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Beyond "Bleached out" Professionalism

Defining Professional Responsibility for Real Professionals

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Consider the following cases:

1. Anthony Griffin, a black lawyer affiliated with the ACLU, agrees to defend the Grand Dragon of the Ku Klux Klan. The case involves the state of Texas's attempt to subpoena the Klan's membership list in order to assist a probe into Klan violence against black residents in a newly integrated housing project. The African American head of the Port Arthur branch of the NAACP subsequently fires Griffin from his position as the unpaid general counsel for that organization when Griffin refuses to withdraw from representing the Klan.[1]

2. Judith Nathanson, a well-known Massachusetts divorce lawyer, is approached by Joseph Stropnicky to review a draft settlement agreement between he and his wife. Nathanson is well known for winning large settlements on behalf of women who have sacrificed their own careers to put their husbands through school while taking care of childcare and household responsibilities. Stropnicky is in precisely this situation, having put his former wife through medical school and delayed his own education for seven years while he stayed home as the primary homemaker and caregiver for the couple's children. Despite these similarities, Nathanson categorically refuses to represent Stropnicky on the ground that "she does not represent men." The Massachusetts Commission Against Discrimination subsequently concludes that Nathanson's "women only" policy violates her obligations as a "public accommodation" by discriminating in her selection of clients on the basis of gender.[2]

3. Gill Garcetti assigns a black prosecutor, Christopher Darden, to be one of the lead prosecutors in the racially charged prosecution of O.J. Simpson. During the course of the trial, Darden seeks to bar the defense from questioning Mark Fuhrman, a white police officer who found a damaging piece of evidence on Simpson's prop-

erty, about whether Fuhrman used racial epitaphs in the past. Subsequently, Johnnie Cochran, the black lead defense lawyer, argues to the predominately black jury that they should acquit his client in part as a means of "sending a message" that police racism and misconduct will not be tolerated.[3]

4. Robert Johnson, the elected black district attorney representing the Bronx, announces that he will refuse to seek the state's newly enacted death penalty in part because he believes it will inevitably be applied in a racially discriminatory manner. Subsequently, Governor Pataki removes Johnson from considering whether to seek the death penalty in a highly publicized case involving three minority youths accused of shooting a white police officer. Pataki replaces Johnson with a white lawyer who is a committed death penalty hawk.[4]

5. While representing Monica Lewinsky in connection with her possible appearance before the grand jury investigating President Clinton, William Ginsburg makes the following statement to an Israeli newspaper, "We are fans of president Clinton and admire his positions and policies concerning Israel. Clinton is very positive toward Israel and the Jews. Monica and I are Jews. I'm torn because I fear for the fate of the presidency in our democracy, and I don't want the president to resign. Who knows who will come after Clinton and how he will deal with Israel." When subsequently questioned about the propriety of this statement, Mr. Ginsburg responds, "I made the statement, I meant the statement, and I'm sincere about the statement. But my personal opinion has nothing to do with the Lewinsky matter. That's the point. The point is that the case is not about me. It's about our democracy. And so that particular statement, while it happens to be my opinion, has nothing to do with this case. As a lawyer, I could represent either or any side of this case. And my contention is we have to play by the rules."[5]

Each of these high profile cases has become a part of America's great conversation—or more accurately "angry polemic"[6]—about the importance of group-based identity in public life. For many Americans, these cases are proof that our legal system has been corrupted by identity politics. On this view, Johnny Cochran "played the race card" in his closing argument in the Simpson case; Robert Johnson allowed his personal agreement with his primarily minority constituency's opposition to the death penalty to undermine his professional obligations as the people's lawyer; and Nathanson and Ginsburg both illegitimately allowed group-based loyalties to undermine their ethical obligation as officers of a system committed to "gender-blind" or "religion-blind" justice. Many of these same individuals believe that lawyers like Griffin and Darden, who are willing to represent interests that appear to be opposed to those of other members of their group, deserve special praise for upholding the highest standards of professionalism in a manner destined to move America closer to the ideal of equal justice under law.

Other observers, however, take a different view. These observers applaud lawyers like Cochran, Johnson, and Nathanson for shedding light on the manner in which

the legal system is anything but blind to the ascriptive characteristics of litigants and lawyers. Proponents of this view argue that it is officials like Governor Pataki and the Massachusetts Commission Against Discrimination who are actually undermining the fairness of our system of justice by sanctioning attorneys for seeking to protect members of their group from state oppression. Not surprisingly, these proponents typically reserve their harshest criticism for the lawyers most praised by the first group; that is, lawyers like Anthony Griffin and Christopher Darden, who, according to this way of thinking, are prepared to "sell out" their people for their own personal gain.

In this essay, I seek to move beyond these standard tropes and to set some preliminary ground work for thinking about the relationship between a lawyer's group-based identity and her professional role. Part I begins by examining the account of lawyer professionalism that underlies the traditional claim, captured by the first set of tropes, that professionalism requires lawyers to check their identities at the door when performing their professional roles. In this account, becoming a lawyer means adopting a "professional self" that supercedes all other aspects of a lawyer's identity. This self becomes the sole legitimate ground for actions taken within the confines of a lawyer's professional role. Professor Sanford Levinson aptly labels this traditional view "bleached out professionalism."[7] By instructing lawyers, clients, and the public that a lawyer's nonprofessional identity is irrelevant to her professional role, bleached out professionalism provides real and important benefits to those who produce and consume legal services and to our system of justice as a whole. Nevertheless, in Part II, I argue that bleached out professionalism fails as a professional ideal for real lawyers. As the second set of tropes underscores, bleached out professionalism neither accurately describes the manner in which real lawyers engage with their work, nor provides adequate answers for some of the most important ethical problems concerning the relationship between a lawyer's nonprofessional identity and her professional role. When all is said and done, this standard account of the lawyer's role reinforces an overly rigid understanding of lawyering that both curtails opportunities for the profession's traditional outsiders and inhibits innovation in the profession as a whole.

Part III, therefore, attempts to lay a foundation for a new understanding of the lawyer's role that moves beyond the limitations of bleached out professionalism without ignoring the important values that this traditional philosophy was designed to protect. I begin by arguing that the legitimacy of group-based considerations in professional decision making depends upon two contextual factors, (1) the moral standing of the group-based claim being asserted, and (2) the effect that asserting this claim will have on the lawyer's ability to carry out the legitimate social purposes of the specific lawyering role in question. I conclude by examining how these two criteria can help lawyers like those in the celebrated cases described above navigate the complex intersection between identity and professional role.

1. Identity and the Professionalism Project

> The triumph of [this] . . . standard version of the professional project would . . . be the creation . . . of purely fungible [lawyers]. Such apparent aspects of the self as one's race, gender, religion, or ethnic background would become irrelevant to defining one's capacities as a lawyer.[8]

Professionalism is traditionally a greedy ideology.[9] In the standard view, becoming a professional involves more than simply performing a specific job or assuming a certain social standing. Instead, it involves becoming a particular kind of person; a person who both sees the world and acts according to normative standards and conventions that are distinct from those that govern nonprofessionals.[10] Through a complex process involving self-selection, professional education, collegial socialization, and the threat of professional discipline, individuals who enter into professions are presumed to adopt a new professional identity based on the unique norms and practices of their craft. This "professional self," in turn, subsumes all other aspects of a professional's identity—gender, race, ethnicity, religion—and becomes the sole legitimate basis for actions undertaken within the confines of his or her professional role.

Bleached out professionalism, as I will refer to this standard account, is central to the dominant model of American legal ethics. The legal profession has long claimed the right to define and inculcate its own normative standards and to enforce those standards through professional discipline. The resulting rules of professional conduct are explicitly cast in universalist terms that purport to apply to all lawyers in all contexts.[11] Moreover, when we shift our attention to the myths, lore, and narratives that lawyers have traditionally told themselves and the public about the nature of the lawyer's role, the claim that a lawyer's nonprofessional identity is (or at least ought to be) irrelevant to her professional role becomes even more salient.[12]

Consider, for example, the public's reaction to the possibility that racial considerations might have influenced the lawyers' conduct in the Simpson case. In addressing the so-called Darden Dilemma involving the alleged difficulties that black prosecutors such as Christopher Darden face in prosecuting black defendants, Ken Hamblin writes that society has a legitimate right to demand that anyone who becomes a prosecutor should "leave their biases behind to serve as the people's counsel."[13] Hamblin concludes that any minorities who believe that they have a "special allegiance to people of color" should "stop polluting the legal profession."[14] William Safire's charge that "Simpson's black attorney . . . blatantly urg[ed] [the predominately black jury] to ignore the evidence of murder and to get even for society's past injustices" reflects a similar assumption that Cochran improperly allowed racial considerations to "pollute" his legitimate obligations as defense counsel.[15] Even Gil Garcetti was accused of "play[ing] the race card" by assigning Darden to the case and by prosecuting Simpson in Los Angeles County, where there would likely be many blacks on the jury, rather than in virtually all-white Santa Monica County.[16]

Indeed, most of the participants in the celebrated cases described above, including virtually all those who have been accused of violating the norms of bleached out professionalism, have been careful to pay allegiance to this core professional ideal. Thus, Anthony Griffin sometimes claimed that race had "nothing to do" with his decision to represent the Klan,[17] branding as "racist" both "those black folks who told me I should have let a white lawyer take th[e] case" and "Anglos, who regarded me as some kind of oddity because I was a black man who represented the Klan."[18] Similarly, Darden flatly states that "[I]f I thought I was being assigned to the case primarily because I was black, I would've rejected it."[19] Nevertheless, Darden believes that for many Americans, he "was a black prosecutor, nothing more."[20] Even William Ginsburg, in the excerpt quoted at the beginning of this essay, claimed that his statement about his religion and Clinton's policy toward Israel "has nothing to do with this case" and that he "could represent either or any side" of the Clinton/Lewinsky matter.[21]

It is not surprising that bleached out professionalism has become a core professional ideal. Norms such as neutrality, objectivity, and predictability are central to American legal culture. Lawyers are the gatekeepers through which citizens gain access to these important legal goods. If the law is to treat individuals equally, the argument goes, than lawyers must not allow their nonprofessional commitments to interfere with their professional obligation to give their clients unfettered access to all that the law has to offer. A professional ideology that treats a lawyer's nonprofessional identity as relevant to her professional conduct appears to threaten this important role.

In addition to the benefits that bleached out professionalism offers to the consumers of legal services, it also appears to safeguard the interests of the women and men who become lawyers. The universalizing claims made on behalf of the professional self suggest that differences among those who become lawyers that might matter outside the professional sphere are irrelevant when evaluating these individuals' professional practices. This "professional" status is particularly important for the profession's new entrants—Jews, women, blacks, and other racial and religious minorities—who, in their nonprofessional lives, have been subject to discrimination on the basis of certain aspects of their identities. These traditional outsiders have a powerful stake in being viewed as lawyers *simpliciter*, freed by their professional status from the pervasive weight of negative identity-specific stereotypes. A professional ideology that explicitly recognizes the importance of a lawyer's nonprofessional identity runs the risk of reinforcing stereotypes about group membership in a manner that threatens the goal of ensuring equal opportunity within the profession.

Finally, bleached out professionalism appears to uphold the legal system's core commitment to the fundamental equality of persons. Thus, the idea that a lawyer's gender, race, or religion is irrelevant to her professional role seems to flow directly from the broader claim that the legal rules and procedures that lawyers interpret and implement should also be unaffected by identity. The claim that "our constitu-

tion"—and, indeed, justice itself—"is colorblind" (or "gender blind") is a bedrock principle of our legal order, and indeed of our public morality.[22] Lawyers who either explicitly or implicitly call attention to issues involving race or gender—including their own racial or gender identity—seemingly undermine this ideal.

Each of these three justifications for bleached out professionalism, (1) clients' need to receive a uniform professional product, (2) lawyers' (particularly lawyers from traditionally disadvantaged or marginalized groups) need to inherit the full trappings of professional standing, and (3) the public's need to reaffirm the fundamental equality of everyone before the law, stand as a powerful check against any attempt to modify or replace bleached out professionalism as a normative ideal for the American legal profession. Nevertheless, I will argue that we must do just that. To see why, it is necessary to look more closely at the justifications for—and, equally important, the costs of—this widely held, but rarely analyzed, professional ideal.

