wearing a yarmulke, has a beard, and long dark hair, one might make a reasonable assumption that the individual is an Orthodox or Hasidic Jew. However, even in this context, that assumption is not absolutely correct. In addition, if the individual is Jewish, the individual can choose — assuming there is no violation of religious dictates that constrain choice — to alter their appearance to conform to whatever happens to be the norm.

Better yet, why don't firms discriminate against Italians, Russians, or those ethnically French-Canadian? I think the answer is clear: Ethnicity, unlike race, is not a fixed and immutable characteristic that cannot be manipulated and hidden.

Thus, my contention is that if racial identification is destabilized and replaced with ethnicity, the tension that is produced when lawyers belong to one group — a racial group — with one set of dominant ideals or principles predicated on that group's identity, while simultaneously belonging to another group — the occupational group of lawyers — with an antithetical set of ideals and principles predicated on that group's identity, will be largely eliminated. Once racial identification disappears, no ethnic identity — or any other kind of identity — will arise to supplant it if the principles associated with that group identity are antithetical to the principles of equality and justice.

Nevertheless, if one cannot embrace my destabilizing race heuristic as a realistic vehicle for reducing the racial tensions that create the underrepresentation of minorities in elite firms, there is yet another, more traditional vehicle to correct that underrepresentation. Of course, I am referring to the express utilization of affirmative action as a tool to increase the number of minority lawyers in elite firms.

B. *Affirmative Action*

One can approach the affirmative action debate from many different perspectives.¹³² Indeed, the debate over affirmative action has taken a strange twist recently. Recipients of affirmative action have decried its use and given validity to the arguments of other, more traditional critics who characterize it as reverse discrimination.¹³³ As a past recipient of affirmative action, I can speak personally that had it not been in place at Princeton University, later at

132. Any attempt to recite or catalogue the many articles and books that address the affirmative action issue could not be exhaustive. The books that I have perused in preparing this article include: RONALD J. FIGUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION* (1992); KENT GREENAWALT, *DISCRIMINATION AND REVERSE DISCRIMINATION* (1983); BARRY R. GROSS, *DISCRIMINATION IN REVERSE* (1978); *REVERSE DISCRIMINATION* (Barry R. Gross ed., 1977); MICHEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE* (1991); *SOCIAL JUSTICE & PREFERENTIAL TREATMENT* (William T. Blackstone & Robert D. Heslep eds., 1977).

133. See, e.g., CARTER, *supra* note 28; SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* 111-25 (1990). Also consider statements by Justice Clarence Thomas commonly viewed as anti-affirmative action. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2119 (Thomas, J., concurring in part and concurring in the judgment) ("[G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prosecution. In each instance, it is racial discrimination plain and simple.").

the University of California at Los Angeles School of Law, and finally in legal academia, both at the University of Minnesota and the University of Virginia Schools of Law, I would not be in the position I am today, and for that I am eternally grateful.¹³⁴ What is important for the thesis of this article is what effect the absence of affirmative action would have had on my career and, more important, the effect that the aggressive use of affirmative action would have on blacks in current society, generally, and in law firms, in particular. In my own case, I can readily assert that had there been no affirmative action, I too would have channeled my efforts to some other endeavor like sports, in a best case scenario, or crime, in a worst case scenario, to the exclusion of academics.¹³⁵

This section demonstrates that the aggressive use of affirmative action continues to benefit society and should be expanded to include elite law firms. The aggressive use of affirmative action is warranted whether there exists only a perception of discriminatory use of standards — what I characterize as the present and forward-looking defense of affirmative action — or an actual discriminatory use of standards — a backwards- or reparations-looking defense of affirmative action.

In this section, I will assume that standards have been applied historically in a discriminatory manner, consciously or subconsciously, thus calling for the use of affirmative action — a use that is backwards-looking — to correct past acts of societally impermissible discrimination. I do so because an analysis of the stated reasons for the underrepresentation of minority lawyers at elite law firms, as addressed previously, do not pass muster.¹³⁶ If the standards employed by elite law firms to hire lawyers have been applied discriminatorily, either consciously or subconsciously, by whites to protect their hegemonic position in society and to gain intragroup status,¹³⁷

134. I cannot say with certainty that affirmative action played a role in any admission or hiring decision that has affected my legal career. On the other hand, I believe that there is a high degree of probability that without preferential treatment based on my race, I would not have been afforded the opportunities that I have taken advantage of to date. Indeed, I am proud to proclaim, and rightly so, that I have been a recipient of affirmative action.