II. Unmasking the Professional Self

The claim that lawyers who interject identity issues into professional practice "pollute the legal profession" implicitly rests on the assumption that in the absence of this kind of intervention, identity-related considerations would *in fact* be irrelevant. This implicit factual assumption, however, is at best misleading, and at worst counterproductive, to creating appropriate ways for lawyers to respond to America's continuing failure to make good on its promise of providing equal justice under law. Three aspects of our contemporary environment make it crucial that lawyers account for the manner in which identity—including their own identity—continues to structure the legal rights of citizens. First, contrary to the "bleaching" metaphor, current understandings of lawyer professionalism continue to reflect the identities of those who founded the modern American legal profession. This historical legacy both undermines the normative claim that identity is "irrelevant" and poses important challenges for the careers of certain lawyers who do not share these identity characteristics. Second, what is true for lawyers is even more true for litigants. Although the American legal system promises that justice will be "blind" to identity, the reality is that certain groups continue to encounter substantial impediments to gaining access to the public goods encoded in law as a result of their identity. By obscuring this fact, bleached out professionalism fails to help lawyers determine how to respond to this reality. Finally, bleached out professionalism ignores the extent to which a lawyer's own identity affects that lawyer's ability to perform his or her job. Once we understand that lawyers will often not be able to "check" their identities at the door, it is not at all clear that instructing them to act as though their identities do not matter is the appropriate ethical response. The next three sections briefly explore each of these problems with the fundamental assumptions underlying bleached out professionalism. Part IV argues that, partly as a result of these limitations, there are benefits to certain forms of identity-conscious lawyering, benefits

that must be weighed against the real—as opposed to ideal—benefits of bleached out professionalism in determining the role that identity should play in professional life.

Historicizing Professionalism

Proponents of bleached out professionalism implicitly assume that the profession's current norms and practices exist independent of any particular identity. History, however, teaches otherwise. Like every normative system, the current understanding of professional role was created at a particular time and a particular place. As many scholars have documented, this period was dominated by a handful of relatively homogeneous elite New York lawyers who wielded considerable influence over the creation of the modern professional ideal.[23] Moreover, these founders acted in an era in which various forms of identity-based discrimination were an accepted part of the legal and moral landscape. These initial conditions cast a continuing shadow over current understandings of professionalism.

Many of today's professional ideals can be traced to particular aspects of the identities of the profession's founding fathers.[24] For example, in his pioneering study of the American bar, Jerold Auerbach describes how the elite lawyers who created the rules of professional conduct raised entry requirements and pushed for stringent restrictions on commercial practices such as advertising and solicitation as a means of distancing themselves from the new wave of immigrant lawyers who, out of necessity, relied on many of these practices.[25] This historical legacy has lead Thomas and Mary Shaffer to characterize the prevailing understanding of the lawyer's role as "Gentleman's Ethics."[26] Other scholars assert that the understandings underlying the bleached out view of professionalism are in fact gendered. Starting from Carol Gilligan's influential hypothesis about gender differences in the moral reasoning styles of men and women, some feminist scholars have argued that the rigid, detached, hierarchical, and adversarial character of traditional notions of lawyer professionalism reflect a distinctly "male" identity.[27] Although many feminist scholars criticize this framework, the dramatic differences that have attended women's introduction into most spheres of contemporary social and political life support the idea that the presence of women at the creation of the modern understandings of professionalism would have "expand[ed] and transform[ed] the way we produce and use law."[28]

Even those who are not convinced that the content of professional norms are gendered will be hard pressed to deny that the traditional lawyer's career path was created to fit a male biography. The typical career path in a large law firm, for example, calls for a recent law school graduate to spend six to ten years locked in a highly competitive "tournament" at the end of which only a select few will be elevated to partnership.[29] This structure has been in existence since the early days of this century when it was pioneered by Paul Cravath and a handful of other prominent New York and Boston lawyers. Both then and now, firm leaders have justified their use of

the "Cravath System" in distinctly professional terms.[30] This system of professional development, created at a time when women were formally barred from most elite firms, disproportionately burdens women lawyers. The six- to ten-year period after law school coincides almost exactly with a woman's prime childbearing years. Women, therefore, are faced with the choice of either postponing—and possibly forgoing—childbearing or adding childcare demands to the already substantial pressure of their work at the firm. Male associates, particularly those with wives who do not work outside of the home (or who have careers less demanding than those of a corporate associate) are not put to this choice. It is this particular kind of male identity—men with wives who do not work—that underlies the bleached out understanding of professional career development in elite firms.

This last point, that bleached out professionalism masks the gendered dimension of the typical legal career path at a large law firm, underscores the second problem with this traditional professional ideal; its failure to account for the extent to which the legacy of historic discrimination against certain groups continues to affect their ability to participate equally in our system of justice. For even if it were possible to truly bleach out of contemporary notions of professionalism all of the tell-tale residue of the identities of the profession's founding fathers, lawyers would still be left with the problem of how to respond to continuing identity-based discrimination. Once again, bleached out professionalism leaves lawyers ill prepared for this important task.

Conscious Blinding

Equal Justice under Law may be a core legitimating ideal of the American legal system, but it is hardly a reality. Although most of the trappings of de jure segregation have been eliminated in the last quarter century, blacks, women, gays and lesbians, Jews, and a number of other Americans continue to face substantial obstacles to obtaining equal access to the benefits and protections of the law; obstacles that are complexly, but nevertheless directly, connected to their identities.[31]

Bleached out professionalism tends to obscure this reality. One can, of course, subscribe to colorblindness as a normative ideal without also believing that our legal institutions fully, or even largely, live up to this ideal in practice. Too often, however, proponents of the ideal of colorblindness conflate these two propositions. This conflation, in turn, strengthens the claim that lawyers must bleach their minds and their actions of any reference to identity.

Jeffrey Rosen's critique of Cochran's "send a message" argument demonstrates how bleached out professionalism implicitly rests on factual claims about colorblindness.[32] Rosen identifies Cochran's decision to interject race into the Simpson trial as an example of how blacks and other minorities "[a]scrib[e] sympathetic attributes of victimhood to a defendant because of his race" based on claims about the continuing existence of widespread racism.[33] Rosen asserts, however, that such claims are false—not on the basis of any empirical argument, but rather, as Frank Michelman argues, because "the premise of institutional racism carries normative and prescriptive implications at odds with liberal ideals of colorblindness and individual responsibility, and *for that reason* cannot be entertained in legal argument."[34] This a priori linkage between bleached out professionalism and the presumed reality of colorblindness puts black lawyers who have either experienced or witnessed the gap between the ideal and the actual of colorblindness in American law in a particular bind: "[they] must deny the realities of racism in order to appear balanced and fair in advancing the case of the client."[35]

If America is to come closer to fulfilling its promise of equal justice under law in the twenty-first century than it did in the one that just closed, then lawyers must find ways to acknowledge and account for the ways in which legal norms and practices—including some of those at the core of contemporary understandings of legal professionalism—continue disproportionately to disadvantage the members of certain identifiable identity groups. Bleached out professionalism, by perpetuating the false claim that identity is irrelevant in both professional norms and everyday life, takes us away from this important task. It also deflects attention from the manner in which a lawyer's own race can affect the outcome of a legal proceeding.

The Persistence of Identity

Bleached out professionalism rests on some combination of factual and normative claims about whether others are likely to view a given lawyer as bleached. Factually, the model seems to assume that if lawyers ignore their nonprofessional identity, that others will do the same; that is, that lawyers and nonlawyers alike will treat individual lawyers as generic ones, without reference to the contingent features of a given lawyer's identity. Alternatively, the model rests on the normative claim that lawyers should act as though others do not notice their identity even if they in fact do. Neither the factual nor the normative aspects of this argument are persuasive.

Empirical and anecdotal research confirms that contingent features of a person's identity exert a strong influence over how that person perceives and is perceived by others. For example, in his pioneering work on careers and developmental relationships inside corporations, David Thomas reports that race and gender significantly influence conduct and perceptions within organizations.[36] This influence takes many forms. Chief among them is the preference that senior mentors have for protégés who remind them of themselves. White men, as Thomas's work repeatedly demonstrates, feel more comfortable in working relationships with other white men. My own research on law firms suggests that, notwithstanding their professional training, lawyers are not immune to this tendency.[37]

The fact that perceptions and judgments are likely to be filtered through the prism of identity has important implications for lawyers. Consider, for example, Anthony Griffin's decision to represent the Ku Klux Klan. Griffin repeatedly stated that his identity as a black man was irrelevant to his decision to represent the Klan. Nev-

ertheless, it is perfectly clear that other relevant actors, including Griffin's client, viewed Griffin's race as highly relevant. After recovering from the initial shock of discovering that he had been assigned a black lawyer, the Grand Dragon of the Ku Klux Klan gleefully exclaimed, "[i]t couldn't get any better than this. . . . I need a minority in my corner."[38] Similarly, Griffin's race may also have made it easier for the Klan to vindicate its position in the courts and in the court of public opinion. As Griffin himself acknowledged, his presence in the case "dramatically underscores" the importance of the Klan's legal position.[39] At the same time, many Americans may take the fact that the Klan was able to secure the services of a black lawyer as a sign that the Klan is at worst a "fringe" organization of no real consequence instead of the viscous terrorist organization that it really is. For their part, the black residents in the housing project who were being subjected to Klan violence and intimidation are likely to feel a special sense of agrievement knowing that those who terrorize them are being defended by a black lawyer.

Proponents of bleached out professionalism might offer two responses to this reality. First, advocates of this view might contend that regardless of what others actually do or think, a lawyer should always act as though his or her identity were irrelevant. Second, they might assert that by urging lawyers and the public at large to ignore contingent features of a lawyer's identity, bleached out professionalism constitutes the best way of minimizing the use of race and other identity-related characteristics in professional action, even if such use cannot be eliminated entirely.

The first of these responses is unpersuasive. Even taken on the narrow terms bleached out professionalism suggests, a lawyer would be foolish to ignore information concerning how his or her actions are likely to be received by relevant decision makers. Consider, once again, the Simpson prosecution. Assuming for the moment that black jurors would have had a more difficult time believing the state's case if the entire prosecution team had been white, Garcetti, as the chief prosecutor, was obligated to consider this reality when deciding how to meet his professional responsibility to present the state's case in its most persuasive light. I return below to the question of whether adding Darden to the prosecution team was a reasonable way of meeting this obligation. For the moment, my point simply is that in order to answer the question of whether it was ethically permissible to add Darden, Garcetti and the other white lawyers on the team had to notice the fact that underlying racial attitudes in society threatened to make their own racial identity an impediment to their client's cause.

When we broaden our ethical focus beyond the narrow question of what is best for the client, it becomes even more clear that ignoring the actual role that one's identity is playing in a particular situation is not always the appropriate ethical response. Darden, Griffin, and Nathanson should all recognize that when they represent clients whose interests are, or appear to be, opposed to the interests of some substantial number of those who share their respective identities, that their presence at counsel table sends messages—perhaps unintended but nevertheless predictable—about the merits, or at least the respectability, of these causes. As independent moral agents, they have a responsibility to account for these consequences. To be sure, when a jury, for example, assumes that the Klan is less dangerous because it is represented by a black lawyer, it is engaging in the worst form of group stereotyping. The fact that it is the wrongful conduct of others that makes a lawyer's identity relevant to her professional actions, however, does not relieve the lawyer of the moral responsibility to respond appropriately to the situation in which she finds herself. What constitutes an appropriate response will depend on many factors, including whether the predicament the lawyer faces is due to the wrongful conduct of others. Thus, as I will argue below, Griffin did not have an obligation to refuse to represent the Klan simply because some whites might interpret his willingness to do so as evidence that the Klan is harmless. He did, however, have an obligation to respond to how his race was affecting the Klan's cause; an obligation that bleached out professionalism implicitly denies.

Given that there are both professional and moral costs to ignoring the extent to which identity effects a lawyer's professional role, the persuasiveness of the second defense offered by proponents of bleached out professionalism—that by preaching that identity ought to be irrelevant, bleached out professionalism is the best hope of making this ideal a reality—will depend upon which is the greater harm: the harm that moving away from bleached out professionalism might cause in terms of reinforcing identity consciousness, or the harm created by ignoring the identity consciousness of others that already exists. This calculus, however, is far more complex than bleached out professionalism's supporters typically acknowledge.

Recognizing the extent to which identity continues to structure the legal process may very well encourage lawyers and others to focus somewhat more on identity issues. One can see this effect in the press's reaction to the presentation by Cheryl Mills, a black woman, on behalf of President Clinton during the impeachment trial. Mills expressly called on her identity as a black woman in refuting the House managers' charge that acquitting the president would be "bad for civil rights."[40] Not surprisingly, the press and others picked up on this argument and emphasized Mills's identity as a black woman when reporting her argument.[41]

Even conceding this effect, however, it is far less clear that instructing lawyers to refrain from acknowledging the manner in which their identities affect their professional role will discourage others from drawing identity-related conclusions. To stick with the impeachment proceedings, Clinton was also represented by Nicole Seligman, a white woman partner at Williams & Connolly. Unlike Mills, Seligman never mentioned either her race or her gender during the course of her defense of the president. Nevertheless, many in the press and public speculated that, like Mills, one of the reasons Seligman was selected to present part of the president's defense—and, even more important, to question Monica Lewinsky at her deposition—was that White House strategists believed that her presence undermined the contention that the president is hostile to women.

Of course, both Mills and Seligman might contend that they do not view the fact

that their respective identities had the effect of bolstering the credibility of their arguments on behalf of the president as a "cost" because they are each convinced that his arguments are meritorious and deserve to prevail. Alternatively, they might contend that whether or not the president's arguments have merit, that they as advocates ought to have the same right to deploy their identities—along with their intelligence, knowledge, and skill—for their client's cause as white men have to deploy theirs. After all, Mills and Seligman were not the only lawyers who lent the credibility that flowed from their nonprofessional identity to the president's cause. To the contrary, Clinton reserved his most egregious assault on the ideology of bleached out professionalism for last when he enlisted former Senator Dale Bumpers to sum up his case. Bumpers was clearly selected because of his identity as a former United States senator, an identity that given the historical make up of the Senate, is not unrelated to his identity as a white male.[42] All of this brings us to a subject completely overlooked by bleached out professionalism: the value of allowing lawyers to bring their identities to their roles.

The Value of Identity Consciousness

Proponents of bleached out professionalism assume that identity consciousness is simply an impediment to efficient and ethical professional service. This view, however, ignores the extent to which identity-related issues have played a positive role for each of the three constituencies bleached out professionalism is designed to serve: clients, lawyers, and the legal system.

From the consumers' perspective, bleached out professionalism tends to discourage innovation in the delivery of professional services. Many of the most powerful critiques of current professional norms have been launched in the name of particular identities. Consider, for example, the feminist critique of adversary ethics discussed above. Not surprisingly, feminist scholars who support this critique have been in the forefront of the alternative dispute resolution movement.[43] This movement has, in turn, had a profound impact on lawyers—both male and female—and on clients. Although many of the movement's tenants and proposals remain controversial, few would deny that many clients have benefited from having access to a broader range of dispute processing alternatives.

One can tell a similar story about the critique mounted by blacks and other minorities of traditional hiring and evaluation policies in large law firms. Many corporate clients increasingly see good reasons to value law firm diversity in circumstances where those who are resisting greater integration in the name of "professional" standards may not. Consider a company that is being sued for dumping a dangerous chemical into a largely minority community in New Orleans, or an investment bank seeking to sell financial services to the city of Detroit, or a large bank that is seeking to diversify both its own work force and (with the gentle prodding of the federal government through the Community Reinvestment Act) its customer base. In each of these

scenarios, the client is likely to see it as in its self-interest to be represented by a law firm that has one or more minority partners. Traditional bleached out practices that get in the way of this result are therefore arguably not in the client's best interests.

Indeed, contrary to the standard assumption of those who argue that lawyers should never allow their nonprofessional identities to influence their professional roles, sometimes it is precisely these identity-related commitments that provide the impetus for a lawyer to fulfill his or her most difficult role-specific obligations. Griffin, Nathanson, Johnson, Darden, and Cochran directly called on aspects of their nonprofessional identities when taking actions within the confines of their professional roles. In each case, however, one important consequence of this integration of identity and role was to *reinforce*, at great personal cost, professional norms. Thus, Anthony Griffin's strong suspicion of state power is rooted in his experience as a black man growing up in the South.[44] This suspicion, in turn, underlies his personal commitment to the ACLU and its strong support of First Amendment rights—a commitment that leads Griffin to uphold bleached out professionalism's highest aspirational goal of making legal counsel available to clients with unpopular views. Nathanson's strong feminist commitments have led her to devote her professional life to "remedying continuing gender discrimination against women in the area of family law and eradicating gender bias in the courts."[45] Similarly, Robert Johnson's opposition to the death penalty, rooted in his experience in and commitment to the black community, was the motivating force behind his willingness to risk his career in an effort to prevent the state from pursuing a course of action that threatens the legal profession's central bleached out maxim: the promise of equal justice under law. Finally, both Darden and Cochran directly called on their experiences as African American men to support their mutual professional obligation to advocate zealously for their respective client's positions regarding the admission of Fuhrman's prior racist statements.[46] As Alan Dershowitz eloquently argues in a related context:

> I know I chose to become a criminal defense lawyer at least in part because I am Jewish. I was taught from the earliest age that Jews must always remember that they were persecuted, and that we must stand up for those who now face prosecution. "Thou shall not stand idly by the blood of thy neighbor" was more than a slogan. "Repair the world" was an imperative. . . . I always wanted to be a Jewish lawyer, and, though many Jews disapprove of some of my clients, I believe I am a lawyer in the Jewish tradition.[47]

Group-based moral commitments need not undermine traditional role obligations. Sometimes they provide the very motivation that makes these difficult professional obligations possible.

Acknowledging a greater role for identity-specific professional commitments can also help the legal profession fulfill its fundamental mandate of promoting social justice. Consider, for example, the evolving role that black lawyers have played in the struggle for racial justice in the United States. The legal campaign to end "separate but equal" was spearheaded by Charles Hamilton Houston, Thurgood Marshall, and

an elite core of black lawyers.[48] These black "social engineers" took an expressly racialist approach to their work as lawyers. As vice dean of Howard Law School in the 1930s, Houston expressly taught his students that they had an obligation to use their legal talents to improve the status of the black community.[49] Although this stance did not prevent Houston and his protégé Thurgood Marshall from forming valuable and enduring relationships with white lawyers, it was a direct call on black attorneys to carry their racial identity into their professional role.

Today, many of the brightest and best-educated black lawyers spend some or all of their careers working in large corporate law firms, in corporate legal departments, or otherwise servicing the needs of large corporations.[50] At first blush, it appears that these lawyers will have little to do with helping African Americans achieve social justice. There is, however, another way to look at the connection between black corporate lawyers and the social justice concerns of the African American community. Although these women and men may never be as directly involved in the struggle for racial justice as their forebearers in the civil rights movement, they nevertheless have important opportunities to contribute to this cause. These contributions include challenging stereotypes about black intellectual inferiority; acting as "role models" for other African Americans; helping to open up additional opportunities for blacks in law and elsewhere; directing their own resources and the resources of their employers toward projects that will benefit the black community; using corporate practice as a springboard to gain political influence to assist black causes; and persuading their powerful clients to act in ways that are less harmful (and perhaps even beneficial) to the interests of the black community.

In order to achieve these benefits, however, black lawyers must reject bleached out professionalism. Even the most modest of the above proposals—breaking stereotypes—requires that black corporate lawyers be seen as black. If they are not, their success will be dismissed as exceptional or idiosyncratic and will not benefit other blacks. The same can be said for "role model" arguments, particularly those that assume that black lawyers will take active steps—for example, challenging traditional hiring criteria—to open doors for other blacks. The last three options—devoting resources (including firm resources) to black causes, mobilizing political power for the black community, and counseling clients to refrain from injuring (and perhaps even to help) the fight for racial justice—all assume that black lawyers will incorporate the interests of the black community into their actions as lawyers in particular cases, and more generally, in designing a morally acceptable professional career.

Indeed, black lawyers have good grounds for rejecting the claims of bleached out professionalism apart from the concerns of social justice. For many blacks, having a strong sense of connection to the black community is an important source of strength and well-being in an otherwise hostile world. Bleached out professionalism suggests that these feelings must be confined to the "private" realm. At a minimum, such an attitude, to paraphrase Robert Gordon in a related context, is likely to produce "schizoid" lawyers who can never truly embrace either their identities or their roles.[51]

The true costs of bleached out professionalism for the personal integrity of a lawyer whose nonprofessional identity is central to her sense of self, however, may be a good deal higher than even the schizoid analogy suggests. As Professor Richard Wasserstrom trenchantly argues, the greedy claims of the professional self often extend beyond the confines of the role itself:

> [T]o become and to be a professional, such as a lawyer, is to incorporate within oneself ways of behaving and ways of thinking that shape the whole person. . . . In important respects, one's professional role becomes and is one's dominant role, so that for many persons at least they become their professional being.[52]

Moreover, if recent history is any indication, the demands of the professional self—and, therefore, of bleached out professionalism—are likely to become even more capacious than they are today. Lawyers are working longer hours than ever before, leaving little time for "personal" activities or commitments.[53] At the same time, clients are demanding ever greater loyalty from their lawyers, seeking to block any professional activities that might conflict with the client's pursuit of its own interests,[54] and turning lawyers into all-purpose public relations firms. Black lawyers who subscribe to this latest version of bleached out professionalism will find little if any space to act on their commitments to other African Americans.

A diminished space for race-based commitments harms black lawyers who value solidarity and, surprisingly, even those who do not. For blacks who value their connection to the black community, the capacious demands of modern bleached out professionalism are likely to produce an unhealthy alienation since, to quote Stephen Carter, "the light of solidarity, like the light of love, will go out if not carefully tended."[55] Even for those who eschew feelings of racial solidarity, however, the inability to participate in collective struggles to advance the interests of the black community is likely to be self-destructive. As Martin Kilson argues, even "self-identifying" blacks should recognize that if they do not "aggregate themselves into organizations and coalitions to combat the massive vestiges of American racism, no amount of . . . [individual] development is either conceivable or attainable."[56] At a minimum, this danger must be balanced against the perceived benefits of bleached out professionalism to black lawyers.

This last point underscores that the cost–benefit assessment of bleached out professionalism is a good deal more complex than the proponents of this standard ideal typically suggest. As I indicated at the outset, clients, lawyers, and the public benefit from a uniform understanding of the lawyer's role. Once we expose the assumptions underlying this ideology, however, these benefits are likely to be a good deal less robust than they might at first appear. Bleached out professionalism discourages clients and the public from acknowledging the ways in which identity inevitably shapes lawyer conduct, examining which of these uses are normatively problematic and creating a coherent account of how the conflicting demands of identity and role might be balanced in particular cases. Moreover, for certain lawyers—those

whose nonprofessional identities play a crucial role in their own lives and in the lives of other members of their group—bleached out professionalism runs the risk of alienating these lawyers from themselves and their communities.

III. Toward a Theory of Identity-Conscious Professionalism

We are left, therefore, with a quandary: How can we preserve the values underlying bleached out professionalism while at the same time recognizing that this ideology neither can nor should be as "greedy" as traditionally understood. A comprehensive answer to this complex and important question would require far more space than I have here.[57] Instead, I want to argue that any attempt to integrate identity and professional role must address two related issues: the *moral justification* for considering any specific identity-related issue and the *social purposes* of the specific lawyering role into which the identity-related consideration is to be incorporated. I conclude by briefly explaining these concepts and applying them to the cases presented at the beginning of this article.