135. I played freshman baseball at Princeton for about a month, at which point I determined it was detrimentally affecting my studies; I then quit the team to concentrate on the difficult transition from a predominantly black high school, where I received a relatively poor education, to an elite college, where many of my white peer students had tremendous advantages when measured by their parents' investment in their human capital. See Johnson, *supra* note 121, at 1438-43. Had academics not been a viable alternative, I would have devoted what I perceive to be my considerable energies to sports — I would have given it my all.

136. See *supra* section I.B.

137. See *id.*

remedial steps must be taken to ensure that the manipulation of the standards that leads to the underrepresentation is corrected.

This section attempts to accomplish the most difficult task one undertakes in defense of affirmative action: providing a philosophical defense of affirmative action that does not also legitimate or make acceptable "first-order discrimination" — discrimination against people of color on the basis that they are biologically or culturally inferior to whites.¹³⁸ In addition, a philosophical and moral defense to the two oft-repeated popular arguments against the use of affirmative action is provided herein.

Affirmative action can be justified legally, philosophically, and morally as remedial action necessary to overcome the effects of discrimination and to lead to a future state in which blacks are proportionately represented in all fields, including elite law firms. First, the key terms of justice, equality, and affirmative action must be defined.¹³⁹ In this context, affirmative action is defined as the preferential hiring of minorities — primarily blacks — at elite law firms for the purpose of increasing the proportion of minorities in these firms so that their number at least matches their number within the legal profession. Moreover, the preferential treatment may be necessary and required to achieve a goal or to fill a quota.¹⁴⁰

Defining equality and justice, however, is a much more difficult task that, standing alone, could be the subject of an article of substantial length. Suffice it to say, if philosophers cannot agree on a finite definition of these two ephemeral concepts, such a resolution will not be proposed here. However, to address the issues raised by this article, I provide tentative definitions in order to establish a framework for discussion.

The definition of equality used herein is premised on the normative proposition that all individuals are morally equal as individuals, a proposition that serves as the base of modern liberal theory.¹⁴¹ This has been referred to by Rosenfeld as the "postulate of equality" and it proscribes "using differences of status or birth as the basis for treating persons unequally."¹⁴² Implicit, however, in the definition of equality are two very different notions of measuring

138. See ROSENFELD, *supra* note 132, at 4.

139. See *id.* at 12. See also REVERSE DISCRIMINATION, *supra* note 132, at 4, for the original narrow definition of affirmative action.

140. See ROSENFELD, *supra* note 132, at 47-48. For a discussion focusing on the appropriate and legitimate use of quotas, see Johnson, *supra* note 107.

141. See ROSENFELD, *supra* note 132, at 20-21.

142. *Id.* at 21.

“equal” treatment: “equality of result” versus “equality of opportunity.”

[E]quality of result means that each member of the class designated as the subject of equality ends up with an equal lot (of the good being allocated). Equality of opportunity, on the other hand, means that each member of the subject class has the same opportunity as every other member to obtain the scarce good, but that all members will not end up with an equal lot, as some but not all will succeed in acquiring the scarce good. . . .

. . . .

. . . In short, in terms of distinction drawn by Dworkin, equality of opportunity may not result in *equal treatment*, but it does . . . respect every person's right to *treatment as an equal*.¹⁴³

Justice also has multiple meanings: It can refer to distributive, compensatory, or procedural justice. Rejecting the narrow Aristotelean view that distributive justice relates to the distribution of public goods by public authorities and compensatory justice relates to the distribution of private goods by private citizens,¹⁴⁴ I broadly define distributive justice to include “goods and evils of a nonpolitical kind that can be distributed by private citizens to other private citizens.”¹⁴⁵ This definition encompasses acts of distribution as well as the states of affairs that exist following distribution. Thus, in its broadest sense, distributive justice includes the process and *product* of distribution by both public and private players.

Jules Coleman has best defined compensatory justice:

Corrective [compensatory] justice is a matter of justice . . . *not* because it promotes justice in the distribution of holdings, but rather because it remedies unjust departures from the prevailing distribution of holdings. [Moreover, compensatory justice provides an independent justice principle] precisely because it may be legitimately invoked to protect or reinstate distributions of holdings which would themselves fail the test of distributive justice.¹⁴⁶

Procedural justice in Rawlsian terminology consists of two distinct notions. The first, called “perfect procedural justice,” depends on an independent criterion of justice:

to determine what would be a just compensation or distribution and a procedure to lead to the desired outcome as determined by the independent criterion. If the procedure assures the desired outcome,

143. *Id.* at 23-24 (footnote omitted).

144. *See id.* at 30.

145. *Id.* (citing JOEL FEINBERG, *SOCIAL PHILOSOPHY* 107 (1973)).

146. Julius L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 L. & PHIL. 5, 6-7 (1983).

then one has, according to Rawls, "perfect procedural justice"; if it does not, then one has "imperfect procedural justice."¹⁴⁷

Simpler is the concept of "pure procedural justice," which simply requires that a fair procedure be followed in the distributive process.¹⁴⁸

1. *Refuting the Attacks on Affirmative Action*

The two popular arguments that attack the appropriateness and justness of affirmative action, at first glance, appear irrefutable from a philosophic perspective.¹⁴⁹ The first argument rests on the notion that any program that discriminates, for whatever reason, is unjust.¹⁵⁰ Because affirmative action programs provide preferential treatment based on the color of an individual's skin (and other reasons), and therefore discriminate in favor of people of color, consequently, affirmative action in hiring by necessity also must be unjust. A more advanced version of this argument is that affirmative action programs provide benefits to individuals "simply because they are persons of color." The immutable characteristic of a person's color or ethnic identity is, of course, irrelevant pursuant to our conception of equality,¹⁵¹ and therefore it is unjust to provide

147. ROSENFELD, *supra* note 132, at 41 (citing JOHN RAWLS, A THEORY OF JUSTICE 85-87 (1971)).

148. *See id.* at 41 (citing RAWLS, *supra* note 147, at 86).

149. The two arguments against affirmative action summarized herein and the critique of same are taken largely from Thomas E. Hill, Jr., *The Message of Affirmative Action*, 8 SOC. PHIL. & POLY., Spring 1991, at 108.

150. *See id.* at 112. I am ignoring for the sake of argument and clarity the objections that can be made to this very sparse, yet incredibly complicated statement. In other words, the premise that all discrimination is unjust neatly conflates the notion of harm and remedy by solidifying the status quo in favor of those who have been the beneficiaries of previous discrimination. Moreover, the assertion that any discrimination is unjust implies an incorrect and inappropriate meaning of the word discrimination that is different from the meaning used herein. Even when discrimination is used in this different, pejorative sense, it is too simplistic and ignores the rather obvious fact that this society's distribution of resources and goods is one based on discrimination. For example, the decision to bail out the savings and loan industry through the use of public monies is a perfect example of a legislative and executive decision to discriminate in favor of those in the financial-capital markets at the expense of others. For a discussion of the savings and loan crisis which lead to the formation of Resolution Trust Corporation, see Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 DUKE L.J. 469 (1992). That money, for example, could very easily have been used to fund a "Marshall Plan" for the inner cities. Thus, those who blithely claim that all discrimination is unjust must explain why it is that only discrimination that favors minorities is unjust.

151. Once again, I am assuming for the ease of discussion that those espousing these statements operate with a selective naïveté that allows them to make these sorts of ridiculous statements in good faith, and with a straight face. I find it impossible to believe that any intelligent person in American society currently believes that race and gender are irrelevant characteristics in American society. *See, e.g.*, CORNELL WEST, RACE MATTERS (1993); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

benefits to these individuals based solely on these immutable characteristics.