The Differing Moral Justifications for Identity Consciousness

Any proposal to allow lawyers to consider aspects of their nonprofessional identities in performing their professional roles must answer one fundamental challenge: What is the *moral* justification for allowing identity to influence *any* decision? As bleached out professionalism emphasizes, ours is a political community predicated on the fundamental moral equality of all persons. How can a contingent feature of an individual's identity—her race, gender, religion, or sexual orientation—have any bearing on how she should act in the world or treat any other human being?

The universal respect and concern that we owe to each other as human beings does indeed stand as a constant check against excessive particularism in all of our relationships. But this does not mean that we are morally obligated not to consider contingent features of our own identities, and those of others, when acting in particular situations. To the contrary, sometimes we are morally required to do so.

Proponents of bleached out professionalism assume that "blindness"—color-blindness, gender blindness, religion blindness—is a fundamental principle of justice. Although intuitively appealing, this argument conflates ideal theory with the morality that should govern us in the real world. As Amy Gutmann argues, although "blindness" may be the just policy in an ideal society, it is not the correct moral stance in a nonideal society such as ours where benefits and burdens continue to be distributed on the basis of identity characteristics such as race and gender.[58] Identity-blind policies treat individuals fairly when racism, sexism, and other forms of disadvantage based on identity no longer effect the lives of citizens. But when identity continues to exert a major influence on the ability of citizens to participate equally in public and private life, as it surely does in the United States, identity-conscious policies may be

the only way to accord individuals the fair treatment that is their moral due. Fairnes not colorblindness, is the fundamental principle of justice in a nonideal world such : our own.

Not all forms of identity consciousness, however, are likely to promote fairnes Quite the contrary. The most dominant and prevalent form of identity consciou: ness in the United States, the long and sorry history of many white Americans belie ing in the inherent inferiority of anyone who does not share their identity, has bee and continues to be one of the major impediments to the fair treatment of million of citizens. Nor are the evils of identity consciousness restricted to situations i which a dominant group seeks to oppress a subordinate group. To continue with th example of race, nothing in America's long history of racial oppression agains African Americans justifies the view that blacks cannot be racist or engage in th racist oppression of others.

That calls for group solidarity and advancement have been a part of some of thi country's worst atrocities, however, does not mean, as advocates of bleached out pro fessionalism insist, that all forms of identity consciousness should be suppressed. Tc do so, as I argued in Part II, quite literally "blinds" us to both the continuing signifi cance of identity and its real costs and benefits. Instead, what is needed is critical re flection on the morality of particular identity-related claims in specific circum stances. Bleached out professionalism, like other universalizing tendencies inherent in the traditional model of legal practice, reduce all identity-related questions to a single yes or no answer. Either identity consciousness is "good," in which case white pride is a morally praiseworthy goal, or it is "bad," in which case black racial pride is simply a form of racism.[59] This way of framing the issue ignores important differences in the moral standing of various forms of identity consciousness.

Identity consciousness can take many different forms and play many different roles. One can group the forms of identity consciousness most relevant to bleached out professionalism into three broad categories.[60] At the most basic level, identity consciousness can help individuals "notice" the extent to which identity—both their own and others—continues to effect their own lives and the life chances of other citizens. Second, identity consciousness can be an essential attribute of self-understanding and self-worth. Finally, identity consciousness gives individuals special reasons for caring about others who share their identity and to work together to advance the interests of their group.

At this level of generality, it should be clear that each of these effects of identity consciousness can both contribute to and undermine important moral values. Thus, "noticing" identity can promote a healthy understanding of the continuing effects of discrimination or it can produce a vision of the world in which everyone has to be classified in terms of their morphology, biology, or beliefs; a view that can quickly degenerate into a tendency to meld all of these disparate factors into one overarching categorical scheme about human nature.[61] Connecting one's self-worth to the "recognition" of one's identity as a black (or as a woman, or as a Jew, or as a gay man)

can be an essential step toward being treated as a whole human being, but it can also produce "scripts" about the proper way to be black (or a woman, or Jewish, or gay) that deny our individual humanity.[62] And caring about the welfare and advancement of group members can either help to produce a more equitable society or contribute to the oppression of one group over another.

When we look more closely at our contemporary situation, however, it is apparent that certain kinds of identity consciousness, based on certain kinds of identity, are more likely than others to produce either positive or negative effects. Thus, the first kind of identity consciousness—noticing how identity affects you and the world—is, in our contemporary era, both the least problematic and the most applicable to all forms of identity. Given the extent to which race continues to shape the lives of millions of individuals in this country, for example, one can make a strong argument that all Americans would benefit from a heightened degree of consciousness about racial identity. With the exception of white supremacists and the most committed multiculturalists, white Americans rarely see themselves as having a "racial" identity separate and apart from their identity as "Americans." Although the continuing legacy of racial discrimination in the United States ensures that most black Americans have a strong sense of their own racial identity, as well as of the racial identity of whites, both blacks and whites frequently have only a limited understanding of racial identities other than "black" and "white."[63]

Collectively, this state of affairs makes it more difficult to achieve racial justice. The fact that whites do not see themselves as "raced" frequently blinds them to the extent to which they enjoy important privileges simply because of the color of their skin—whether they intend to or not.[64] As a result, blacks must continually bear the burden of pointing out racial injustice and of convincing whites that their claims are valid.[65] At the same time, the fact that both blacks and whites overlook America's other racial minorities tends to obscure discrimination (by both blacks and whites) against these other groups while at the same time forcing other minorities into seeing themselves as either "like" or "not like" blacks.[66] A greater degree of race consciousness on the part of all Americans would help all groups to gain a better appreciation of the full extent of our continuing race problem.

One can see the benefits of this first form of identity consciousness by comparing Gil Garcetti's actions in the Simpson case with Governor Pataki's in the Johnson case. Garcetti took concerted steps to ensure that Simpson would be prosecuted in a jurisdiction where there were likely to be black jurors, by a prosecution team that included at least one prominent black lawyer. In the next section, I will argue that these race-conscious actions supported, rather than undermined, the social purposes of Garcetti's role as district attorney. For present purposes, however, it is important to note that Garcetti would not have been able to take these important steps unless he had first "noticed" the manner in which race was likely to play an important role in the case. Although Garcetti, like virtually all of the other participants in the case, initially took the position that race was not an issue in the Simpson prosecution,[67]

this standard bleached out view was clearly false. Long before Fuhrman's racism or the racial composition of the jury surfaced as issues in the case, the simple fact that a black man was accused of murdering his white ex-wife and her handsome white friend ensured that race was likely to play an important role in how many participants in the process viewed the case. By coming to terms with this reality, Garcetti helped to produce a proceeding that would protect Simpson from unfair inferences based on the color of his skin.

Pataki's decision to replace Robert Johnson with a white attorney who was a committed death penalty hawk had the opposite effect. Once again, in the next section I will argue that the social purposes underlying the role of district attorney support Pataki's decision to remove Johnson. But by not "noticing" how race affects capital punishment cases, Pataki's actions arguably further entrenched existing racial divisions about the administration of capital punishment. For reasons that have been well documented, black citizens have reason to believe that equal justice under law is often not achieved in practice. This is particularly true in cases involving the death penalty. There is substantial evidence that race does play an important role in whether prosecutors seek the death penalty and whether juries are likely to impose this punishment.[68] Replacing a black district attorney who has expressly attempted to take this reality into account with a white lawyer who is a known death penalty hawk sends a powerful message to the black constituents of this district that their concerns about the discriminatory nature of capital punishment will not be heard.

Evaluating the moral weight of the remaining two arguments in favor of identity consciousness requires paying greater attention to context. Consider the second argument, that identity consciousness is an essential part of recognizing the fundamental equality of persons. Although many aspects of an individual's identity may be *personally* meaningful, not all of these attributes are *socially* important. Intelligence, beauty, habits, and interests all undoubtedly play a significant role in constructing one's sense of one's self as a unique human being. These attributes, however, do not form the basis of social groupings in any meaningful sense. Thus the claim that someone should be "recognized" in a social, as opposed to an individual, way as being a member of "the beautiful people," or "bridge players," or "compulsive eaters" simply misses the point of why society (as opposed to individuals) ought to value group identity.[69]

Nor is it even the case that all social forms of identity are equal candidates for social recognition on the ground that doing so is essential to treating the bearers of these identities as social equals. Although everyone has a gender, a sexual orientation, a social class, and a race (even if with respect to each of these categories, particular individuals straddle existing definitions), it is not true that all of these admittedly "social" distinctions have the same meaning either for individuals or for society as a whole. As I argued above, white Americans typically do not have a strong sense of racial identity. Black Americans typically do. As a result, a white American's and a black American's claim to be recognized *as* white or *as* black stand on substantially

different ethical footing. Although whites should not be discriminated against *because* of their race, given America's history of ignoring—or privileging—white racial identity, recognizing whites *as* whites is not an essential part of treating whites equally. For black Americans, on the other hand, not to recognize race is to deny a key aspect of the everyday reality of the black experience. Not surprisingly, this everyday reality has made race a central component of the self-understanding of many blacks. But even for those who would rather reject race consciousness, the fact that their lives continue to be structured (albeit, not defined) by race means that being socially recognized *as* black is an essential part of being treated as an equal human being—and not just a human being who is equal *despite* being black.

Other forms of social identity—gender, sexual orientation, religion—will have their own unique claims for recognition. In order to evaluate the merits of these claims for identity consciousness based on the need to recognize the moral equality of certain individuals, one must first examine the historical and contemporary connections between the identity in question and the moral worth of persons. My point simply is that the results of such an examination are unlikely to be the same for all identities.

Let me be clear here. Individuals undoubtedly find important meaning in many aspects of their own identity and in their connection to others. For these attributes to be socially recognized, however, they must be linked in some important way to society's fundamental commitment to honor the equal moral worth of all human beings. And it is this claim—the claim that society should reject bleached out professionalism because it fails to recognize the ways in which identity consciousness facilitates treating individuals as moral equals—that is at the core of this second argument for allowing lawyers to bring their identities to their social roles as lawyers.

A recent case involving an avowed white supremacist's attempt to gain admission to the Illinois Bar highlights this distinction. Matthew Hale is the head of the World Church of the Creator, a quasi-religious organization dedicated to producing a racial holy war to "cleanse" America of blacks, Jews, and other racial and religious minorities. Clearly for Hale, his racial and religious identities are central to his understanding of his own self-worth. Nevertheless, for the Illinois Bar (or any other public organization) to "recognize" this part of Hale's identity—by accepting him *as* a white supremacist or otherwise sanctioning his racist views—would violate the basic moral injunction to treat all individuals fairly as moral equals. Whether or not this moral commitment to equality is sufficient to keep Hale out of the bar altogether is a close question that turns on whether the mere fact that an applicant holds racist views sufficiently undermines the social purpose of the lawyer's role in a manner that justifies his exclusion. I will return to this subject below. What is clear, however, is that if Hale, once admitted to the bar, were to act on the basis of his racist views—in other words, if he were to bring this aspect of his identity to his role—the bar would be justified in expelling him in order to preserve its fundamental commitment to equal justice under law.

Recognizing the connection between a black lawyer's racial identity and his or her moral personality, however, will (at least in some cases) further the goal of fairness. Consider, for example, Anthony Griffin's decision to represent the Ku Klux Klan. Assume for the moment that Griffin did not want to represent the Klan because he did not want his racial identity to be used by an organization committed to exterminating blacks. In the next section, I will argue that a proper understanding of the social purposes underlying the rules about client selection support Griffin's right to make this decision. For the moment, however, I want to emphasize that, unlike Hale's case, Griffin's decision to bring this part of his identity to his role would have been morally justified. Although some theorists believe that lawyers surrender their moral autonomy simply by becoming lawyers, such a requirement would demand too much. Given our society's commitment to both individual autonomy and moral pluralism, it would be wrong for the state (or the profession) to require an individual to commit a moral wrong for the sake of the greater good. This is why, for example, we allow conscientious objection from military service. And, like soldiers, lawyers must *advocate* for their clients. As the Klan's lawyer, Griffin was obligated to present arguments zealously on the Klan's behalf; arguments that both Griffin and his client acknowledged were likely to be perceived as being more credible precisely because Griffin was black. To refuse to allow Griffin to conscientiously object to lending his moral authority to a cause that he finds morally repugnant would be to fail to treat him as a moral equal.