This first and most simplistic attack on affirmative action programs improperly conflates two very different meanings of "discrimination," hence leaving wholly unsupported its conclusion that discrimination as it is used in the affirmative action context is wrong. As pointed out above,¹⁵² elite law firms use many different evaluative criteria to assess the merits of entry-level candidates in their hiring process. In doing so, for example, *distinctions* are made between individuals from certain schools — a law firm may be willing to hire someone from the middle of the class at an elite, top-twenty law school, whereas that same firm only may be willing to hire someone from the top five percent of a class at a lesser, top-fifty school — individuals who anticipate practicing in certain specialties, individuals related to or known to individuals in the hiring firm, and individuals who are recommended by other individuals; the list is almost endless.

Moreover, to discriminate is "to make a *distinction* in favor of or against a person or thing on a categorical basis rather than according to actual merit . . . to make or constitute a distinction in or between; differentiate."¹⁵³ As a result, it is beyond peradventure that affirmative action programs do discriminate in the sense that they require individuals or institutions and, in this case, law firms, to make *distinctions*.

The claim that discrimination by institutions is unjust cannot, therefore, be based on the accepted definition and meaning of discrimination. If it were, law firms would have to conduct lotteries pursuant to which each individual applicant, irrespective of qualifications, would have an equal chance of being hired at the law firm

152. See *supra* section I.B.

153. THE RANDOM HOUSE COLLEGE DICTIONARY 379 (Jess Stein et al. eds., 1982) (emphasis added). The use of the loaded term "merit" in the definition detracts from its usefulness and presupposes that there is some accepted standard that is being deviated from when one "discriminates." Determining what is meritocratic in the hiring process is a large part of the issue and is discussed *supra* section I.B. See also Alex M. Johnson, Jr., *Scholarly Paradigms: A New Tradition Based on Context and Color*, 16 VT. L. REV. 913 (1992) (discussing the analogous issue of what is meritocratic in the legal academy). In any event, I am assuming for the sake of discussion that whatever the meritocratic metric, discrimination occurs when one evaluates the candidates evenly according to that metric and then departs from that metric to favor or discriminate against an individual based on a factor that is not originally included in the metric. The paradigmatic case in law firm hiring is when one has two or more candidates for the same position with equal grade point averages from the same or similar schools, but one candidate is favored over the other because she is athletic, or took more tax courses, or is married, or is the niece of a major client of the firm.

of her choice.¹⁵⁴ This would result in true equality of opportunity and would respect every person's right to treatment as an equal. Of course, no one is willing to argue that a lottery be conducted to award entitlements like positions in elite law firms. Obviously, then, the claim that all discrimination is unjust is based on a pejorative use of the term discrimination "meaning (roughly) 'making use of a distinction in an unjust or illegitimate way.'"¹⁵⁵

The problem with the use of discrimination in its pejorative sense is that it begs the question of what is unjust and illegitimate and fails to provide any basis, pro or con, that the discrimination required by affirmative action is unjust or illegitimate in the context in which it is employed. In other words, "[a]lthough one may in the end, *conclude* that all public use of racial and gender distinctions is unjust, to do so requires more of an *argument* than the simple one (just given) that merely exploits an ambiguity of the word 'discrimination.'"¹⁵⁶ More precisely, the simplistic argument against affirmative action fails to provide a principled basis to differentiate between permissible and impermissible forms of discrimination (distinctions) that take place in the hiring process; it simply concludes that affirmative action (distinctions) based on race or color is impermissible.

The second, more sophisticated argument against affirmative action is also loaded with misleading terminology that is exploited to reach the conclusion that affirmative action is unjust. The assertion that individuals are benefited *simply* because they are persons of color is wrong in that it ignores the historical and other justifications for the use of affirmative action in our society.

To say that someone favors a person "*simply because* that person is black (or female)" implies that there is no further reason, purpose, or justification, as if one merely had an utterly arbitrary preference for dark skin as opposed to light or female anatomy over male anatomy. But no serious advocate of affirmative action thinks the program is

154. For example, the law firm could establish minimal standards such as graduating within the top quarter of the class or bar passage on the first attempt. Presumably if these standards were put in place and a lottery conducted, the firm would hire those selected by the lottery and perhaps spend more time monitoring these new hires to assess their skills and their ability to complete the tasks that they have been assigned. I am uncertain whether such a lottery would lead to more or less turnover in the associate ranks if firms were forced to accept hires as a result of a lottery with no additional screening. Given the unhappiness and unease currently experienced by associates, the question exists whether a modification of the current system may perhaps be warranted. For a discussion of associate dissatisfaction with large firm practice, see Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1249-56 (1991).

155. Hill, *supra* note 149, at 112.

156. *Id.* at 112-13.

justified by such personal preferences. On the contrary, advocates argue that, given our historical situation, quite general principles of justice or utility justify the temporary classificatory use of race and gender. That being black or white, male or female, does not in itself make anyone morally better or more deserving is acknowledged on all sides.

... The proper conclusion, then, is not that any current program that makes use of race and gender categories is simply committing the same old wrongs in reverse. The worst wrongs of the past went far beyond merely the arbitrary use of categories [; they treated African-Americans and women *as no human being should be treated*]; moreover, it has yet to be established that the new use of these categories in affirmative action is in fact arbitrary (like the old use). An arbitrary category is one used without good justification; the charge that affirmative action programs use race and gender categories unjustifiably is just what is at issue, not something we can assume at the start.¹⁵⁷

2. *The Arguments in Favor of Affirmative Action: A Philosophical Perspective*

A moral and philosophical defense of affirmative action can be made that results in the just and appropriate use of affirmative action in elite law firms. However, justifying the use of affirmative action, from either a moral or philosophical perspective, requires more than the mouthing of simple platitudes that mask what, it is contended, are other motives. Instead, any legitimate discussion of the justificatory purposes of affirmative action must start with context — a contextual framework centered firmly in the reality of race relations in this society's past, present, and future.

Of the many arguments made in favor of affirmative action, most of them fall into two distinct categories: those that look to the future, and those that look to the past. The utilitarian, future-looking justifications for affirmative action focus on the remedial aspect of affirmative action and the resulting benefits to future society. They are premised on the perception that standards are consciously or subconsciously applied in a discriminatory fashion. Moreover, what is important, whether accurate or inaccurate, is the perception of the discriminatory use of standards. Pursuant to this rationale, affirmative action is used to dispel misperception and demonstrate societal commitment to equality.¹⁵⁸

157. *Id.* at 113-14.

158. Some of the societal benefits that flow from the aggressive use of affirmative action are detailed below:

For example, some argue that affirmative action will ease racial tensions, prevent riots, improve services in minority neighborhoods, reduce unemployment, remove inequities

Conversely, the reparations-based backward-looking justification for affirmative action focuses on remedying past wrongs. (There is an assumption that in the past meritocratic standards were applied in a discriminatory fashion.)¹⁵⁹ And although these two temporal perspectives provide excellent rationales for the appropriate use of affirmative action, there is yet a third temporal perspective that provides an equally valid rationale for its use. That temporal perspective is centered on neither the past nor the future but on the present.

[T]he values that give affirmative action its point are best seen as cross-time values that fall outside the exclusively forward-looking and backward-looking perspectives. They include having a history of racial and gender relations governed, so far as possible, by the ideals of mutual respect, trust, and fair opportunity for all.

....

... The main suggestion is that, ideally, a central purpose of affirmative action would be to communicate a much-needed message, sincerely and effectively. The message is called for not just as a means to future good relations or a dutiful payment of a debt incurred by our past. It is called for by the ideal of being related to other human beings over time, so that our histories and biographies reflect the responses of those who deeply care about fair opportunity, mutual trust, and respect for all.¹⁶⁰

In creating a philosophical justification for affirmative action, I utilize a contextual approach that focuses on contemporary American society in which equality is not defined as a belief that all individuals possess equal abilities or intelligence. The so-called postulate of equality, the normative proposition that all individuals are morally equal as individuals,¹⁶¹ is however the starting point for the discussion in this section. That postulate of equality focuses on

in income distribution, eliminate racial and sexual prejudice, and enhance the self-esteem of blacks and women. Some have called attention to the fact that women and minorities provide alternative perspectives on history, literature, philosophy, and politics, and that this has beneficial effects for both education and research.