The moral justifications for the last argument in favor of identity consciousness—that it promotes political efforts for group advancement—also vary by context. In Part II, I argued that identity consciousness for black lawyers facilitates projects for the collective advancement of black Americans as a whole. In order for such projects to be morally justified on fairness grounds—as opposed simply to being in the self-interest of blacks—there must be a plausible link between the specific project for group advancement and the unjustified status of the black community. In today's America, this link will often be easy to draw. Black Americans continue to lag behind whites in virtually every category connected with material wealth or social and political power. Although the reasons for this continued inequality are multiple and complex, there can be no serious doubt that racial prejudice, both in the past and in the present, is a substantial contributing factor.

Nevertheless, not every project for group advancement proposed by black Americans satisfies the moral requirement that it promotes fairness. For example, critics of Johnnie Cochran's closing argument in the Simpson case contend that his plea for the jury to "send a message" that police misconduct would not be tolerated was a thinly disguised attempt to get black jurors to vote to acquit regardless of their belief in Simpson's guilt. For reasons that I outline in the next section, I do not believe that this characterization is correct. There are, however, some who contend that black jurors should routinely refuse to convict black defendants accused of nonviolent crimes.[70] This proposal cannot be justified on fairness grounds.

In order to justify blanket nullification (by which I mean nullification in the absence of specific evidence that a given defendant's prosecution has been tainted by racism) by black jurors in cases involving nonviolent black defendants one would have to demonstrate that the American justice system is so pervaded by racism that no black defendant is able to get a fair trial. Thus, given the racism and corruption in Nazi Germany or Apartheid South Africa, these legal systems were arguably unworthy of any moral respect—particularly by Jewish or black lawyers. But the sad fact that the United States is far from achieving the ideal of colorblind justice does not mean that our legal system is similarly illegitimate. Although our system of justice continues to produce systematic injustice on the basis of race, it is capable of responding to racial injustice as well. To treat the victims of crime fairly—including those victims who happen to be white—all participants in the system must respect this basic reality.

Indeed, proposals for blanket nullification fail even to treat their intended beneficiaries fairly. Such proposals are expressly designed to empower black jurors to strike a blow for racial justice. Sadly, any indication that black jurors are engaging in blanket nullification is likely to have precisely the opposite effect. African Americans already face substantial obstacles, including eligibility requirements and peremptory challenges, to serving on juries.[71] Proposals for blanket jury nullification are certain to exacerbate this state of affairs.

Similar arguments apply to certain group-enhancement claims pertaining to women. Judith Nathanson's women-only client policy is instructive. Nathanson's desire to promote women's rights by protecting the interests of women in divorce cases is, standing alone, fully justified. As numerous studies have documented, gender discrimination is still pervasive in American courts.[72] Moreover, women lawyers have played and continue to play a crucial role in working to uncover and ameliorate these inequalities.[73] Finally, as I argued in Part II, Nathanson has good grounds for worrying that when she represents men in divorce cases, she inevitably lends her gender identity to their cause.

Nevertheless, her claim that her commitment to promote women's rights justifies her decision not to represent any man in a divorce case goes too far. Over the years, advocates for women's rights have won important victories by bringing cases on behalf of men ensnared in legal traps that traditionally disadvantage women. In the 1970s, for example, no less an advocate for women's rights than Justice Ruth Bader Guinsberg made representing men a mainstay of her legal strategy for overcoming sex discrimination.[74] Although criticized by some feminists, this strategy proved "highly appealing to male judges, who had to be educated to see the unfairness of sex-distinctions that had long been accepted."[75]

The fact that some may differ about the wisdom of a particular strategy does not mean that it is not a proper avenue for group advancement. Given the complexity of the issues confronting women, blacks, and other oppressed groups, it is imperative that advocates for these communities recognize that there are many strategies for advancing, for example, women's rights. And it is the *right*—in Nathanson's case the spouse's right to a fair share of the jointly acquired career—and not simple solidarity that defines the acceptable bounds of identity-conscious lawyering.[76]

Ginsburg's intimation that he and Monica Lewinsky might be justified in failing to cooperate with the independent counsel because of their commitment to ensure American support for Israel states an even more tenuous claim for identity consciousness. Prior to the 1960s, overt and thinly veiled anti-Semitism was rampant in American society in general and in the American legal profession in particular. Under these circumstances, the claim that Jewish lawyers should vigilantly protect the interests of other Jews (whether in Israel or the United States) seems quite defensible. Given the dramatic increase in the social and economic position of the Jewish community, both in general and in law in particular, such preferential treatment is less justifiable, particularly if it also has the effect of closing off opportunities for individuals from other groups whose members face more severe disadvantages. Although a plausible claim might be made that ensuring fairness in America's foreign policy toward Israel represents a special case justifying the continuing vigilance of American Jews, the "fit" between this goal and Ginsburg's proposed course of conduct is far too loose. The United States has supported Israel for almost five decades, under both Democratic and Republican administrations. At a minimum, there is no credible evidence that Al Gore, Clinton's constitutional successor, would be significantly less sympathetic to Israel's legitimate interests. And even if there was some doubt about this, the proper response would be to bring pressure to bear on Gore to improve his policies. To put the point bluntly, sabotaging an on-going investigation is not a necessary element of any legitimate project to promote the collective interests of Jews in the United States or Israel.

Finally, it should go without saying that identity consciousness for whites cannot be justified on the ground that it is necessary to promote collective projects for white advancement. There are many individual whites who are poor, uneducated, and mistreated. Whites as a group are not. Therefore, efforts by white lawyers to help poor whites, for example, by urging the government to commit more funding to legal aid, need not incorporate an identity-based component.

By carefully examining the moral claims underlying various calls for identity consciousness, we can begin to separate those moves away from bleached out professionalism that are likely to promote fundamental fairness and those that are likely to detract from this goal. If lawyers were merely ordinary citizens seeking to act morally in the world, this analysis might be all that is needed. But lawyers are not simply citizens; they are professionals who have made an express commitment to uphold the rules of legal ethics and to safeguard the interests of both clients and citizens. The partial, but nevertheless important truth about bleached out professionalism outlined in Part I underscores that these commitments carry significant moral weight. Therefore, in addition to examining the moral justifications for particular claims of identity consciousness, we must also address how recognizing even a legitimate

claim might undermine values central to the lawyer's role. This leads us to the concept of social purpose.

Professionalism in Context: The Social Purposes of Lawyering

Bleached out professionalism is premised on the profession's long-standing commitment to the idea that American lawyers constitute a single unified profession, governed by a common set of ethical norms.[77] Thus, the American Bar Association's Model Code of Professional Responsibility explicitly states that the same ethical rules should be applied to "all lawyers, regardless of the nature of their professional activity."[78] Other sources of professional norms and enforcement practices either ignore differences among the tasks lawyers perform, the clients they represent, or the institutions in which they work, or treat these differences as insignificant.[79] As most observers concede, however, this traditional image of a homogeneous profession united by a common normative culture is increasingly out of touch with the growing heterogeneity and specialization of the contemporary bar.

Diversity within the lawyer's role poses a challenge to bleached out professionalism. Simply demonstrating that identity-related considerations tend to undermine *some* aspects of what lawyers do does not prove that these same considerations cannot play a legitimate role in *any* professional practice. Instead, one must find a criteria that will help lawyers to distinguish between those instances in which even legitimate identity claims must be rejected and those where they should be allowed to play at least some role.

The concept of "social purpose" begins to provide a way out of this dilemma. By social purpose, I mean those aspects of a particular lawyering role or task that disinterested social actors would consider to be essential to the proper performance of the job in question. The prosecution's strategy in the Simpson case illustrates how we can apply the concept of social purpose to distinguish those morally justified uses of identity that are *professionally* acceptable from those that are not. As I argued in the last section, Garcetti's statements denying that race would play any role in the Simpson prosecution were simply false. Nevertheless, his statements captured an important aspirational norm fundamental to the social purpose of our justice system: that race *ought not* to affect the determination of the accused's guilt or innocence. To honor this norm, however, prosecutors are sometimes justified in engaging in race-conscious lawyering strategies. Viewed from this perspective, Garcetti's decision to prosecute Simpson in Los Angeles County rather than in Santa Monica County, and his addition of Darden to the prosecution team, both support, rather than undermine, the legitimate aspirations of the criminal justice system. Given the composition of the respective jury pools, a Los Angeles jury was likely to include several blacks. A Santa Monica jury was not. In light of the racially charged atmosphere in Los Angeles at the time of the Simpson trial, and the long history of the demonization of black male sexuality, trying the case before a jury that included at least some

blacks arguably made it more likely that the legal system would honor—and, just as important, that it would be seen as honoring—its commitment to the norm that race should not affect the determination of Simpson's guilt. Similarly, Garcetti's race-conscious decision to add a black prosecutor to the team—particularly one with a demonstrated history of uncovering and prosecuting police misconduct—plausibly increased the chance that Simpson's allegations of official bias and corruption in the investigation of his case would receive (and, once again, be perceived as receiving) a fair hearing.

The argument that these race-conscious lawyering strategies support rather than undermine the legitimate social purposes of the criminal justice system presumes that the blacks who are brought into the process will honor their legitimate role obligations and will not simply become racial patriots. This does not require bleached out professionalism. Thus, black jurors in the Simpson case were entitled to bring their experience with and understanding of racism and official corruption into the jury room. At the end of the day, however, they were obligated to acquit or convict Simpson on the basis of the evidence and arguments presented during the trial. Even nullification should be based on the presence of injustice (either in the content or the application of the law) in the particular case. Thus, even if blanket nullification were a morally acceptable strategy (which, as I indicated, I do not believe that it is), black jurors should refrain from engaging in this strategy because it undermines the legitimate social purpose of their role as jurors.

Similar arguments constrained Darden and Cochran. As I have already indicated, Darden's argument in favor of suppressing Fuhrman's racist statements was expressly color-conscious. Given that he was one of the lead prosecutors on the case, however, Darden was obligated to deploy this color-conscious strategy for the purpose of keeping Fuhrman's statements away from the jury. As a black man, and a strong opponent of racism within the police department, Darden may well have believed that exposing Fuhrman's racism would advance the black community's interests by highlighting the problems African Americans encounter with the police on a daily basis. Nevertheless as a prosecutor, Darden had an ethical obligation to make all reasonable arguments in favor of Simpson's guilt.

One can apply the same analysis to Cochran's "send a message" statement during his closing argument. Once again, Cochran's argument was race-conscious to the extent that it directed the jury's attention to the defense's claim that police racism infected the investigatory process. Nevertheless, Cochran's argument did not exceed the bounds of legitimate advocacy in a criminal case. "Send a message" arguments are a part of the standard lexicon of both prosecutors and defense lawyers in criminal cases. Although controversial, this rhetorical device arguably is not simply a call for nullification.[80] Unlike calls for blanket nullification, Cochran's argument was based on the alleged existence of racism and corruption in the Simpson prosecution itself. Moreover, Cochran did not limit his appeal to black jurors, emphasizing instead that all Americans have a stake in ensuring that police racism does

not taint the trial process. Regardless of whether one finds these arguments convincing, as Simpson's defense lawyer Cochran was ethically obligated to present all reasonable arguments in favor of his client.

Ginsburg's attempt to introduce identity into the Clinton investigation cannot be justified on these terms. Even assuming that Ginsburg was right about the effect on Israel of removing Clinton from office—as I have already suggested, a dubious proposition in itself—this result is irrelevant to the social purpose of his task as Lewinsky's defense lawyer. Ginsburg had two charges in this role. First and foremost, to protect Lewinsky's interests. To the extent that Lewinsky did not in fact share Ginsburg's concerns, his statement to the Israeli press both failed to serve any purpose that Lewinsky may have had for the representation and posed a great risk of substantially prejudicing her case, since many in the United States (including many Jews) do not look favorably on a person who appears to be willing to subvert her own duties as a citizen to assist a foreign power. But even assuming that Lewinsky shared Ginsburg's views, a witness is not permitted to shade or distort her testimony before a grand jury simply because she does not want the target of the investigation to be convicted. Facilitating her doing so, therefore, would have been a violation of Ginsburg's duties as an officer of the legal system.