Hill, *supra* note 149, at 116.

159. Focusing on a reparations-based or backward-looking justification for affirmative action requires a different justification:

A radically different strategy for justifying affirmative action is to rely on backward-looking arguments. Such arguments call our attention to certain events in the past and assert that *because* these past events occurred, we have certain duties now. The modern philosopher who most influentially endorsed such arguments was W.D. Ross. He argued that there are duties of fidelity, justice, gratitude, and reparation that have a moral force independent of any tendency these may have to promote good consequences. . . . The Rossian principle that is often invoked in affirmative action debates is a principle of reparation.

Id. at 117 (footnote omitted).

160. *Id.* at 123, 127.

161. See ROSENFELD, *supra* note 132, at 20-21.

the individual and the treatment of the individual in our society. Thus, "at the very least, the postulate of equality condemns using differences of status or birth [or color] as the basis for treating persons unequally."¹⁶²

The postulate of equality requires that goods be distributed to allow each individual to realize fully the goals of her life plan if enough goods are available. Of course, with respect to the distribution of scarce goods, like positions or jobs at elite law firms, some just method of distribution must be enacted that does not violate the postulate of equality.

At first glance, affirmative action seems to violate the postulate of equality because it apparently treats similarly situated individuals differently based on the accident of their race. Two very different possible goals can justify methods of distribution of scarce resources or goods. The first is *equality of result*, which requires that each member of the subject class receives the same amount of the good allocated. On the other hand, *equality of opportunity* mandates that each member of the subject class have the same or equal opportunity as every other member to obtain the scarce good. Thus, with respect to equality of opportunity, not all will wind up with the scarce good, but each will have a formal — procedural — right to obtain the good.¹⁶³

With respect to entry into elite law firms, it is assumed that what is sought in the hiring process, which constitutes the allocation of a scarce resource — job openings or positions within the firm — is equality of opportunity and not equality of result. The justification for this assumption is that not all applicants can receive an equal share of the resource being distributed. The problem with employing equality of opportunity, however, is that there are two types: "prospect-regarding equality of opportunity" and "means-regarding equality of opportunity." Prospect-regarding equality occurs when two or more persons have equal opportunities for obtaining the desired good. A lottery is a perfect example of prospect regarding equality of opportunity. By contrast, means-regarding equality of opportunity is defined as a situation in which two or more competitors for the scarce resource have the same tools for obtaining the desired good.¹⁶⁴

To illustrate this, let us suppose that two persons, one being twice as strong as the other, compete for a single good G that can only be

162. *Id.* at 21.

163. *See id.* at 23-24.

164. *See id.* at 25.

obtained through the exertion of physical strength. Without tools, other than their brute strength, their prospects for obtaining G are unequal. Moreover, if they are both given the same instrument — say an instrument that is capable of increasing its user's physical strength by a factor of two — they will both possess means-regarding equal opportunity, but their prospects would remain unequal. Conversely, to grant them prospect-regarding equality of opportunity, it will be necessary to provide them with unequal tools for enhancing physical strength. In this latter case, the allocation of unequal means becomes a prerequisite to the achievement of prospect-regarding equality of opportunity.¹⁶⁵

Moreover, even when competitors receive additional tools to obtain the scarce resource, for example, education at an elite law school, all that is achieved is *marginal* means-regarding equality of opportunity.

In other words, in the context of inequality in initial circumstances — that is, the prevailing circumstances immediately preceding the allocation of equal means — the institution of marginal means-regarding equality of opportunity is unlikely to bring about equality of result or prospect-regarding equality of opportunity.¹⁶⁶

Applying these theories of justice and opportunity to the debate over affirmative action leads to the rather obvious conclusion that means-regarding equality of opportunity cannot be achieved if the competition for positions at elite law firms is premised on being treated equally, that is, irrespective of race. The premise of equal competition inevitably will fail, given that different treatment will result from one's racial identification combined with the hiring attorney's position within another racial group that influences her hiring decision.¹⁶⁷ In other words, if two competing claimants for the same position are of different races, given the existence of group dynamics, relative preferences, and the production of intra-group status, it stands to reason that the applicant whose race matches the race of the dominant group will have a better chance of being hired for that position.