Social purpose considerations also put important constraints on the use of racial or gender identity. Nathanson's case is again instructive. Even if we were to give credence to Nathanson's construction of what is in the best interest of women—once again, for the reasons stated above, a dubious position—it should still be impermissible for a *lawyer* to engage in this form of status-based discrimination. This conclusion is not mandated by the profession's current rules. These rules presently give lawyers broad discretion to turn down clients for virtually any reason. These rules, as I argued in the last section, serve the legitimate goal of protecting the moral integrity of lawyers who do not wish to advocate on behalf of causes they find morally reprehensible. Status discrimination, however, undermines the legitimate social purposes underlying the rules regarding client selection. While it is true, as many have noted, that the attorney-client relationship is inherently personal, this should not be taken as a license for individuals to indulge their personal taste for discrimination. Lawyers have been granted a monopoly by the state to perform an essential service. Whether lawyers technically constitute a "public accommodation," as the Massachusetts Commission Against Discrimination held, the profession's commitment to equal justice under law is undermined if attorneys are allowed to refuse to represent individuals on the basis of considerations that have nothing to do with either the potential client's moral worth as a human being or the substance of the individual's legal claims.

Nor can rules permitting wholesale status-based discrimination be justified on the ground that they are necessary to protect clients. Sometimes clients will rationally prefer to work with lawyers who are hostile to the client for reasons extending beyond the attorney-client relationship. Consider, for example, how the Grand Dragon of the Ku Klux Klan reacted when he discovered that the ACLU had assigned

him a black lawyer: "The way I look at it, he has to do a good job for me. . . . If he doesn't win, people are going to say, 'Yup, that's what you get for taking an African-American lawyer.' Everybody will know I got sold down the river by the ACLU."[81] Clients who obtain lawyers who would rather not serve them are protected by malpractice and other related doctrines against incompetence or deceit on the part of their reluctant champions.

Finally, the concept of social purpose helps us determine what to do when lawyers feel that their identities preclude them from performing their professional roles. Robert Johnson's case nicely illustrates the point. Johnson was the elected district attorney for the Bronx. In that capacity, he had wide discretion to set the law enforcement priorities for his jurisdiction. Moreover, as an elected official, he was obligated to consider his constituents views about how those priorities should be set. His constituents overwhelmingly supported his decision not to seek the death penalty.

Despite this clear popular mandate, however, Johnson did not have the authority to adopt a policy of refusing to seek the death penalty in all cases. The argument that a locally elected district attorney lacks such authority flows directly from the social purposes underlying the role of public prosecutor. Although prosecutors are given substantial discretion to decide which cases to prosecute and what penalties to seek, our system depends upon these decisions being made in a manner that is consistent with the will of the people as expressed through their legislative representatives. To hold otherwise would effectively disaggregate the state into a loose collection of local fiefdoms. A black district attorney, therefore, has a binding professional obligation to seek the death penalty in cases where, in his professional judgment, the punishment is warranted under the statute. To the extent that the district attorney feels that his commitments to the black community will not allow him to carry out this obligation, the governor has a right to remove him and appoint someone who will.

The governor's actions, however, should also be constrained by a proper understanding of the social purposes of prosecution. In this case, the governor's decision to replace the black district attorney with a white death penalty hawk fails to meet this standard. This is true for two reasons. First, by turning the decision over to someone who is virtually certain to seek the death penalty, the governor is undermining the social purposes of prosecution in a manner that is exactly parallel to Johnson's blanket refusal to seek the death penalty. Death penalty statutes expressly give prosecutors discretion so that they can make a case-by-case determination of whether this most extreme punishment is warranted by all of the facts and circumstances surrounding a particular crime.[82] Appointing someone who believes that the death penalty should be sought in every case authorized by the statute undermines this important discretionary element. Second, under the circumstances of this case, the fact that the death penalty hawk is white further compounds the error. Just as in the Simpson case, it is vital to the social purposes of the criminal justice system that citizens believe that decisions in racially charged cases do not depend upon either the victim's or on the al-

leged perpetrator's race. Pataki's decision to replace Johnson with a white death penalty hawk gives black citizens further reason to doubt the system's fairness.

Finally, Johnson's case underscores the fact that when a black lawyer feels compelled to violate an express professional command, considerations of social purposes dictate that she do so in a manner that respects the moral force of existing norms. One can see the value of this requirement by contrasting Johnson's actions with those of Robert Morgantheau, the respected district attorney for the Borough of Manhattan. Johnson publicly announced his intention not to seek the death penalty and carefully explained his reasons for not doing so. By all accounts, Morgantheau shares Johnson's view that the death penalty is administratively inefficient and morally reprehensible.[83] Unlike Johnson, however, Morgantheau has consistently taken the position that "he would enforce the will of the people but privately has done as little as possible to actually prepare a death case."[84] Although Morgantheau has largely escaped criticism by covertly submerging his opposition to the death penalty into case-by-case decision making, it is Johnson, not Morgantheau, who has demonstrated the appropriate respect for the social purposes of his role as prosecutor.

Considerations of social purpose, like the moral analysis in the preceding section, will not answer every question about when and how it is appropriate for lawyers to take account of identity-based considerations in their professional actions. Careful attention to both moral and social purpose considerations, however, can help us move beyond bleached out professionalism without ignoring the legitimate interests of clients, lawyers, and the public. This may be the best we can hope for in a world in which we recognize, rather than ignore, the inevitable intersection of identity and role.

Notes

1. See Sam H. Verhovek, "A Klansman's Black Lawyer, and a Principle," *N.Y. Times*, September 10, 1993, B9. See also David B. Wilkins, "Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?," 63 *Geo. Wash. U.L. Rev.* 1030 (1995).

2. See *Stropnicky v. Nathanson*, No. 91-BPA-0061 (Mass. Comm'n Against Discrim.) (Feb. 25, 1997) (Charles E. Walker, hearing commissioner).

3. See Margaret M. Russell, "Beyond 'Sellouts' and 'Race Cards': Black Attorneys and the Straitjacket of Legal Practice," 95 *Michigan L. Rev.* 766 (1997).

4. See John M. Goshko, "Police Killing Sparks Debate on Death Penalty in New York," *Wash. Post*, March 24, 1966, A24.

5. NBC News Transcripts, "William Ginsburg, Attorney for Monica Lewinsky, Discusses the Progress of the Investigation," Meet the Press, February 22, 1998 (available in LEXIS, NEXIS Library, Script File).

6. K. Anthony Appiah, Epilogue to K. Appiah and Amy Gutmann, *Color Consciousness: The Political Morality of Race* (Princeton: Princeton University Press, 1996) (noting that "[t]here is a great deal of angry polemic about race in this country today").

7. See Sanford Levinson, "Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity," 14 *Cardozo L. Rev.* 1577 (1993).

8. Ibid., 1578–79.

9. See generally, Lewis A. Coser, *Greedy Institutions: Patterns of Undivided Commitment* (New York: Free Press, 1974), 5 (defining greedy institutions as those "which make total claims of their members [and] seek exclusive and undivided loyalty and attempt to reduce the claims of competing roles and status positions on those they wish to encompass within their borders").

10. See Alan Goldman, *The Moral Foundations of Professional Ethics* (Totowa, N.J.: Rowman and Littlefield, 1980).

11. See David B. Wilkins, "Everyday Practice *Is* the Troubling Case: Confronting Context in Legal Ethics," in *Everyday Practice and Trouble Cases*, A. Sarat, ed. (Chicago: Northwestern University Press, 1998).

12. I discuss this point at some length in David B. Wilkins, "Two Paths to the Mountaintop: The Role of Legal Education in Shaping the Values of Black Corporate Lawyers," 45 *Stan. L. Rev.* 1981, 2014–16 (1993).

13. Ken Hamblin, "No Excuse for Color-Coded Justice," *Atlanta J. & Const.*, April 10, 1996, 15 (available in 1996 WL 8200403).

14. Ibid.

15. William Safire, "After the Aftermath: Damage Done," *Atlanta J. & Const.*, October 13, 1995, A19 (available in 1995 WL 6556856).

16. See Brent Staples, "Millions for Defense," *N.Y. Times*, April 28, 1996, Section 7 (Book Review), 15.

17. Kevin Moran, "Black Lawyer Giving His Best to the Klan: Galveston Man Calls His ACLU Work a Way to Safeguard First Amendment," *Hous. Chron.*, July 27, 1993, 1A (available in LEXIS, News Library, Hchron File).

18. Nat Hentoff, "A Free Speech Lawyer Fired by the NAACP," *Wash. Post*, June 25, 1994, A21.

19. Ellis Coase, *The Darden Dilemma: 12 Blacks Write on Justice, Race, and Conflicting Loyalties* (New York: HarperPerennial, 1997), vii (quoting Darden).

20. Ibid.

21. Meet the Press, *supra* n. 5.

22. The phase "our constitution is colorblind" was first made famous by Justice Harlan in his dissent in *Plessey v. Fergusson*. See *Plessy v. Fergusson*, 136 U.S. 537, 557 (Harlan, J., dissenting), overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954). For a discussion of the central importance of the claim that "all men [and, obviously, all women] are created equal" to our public morality, see George P. Fletcher, "Loyalty: An Essay on the Morality of Relationships" (New York: Oxford University Press, 1993), 13.

23. See, e.g., Russell G. Pearce, "Rediscovering the Republican Origins of the Legal Ethics Codes," 6 *Georg. J. of Leg. Ethics* (1992), 241; and Robert W. Gordon, "The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers," in G. Gawal, ed., *The New High Priests: Lawyers in Post-Civil War America* (Westport, Conn.: Greenwood Press, 1984).

24. I use the term "fathers" advisedly here since virtually all of the lawyers I am referring to were men.

25. See Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976).

26. See Thomas L. Shaffer and Mary Shaffer, *American Lawyers and Their Communities: Ethics in the Legal Profession* (Notre Dame, Ind.: Notre Dame University Press, 1991).

27. See Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1992). See also Rand Jack and Paula Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers*

(New York: Cambridge University Press, 1989) (adopting Gilligan's critique); and Carrie Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process," 1 *Berkeley Women's Law Journal* 39 (1985) (same).

28. Carrie Menkle-Meadow, "Portia Redux: Another Look at Gender, Feminism, and Legal Ethics," in S. Parker and C. Sampford, eds., *Legal Ethics and Legal Practice: Contemporary Issues* (New York: Oxford University Press, 1995), 54. For criticism of the Gilligan framework, see Deborah H. Rhode, "Missing Questions: Feminist Perspectives on Legal Education," 45 *Stan. L. Rev.* 1547 (1992); Cynthia Fuchs Epstein, "Faulty Framework: Consequences of the Difference Model for Women in the Law," 35 *N.Y. L. Sch. L. Rev.* 309 (1990).

29. See Marc Galanter and Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm 100* (Chicago: University of Chicago Press, 1991). Although Galanter and Palay are correct that associates compete in a "tournament" for promotion to partnership, that tournament is substantially different in character than the authors suppose. See David B. Wilkins and G. Mitu Gulati, "Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Large Law Firms," 84 *U.V.A. L. Rev.* 1581 (1998).

30. See Robert Nelson, *Partners with Power: Social Transformation of the Large Law Firm* (Berkeley: University of California Press, 1988), 214-20 (documenting how firm leaders link the typical associate career path to core professional values such as training, competence, and ethical service); Edwin Smigel, *Wall Street Lawyer: Professional Organizational Man* (Bloomington: Indiana University Press, 1969) (linking organizational structure to professional norms).

31. See, e.g., Deborah Rhode, *Speaking of Sex: The Denial of Gender Inequality* (Cambridge, Mass.: Harvard University Press, 1998) (describing the continuing problems that women encounter in the legal system; and Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (New York: Scribner's, 1995) (documenting how race continues to disadvantage black Americans).

32. See Jeffrey Rosen, "The Bloods and the Critics: O. J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America," *New Republic*, December 9, 1996, 27.

33. Ibid., 42.

34. Frank Michaelman, "Racialism and Reason," 95 *Mich. L. Rev.* 723, 728 (1997).

35. Ibid., 788.

36. See, e.g., David A. Thomas, "The Impact of Race on Managers' Experiences in Developmental Relationships (Mentoring and Sponsorship): An Intra-organizational Study," 11 *Journal of Organizational Behavior* 479 (1990); David A. Thomas, "Racial Dynamics in Cross-Race Developmental Relationships," 38 *Administrative Science Quarterly* 169 (1993); David Thomas and Clayton P. Alderfer, *The Influence of Race on Career Dynamics: Theory and Research on Minority Career Experiences*, in M. B. Arthur et al., *Handbook of Career Theory* (New York: Cambridge University Press, 1989), 133.

37. See David Wilkins and G. Mito Gulati, "Why Are There So Few Black Lawyers in Corporate Law Firms?: An International Analysis," 84 *Cal. L. Rev.* 493(1996).

38. Elizabeth Gleick, "The Odd Couple: A Black Attorney Defends a Texas Klansman in a Racially Heated Case," *People*, September 20, 1993, 71.

39. Gary Taylor, "Klan, Texas Embroiled in Legal Tug of War," *Nat'l L. J.*, August 16, 1993, 10.

40. See Ann Scales, "A Clinton Counsel Makes Her Mark: Mills Adds a Tone of Diversity to the Defense's Team," *Boston Globe*, January 21, 1999, A1 (reporting that Mills opened her argument by stating that "as a lawyer, as an American, and as an African-American," she is a strong proponent of the rule of law, and she rebutted the House managers' charge that acquitting Clinton would undermine the cause of civil rights by stating, "I stand here before you today because President Bill Clinton believed I could stand here for him" and "I'm not worried about civil rights, because this president's record . . . is unimpeachable").

41. See ibid., A20 (reporting that Mills's presence constituted a "jolt" of diversity and that she "puts a face on the president and his commitment to civil rights"). Tellingly, Scales's article is subtitled "Mills Adds Tone of Diversity to the Defense's Team." Ibid.

42. As Eleanor Holmes Norton stated when comparing Clinton's decision to use Mills and Bumpers, "I'm not sure if a black lawyer helps him before the Senate. I don't know that a former member helps him. He's a member of the club, she is not a member of the club." Ibid.

43. Professor Carrie Menkel-Meadow is the leading example. See, e.g., Carrie Menkel-Meadow, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities," 38 *S. Tex. L. Rev.* 407 (1997); Carrie Menkel-Meadow, "The Trouble with the Adversary System in a Postmodern, Multicultural World," 38 *William & Mary L. Rev.* 5 (1996); and Carrie Menkel-Meadow, "Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change," *Law & Soc. Inquiry* 289 (1989).

44. See Sam H. Verhovek, "Klansman's Black Lawyer," *supra* n. 1 at B1 (quoting Griffin as stating: "We've come a long way in this country when a black man from the Midwest tells a black man from the South that he trusts the State of Texas. . . . I do not.").

45. Terri R. Day and Scott L. Rogers, "When Principled Representation Tests Antidiscrimination Law," 20 *West. N.E. L. Rev.* 23, 36 (1998).

46. See Russell, "Beyond 'Sellouts' and 'Race Cards,'" 787 (quoting Darden as arguing that: "when you mention that word to this jury, or any African American, it blinds people. . . . They won't be able to discern what's true and what's not."), and 787 n.58 (quoting Cochran as replying: "It's demeaning to our jury. . . . African Americans live with offensive words, offensive looks, offensive treatment every day of their lives. And yet they still believe in this country").

47. Alan M. Dershowitz, *The Vanishing American Jew, Cal. Law.* Sept. 1997, 39.

48. Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (New York: Vintage Books, 1975).

49. See David B. Wilkins, "Social Engineers or Corporate Tools: *Brown v. Board of Education* and the Conscious of the Black Corporate Bar," in A. Sarat, ed., *Race, Law, and Culture: Reflections on* Brown v. Board of Education (New York: Oxford University Press, 1997), 141–42.

50. See ibid., 138.

51. Robert Gordon, "The Independence of Lawyers," 68 *B.U.L. Rev.* 1 (1988).

52. Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues," 5 *Hum. Rts.* 1, 15 (1975).

53. Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Harvard University Press, 1993), 300–307.

54. See John Dzienkowski, "Positional Conflicts of Interest," 71 *Tex. L. Rev.* 457, 531–35 (1993).

55. Stephen L. Carter, "The Black Table, the Empty Seat, and the Tie," in *Lure and Loathing: Essays on Race, Identity, and the Ambivalence of Assimilation* (New York: Penguin Press, 1992), 66.

56. Martin R. Kilson, "Realism about the Black Experience: A Reply to Steele, *Dissent*, Fall 1990, 519, 520.

57. For a more complete account of these ideas, see David B. Wilkins, "Identities and Roles: Race, Recognition, and Professional Responsibility," 57 *Md. L. Rev.* 1502 (1998); David B. Wilkins, "Fragmenting Professionalism: Racial Identity and the Ideology of "Bleached Out" Lawyering," 5 *Int'l J. of the Legal Prof.* 141 (1998).

58. See Amy Gutmann, "Responding to Racial Injustice," in K. Anthony Appiah and Amy Gutmann, eds., *Color Conscious, supra* n. 6, 108, 110.

59. See Suzanne Carter, "Moses Presides over Ames Courtroom: Charlton Heston Condemns Political Correctness, Ice T," *Harv. Law Record,* February 19, 1999, A1 (quoting Charlton Heston as arguing that "white pride is just as valid as black pride or red pride").

60. In addition to the three justifications discussed in text, one can also make a cultural defense of identity consciousness. I discuss the strengths and weaknesses of this justification with respect to blacks in David B. Wilkins, "Introduction: Race in Context," in Appiah and Gutmann, *Color Consciousness, supra* n. 6.

61. For a brilliant exposition of how arguments about morphology, biology, and belief were melded together to produce modern understandings of race and racism, see K. Anthony Appiah, "Race, Culture, Identity: Misunderstood Connections," in Appiah and Gutmann, *Color Conscious, supra* n. 6.

62. I borrow the idea of "recognition" from Charles Taylor's important discussion of the politics of recognition. See Charles Taylor, *Multiculturalism and "the Politics of Recognition"* (Princeton, N.J.: Princeton University Press, 1994). I borrow the concept of "scripts" from Anthony Appiah's criticique of Taylor. Ibid.

63. See, e.g., Viet D. Dinh, "Races, Crimes, and the Law," reviewing Randall Kennedy's "Race, Crime, and the Law," 111 *Harv. L. Rev.* 1289, 1290–93 (1998) (arguing that most blacks and whites engage in a "biracial simplification" when discussing issues of race); Deborah Ramirez, "Multicultural Empowerment: It's Not Just Black and White Anymore," 47 *Stan. L. Rev.* 957 (1990) (same).

64. For a general discussion of the privileges whites enjoy simply by being white, see Ian F. Haney López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 1996).

65. See, e.g., Ellis Case, *The Rage of the Privileged Class* (New York: Harper Collins, 1993), 14–26 (discussing the burdens on black professionals of constantly having to be responsible for exposing and coping with the continuing effects of racism); and Joe R. Feagin and Melvin P. Sikes, *Living with Racism: The Black Middle Class Experience* (Boston: Beacon Press, 1994), chap. 4 "Navigating the Middle-class Workplace," 135.

66. See Janet Halley, "Like Race Arguments" (unpublished manuscript on file with the author).

67. Margaret M. Russell, "Beyond 'Sellouts' and 'Race Cards': Black Attorneys and the Straightjacket of Legal Practice," 95 *Mich. L. Rev.* 766 (1997).

68. Randall Kennedy, *Race, Crime, and the Law* (New York: Basic Books, 1998).

69. See Appiah, "Race, Culture, and Identity," *supra* n. 6, 93 (noting that "[t]here is a logical category but no social category of the witty, or the clever, or the charming, or the greedy"); and Iris Marion Young, *Justice and the Politics of Difference,* 186–87 (distinguishing between "interest groups" and "social groups" such as race and gender).

70. See Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," 95 *Yale L.J.* 677 (1995).

71. See Randall Kennedy, *supra* n. 68, 295–301.

72. See, e.g., "The Effects of Gender Bias in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force," 67 *S. Cal. L. Rev.* 745 (1994); and Ann J. Gels, "Great Expectations: Women in the Legal Profession, A Commentary on State Studies," 66 *Ind. L.J.* 941 (1991).

73. See Deborah Rhode, "Perspectives on Professional Women," 40 *Stan. L. Rev.* 1163 (1988).

74. Discussing *Weinberger v. Wiesenfeld,* 420 US 636 (1975), a landmark Supreme Court decision in which Ginsberg represented a young widower denied social security benefits under circumstances in which a young widow would have been entitled to compensation. Ginsberg recently stated that her strategy in that case epitomized for me all that we were doing in the 70s." Jeffrey Rose, "The New Look of Liberalism on the Court," *N.Y.T. Mag.,* October 5, 1997, 60, 64.

75. Ibid.

76. See Deborah Rhode, "Can a Lawyer Insist on Clients of One Gender?," *Nat'l L. J.,* December 1, 1997, A21.

77. See Charles W. Wolfram, *Modern Legal Ethics* (St. Paul, Minn.: West Publishing 1986), 54 (identifying and criticizing this idea).

78. American Bar Association, Model Code of Professional Responsibility, Preamble (1983).

79. I have written extensively on this topic. See David B. Wilkins, "Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics in Everyday Practice and Trouble Cases," 68 (Evanston, Ill.: Northwestern University Press, 1998); David B. Wilkins, "Making Context Count: Regulating Lawyers After Kaye, Scholer," 66 *S. Cal. L. Rev.* 1145, 1151–52 (1993).

80. For further development of this argument, see David B. Wilkins, "Straightjacketing Professionalism: A Comment on Russell," 95 *Mich. L. Rev.* 795 (1997).

81. Sam Howe Verhovek, "A Klansman's Black Lawyer, and a Principle," *N.Y. Times,* September 10, 1993, B9.

82. Jan Hoffman, "Death Penalty Raises Issue of Obligation of Prosecutor," *N.Y. Times,* March 17, 1996, § 1, 33, col. 5.

83. J. Taub, "The DA's Dilemma," *New Yorker,* July 28, 1997, 26.

84. Ibid., in Gerald W. Gewalt, ed., *The New High Priests: Lawyers in Post-Civil War America* (Westport, Conn.: Greenwood Press, 1984).

12

Contested Identities

Task Forces on Gender, Race, and Ethnic Bias and the Obligations of the Legal Profession

DEBORAH R. HENSLER AND JUDITH RESNIK

Conceptions of Identity

During the past few decades, questions of identity have become central in legal discourse. We use the word "identity" here in reference to two sets of issues. First, we are interested in the relevance of "identity politics" to lawyering. Animated by concerns that individuals who share certain characteristics ("women," "women of color," "people of color," "Latinos," "gays") are not sufficiently represented or do not fully participate in economic, social, and political processes, identity politics incorporate efforts to increase recognition, inclusion, status, and authority of members of such groups. Supporters of identity politics argue not only that a commitment to equality requires attention to such issues, but also that bringing individuals of diverse backgrounds into various private and public arenas enriches the lives of all members of society by gaining an array of perspectives on shared problems. Opponents argue, in contrast, that such efforts divide individuals in ways that are harmful to the polity and that, in any event, personal characteristics do not correlate with ideas, values, or experiences, including participation in economic, social, and political processes.

Identity politics have become more relevant to the legal profession as the demographic profiles of both the profession and the population in the United States have changed. Over the past several decades, the profession has evolved from one that was overwhelmingly male and Euro-American to one now including men and women of more diverse sociocultural backgrounds. Concurrently, the United States' population (the users of its justice system) has also become more diverse. What these changes ought to mean for the legal profession is highly contested.