Another objection to affirmative action deserves to be addressed directly. That objection stems from classical liberalism's fundamental requirement that similarly situated individuals be treated similarly. The problem, however, with classical liberalism's emphasis on the individual and its requirement of equal treatment of all individuals is that it presupposes an ideal world that does not exist. Moreover, by requiring the equal treatment of individuals

165. *Id.*

166. *Id.* at 25-26.

167. See *supra* notes 111-13 and accompanying text.

based on notions of meritocracy, it fixes in place a scheme of distribution of benefits (distributive justice) that, although perhaps "fairly" distributed based on neutral principles or practices (procedural justice), does not take into account the individual's identity or place within society (compensatory justice).

Meaningful action is necessary to correct the underrepresentation of minorities in elite law firms. Affirmative action is needed to ensure that equal opportunity is truly part of a process that continues to favor whites over nonwhites when so-called neutral, objective criteria are employed. This society's history, its development, and its current politics and way of life are, to a large degree, based on race. Using affirmative action programs that take race into account as a positive factor is simply an appropriate and realistic way to respond.

One of the sad facts in the history of this country is the residue that remains from the distribution of social goods on the basis of race, gender, disability, and class. This history has produced traditional inequalities that infect all of our social institutions. To understand the nature of production and distribution of social wealth, we must analyze each institution mindful of the distortions that our history and traditions have produced.

The current super-heated rhetoric surrounding affirmative action sees affirmative action as primarily producing a social cost that must be justified. The proposals for the use of colorblind and narrowly meritocratic selection processes are advanced as the only way to reduce these social costs. But this rhetoric, perhaps due to its selective historical blindness, has things exactly wrong. Affirmative action, properly designed and implemented, can only reduce social costs.

It must be recognized that there are current social costs involved in the use of evaluative standards that lead to the underrepresentation of blacks in important occupations like partners at elite law firms. Some of these costs are described in the following passage from the legislative history of the Civil Rights Act of 1964:

The failure of our society to extend job opportunities to [blacks] is an economic waste. The purchasing power of the country is not being fully developed. This, in turn, acts as a brake upon potential increases in gross national product. In addition, the country is burdened with added costs for the payment of unemployment compensation, relief, disease, and crime.

National prosperity will be increased through the proper training of [blacks] for more skilled employment together with the removal of barriers for obtaining such employment.¹⁶⁸

Affirmative action prevents the economic and social waste that would otherwise result from the use of these allegedly neutral hiring standards employed by elite law firms.

IV.

Lawyers must practice what they preach. Their failure to do so as it pertains to hiring and promoting minorities at elite firms is problematic for what it reveals about law and lawyers and what it portends for the future. If lawyers do not make significant progress to hire and promote minorities proportionate with their representation in the profession, lawyers run the risk of losing the prestige — the relative preference — associated with becoming a member of this noble profession.

I have presented two proposals, both attributable to critical race theory, to correct the underrepresentation of minorities at these elite firms. The first, destabilizing racial identity to eliminate the intragroup preference that causes white candidates to be preferred over similarly qualified minority candidates, represents a long-term strategy that would require society to deemphasize and eliminate racial identification. The second, more circumspect strategy calls for those within the legal profession to employ the same remedy of affirmative action that the profession developed and imposed upon schools and other employers, to remedy the effects of past and present racial discrimination in law firms' hiring practices.

The focus on these remedies suggested by critical race theory indicates that using insights gleaned from that body of thought can profoundly influence the development of the law and the legal system, notwithstanding the field's relatively recent birth and incorporation within the halls of academe. Indeed, although critical race theorists cannot point to one single body of law as the progeny of the discipline, they can point to the origination and development of significant theories that have influenced the evolution of the law in innumerable ways. Critical race theorists' influence on law and legal systems not only has been profound, it also will be lasting.

168. H.R. REP. NO. 88-914, *reprinted in* 1964 U.S.C.C.A.N. 2355, 2515.