Our second interest in identity shifts the focus to alternative (and again, contested) conceptions about the meaning of being a lawyer. *Lawyers' identities* are linked to different roles, such as officers of the court, agents of change, zealous advo-

cates for client interests, business people, and "statesmen."[1] Contemporary deba among lawyers reflect fears of the consequences of increased competition, heig ened entreprenerialism, and adversarialism for the public images of lawyers,[2] as w as for lawyers' own understanding of their roles in society. The literature abc lawyers considers whether, for example, because the services lawyers sell involve t justice system, lawyers have moral imperatives that should be incorporated into eth cal rules, such as mandates for pro bono work.[3]

These two conceptions of identity—identity politics and lawyers' professio identity—are both implicated when discussion turns to professional obligations garding equality. Should lawyers and judges be concerned about whether men a women lawyers of all colors are appointed to authoritative positions, recognized professional colleagues, and treated as equals? Do lawyers and judges, as professi als, have *special* obligations to inquire about the treatment of men and women of colors in the legal system, within and outside of courts, and to work toward reme ating unfair differences? Are perceived differences in the treatment of men a women and people of color evidence of excessive adversarialism—to which the propriate responses are codes of civility and better inculcation of professio mores—or do they reflect deeper problems of social ordering—requiring a cha in professional ethical standards?

Such questions *about* lawyers' identities as members of a profession and memb of diverse social groups are reflected in the development of organizations *for* lawyers in their agendas. The American Bar Association (ABA), the largest nationwide organi tion of lawyers, was founded in 1878; for decades, it has served as the leading natic organization for lawyers.[4] Over the succeeding decades, a series of specially identi bar organizations formed, in response to the entrance of small numbers of wor blacks, Asian Americans, Native Americans, and Latinos into the legal profession.

In 1980, a group of judges and lawyers created another general professional ganization, the American Inns of Court (AIC), modeled after its English coun part. As explained by one of its founders, "a felt need to save our professional so prompted the organization to dedicate itself to improving professional standar The focus of AIC on mentoring and civility evidences the concern of some law and judges about a decline in professionalism and the belief that improving cc munication about the profession's norms across generations and among participa is an appropriate remedy. In its programs, AIC aspires to be perceived as neither litical nor entrepreneurial.

While attorneys' ethics, role, and status are central topics for the ABA as w that organization also addresses issues of public governance; the ABA identifies s work as essential to its function as a professional body of lawyers. Thus, the ABA long provided commentary on the needs of the judiciary and on proposed nomir for federal judgeships. The ABA also superintends legal education, promulg policy, and creates commissions on topics ranging from the independence of the diciary to the death penalty.[7] Moreover, during the 1980s and 1990s, the ABA

came increasingly concerned about exclusion of diverse groups of people from professional activities and responded in a variety of ways, including forming commissions focused on the roles of women and men of all colors in the profession.

Such projects have, in turn, sparked criticism of the ABA by yet another relatively new organization of lawyers, the Federalist Society. Distressed at the ABA for espousing "policy" positions outside what the Federalist Society claimed to be the proper charter for a "professional" organization of lawyers, the Society began in 1996 to publish a newsletter, called *ABA WATCH*, devoted to discussing decisions by the ABA. In its inaugural issue, the newsletter argued that "[o]ne of the most disturbing social trends in the last two decades has been the growing politicization of institutions that were once praised and respected for being impartial and 'above politics,'" and then asked "whether such politicization has permeated the American Bar Association."[8]

In this chapter, we examine the relationship between the evolution of professional organizations of the bar, the projects that they adopt, and the normative questions of the reach and purpose of ethical rules identified with the legal profession. We focus on the creation, in the 1980s and 1990s, of "bias task forces" about gender, race, and ethnicity, generated by legal organizations as a means of addressing inequality and exclusion within the justice system, and particularly within courts. Bias task forces implicate all of the dimensions of identity discourse: the import of identity politics, the meaning of professional identity for lawyers in a pluralist society, the function of legal professional organizations, and the relevance of reports by individuals of diverse backgrounds about their experiences and perceptions of legal processes.

Below, we first show how the goals and modes of these task forces reflect their deep connections to the legal profession, expressing both its commitments to equal access to justice and to fair process and the concerns raised upon finding less than fulfillment of these aspirations. Second, we use findings from task force reports to learn more about professional identity, including lawyers' experiences of inclusion and exclusion and about how professional norms of adversarial exchange are used to express recognition and marginalization. Third, we examine the debate that the creation of task forces has occasioned for the profession. Within the struggle about the legitimacy of task force projects reside diverse conceptions of professional obligations held by lawyers, judges, and the organizations of which they are a part. We conclude by arguing that, because lawyers are specially situated actors within the justice system, their norms of professionalism must internalize law's commitment to equal treatment.

Projects of the Profession

Beginning in the 1980s, court systems in dozens of state and federal jurisdictions launched remarkable projects of self-study, aimed at asking about the effects of gender, race, and ethnicity within their systems. By the late 1990s, some sixty reports,

commissioned by state and federal judiciaries, had been published.[9] A brief review o the history of these efforts reveals how deep connections to conceptions of profes sional identity and obligations helped to shape their goals, methods, and the ways ir which they reported their results.

The Task Force Movement

The task force movement began as a collaborative effort of the National Organization for Women (NOW) Legal Defense Fund and the National Association of Women Judges, both seeking to educate judges nationwide about the insidious effects of gender stereotyping on judicial decision making. The two organizations cosponsored a NOW project, the National Judicial Education Program to Promote Equality of Women and Men in the Courts (NJEP), which in turn pressed individual jurisdictions to undertake self-studies of the effect of gender on court processes and outcomes.[10] Robert Wilentz, then chief justice of the New Jersey Supreme Court, responded in 1982 by commissioning the first such project.[11] Within two years, New Jersey created a second project, focused on racial and ethnic bias. Several other states soon did the same.

In 1988, lawyers and judges formed another national organization, the *National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts*, aimed at dealing with unfair treatment of racial and ethnic minorities. The consortium also sought to link together task forces that were ongoing in several jurisdictions.[12] In the same year, the chief justices of all fifty states called for the study of gender, racial and ethnic bias in their jurisdictions.[13] Such projects also received support from other national organizations, including the Commission on Women and the Commission on Minorities of the American Bar Association, local specialized bar organizations, and the National Center for State Courts.[14]

In the early 1990s, the federal courts began to undertake similar projects. In 1992, the Ninth Circuit issued the first report about the effects of gender in the federal context.[15] The Judicial Conference of the United States also adopted resolutions in support of studies and educational programs about fairness and the extent to which bias affects participants in the judicial process,[16] and, in 1994, Congress endorsed task force activities through a section of then-new legislation, the Violence Against Women Act.[17] By the decade's end, more than half the federal circuits had commissioned projects on gender and four circuits had task forces addressing race, ethnicity, and (in one instance) religion.[18]

Institutional support for these efforts took various forms. In addition to organizational endorsements, charters to specific task forces, and statements of affiliation, several national conferences were held. Sponsors also published manuals to provide guidance about how to undertake these projects, one directed at gender task forces, one at race/ethnic task forces, and one focused on the federal system,[19] and most recently a guide to implementation efforts.[20]

As this brief overview demonstrates, from their inception, task force projects

were creatures of the legal profession, embraced both by court systems and by institutions of the profession including general, as well as special purpose, professional associations. Lawyers, judges, and legal academics spearheaded the efforts, organized and provided the intellectual resources for study groups, disseminated information about how to implement task force projects, and advocated the adoption of measures to address the problems that task forces uncovered.

Shaping the Inquiries

While based in law and concerned about fair and equal treatment, task forces did not seek (as lawyers might) to "prove" discrimination in the justice system; they were interested not in finding evidence of intentional acts of exclusion[21] but in understanding the experiences that diverse participants had of justice. Purposefully eschewing a litigation model, the task forces fashioned themselves as kinds of "blue ribbon" commissions, commonplace within the traditions of judicial and legal professional organizations.[22] Task forces focused on describing processes and (less frequently) outcomes in which gender or race or ethnicity (and their combinations) played a significant role. As Judge Patricia Wald explained:

> The purpose of [these task forces] is of course not to hunt down actual incidents of provable bias or discrimination but rather to evaluate whether unconscious but nonetheless real bias infects significant relationships in the court house. . . . [The hope is that] once such biases or just plain insensitivities are surfaced, everyone in the system will be more careful, more civil, more willing to try to obliterate any distinctive treatments based on such irrelevancies.[23]

In each of the sixty-some projects, chief judges appointed commissions, task forces, and committees of specially designated judges and lawyers, assisted by law professors and social scientists, who, in turn, enlisted volunteers to augment often scarce resources. Using both legal and social science research techniques, the task forces embarked on fact-finding inquiries to discover whether and how, in a particular jurisdiction, the treatment of lawyers, parties, witnesses, jurors, judges, and court employees differed by gender, and/or race, ethnicity, and religion. They examined the demographic composition of the bench, bar, and court employees; reviewed appointments and hiring practices of courts and, sometimes, of law firms; investigated interactions of lawyers and judges in formal and informal court processes such as discovery, settlement, and alternative dispute resolution; and studied the role of gender, race, and ethnicity in a variety of areas such as criminal justice decisions on bail and sentencing, examinations of women as witnesses in cases involving violence against them, employment discrimination law, and legal regimes governing divorce and custody.

Ambitiously (particularly given their resource constraints), the task forces sought to develop new data through sample surveys aimed at capturing the views of tens of thousands of participants in legal processes. Because the focus of much of the quantitative research was on the most easily surveyed (lawyers and judges) and less frequently on litigants, witnesses, and jurors, these reports provide a rich source of data about the demographic profile of the legal profession and about lawyers' and judges' behavioral expectations and professional mores.

Friends, Not Foes

In articulating their goals, shaping their inquiries, and presenting their results, task force members cast themselves as members and friends of the legal profession rather than as outsiders. Acting in part on the guidance of leaders of the task force movement, the individual task forces were self-consciously positive about their goals. For example, task forces often used affirming titles for their efforts, invoking concepts of "fairness" and "equality."[24] As the chief judge of one circuit who chartered a task force explained, the project was "for all segments of the . . . community, lawyers, litigants, court staff, and judges, . . . [an] attempt in a creative manner to ascertain whether there are barriers to full treatment and, if so, whether we can assure they will be eliminated."[25]

The efforts reflected a common mode of mainstream legal professionalism, assuming the underlying legitimacy and rightness of U.S. legal processes and commitments. Designed to fix, not to accuse, task force reports are generally friendly commentaries, less adversarial in tone than many documents associated with law. In sharp contrast, a Canadian commission, charted by the government to investigate differential treatment of people of color in the criminal justice system, labeled its effort as an investigation into "systemic racism."[26] Further, Canadian commentators have criticized U.S. task forces' reliance on the concept of "gender bias"—popularly used to describe the investigation of differential treatment of women—as a "sugar-coated concept"[27] that "disguises sexual oppression."[28]

Task forces generally reported their findings in careful, and occasionally upbeat, tones. Some task force reports make plain statements of systemic problems of injustice. "Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility."[29] Or, "[t]here is evidence that bias does occur with disturbing frequency at every level of the legal profession and court system."[30] But others present a rosier picture, emphasizing progress. "[The] Circuit has made great strides in the last decade toward a litigation process unburdened by disparate treatments of its participants because of gender."[31] "Many practitioners . . . confirm that experiences in the courts are not as bad as they once were."[32]

Still other reports present a melange of contradictory findings that reflect ambivalence as to their import. For example, one state reported both "no widespread and overt gender bias," but also "evidence that gender bias does exist"[33] within its judicial system. And one federal circuit reported: "The overall findings are positive

. . . [yet] the percentages of attorneys and employees who report that in the last three years they have heard demeaning remarks based upon a person's race, ethnicity or religion in a courthouse or courtroom are unacceptably and surprisingly high."[34]

Taken together, the task forces and their reports reflect tensions within the legal profession about undertaking inquiries so close to core conceptions of U.S. legal processes. Lawyers and judges in this legal system are proud of their own commitment to equal treatment. The notion that task forces are needed, the nature of their investigation (asking about the presence of bias), and, often, their findings are therefore unsettling. Among task force efforts, one finds praiseworthy attempts at self-examination, coupled with a willingness to report less than happy self-descriptions, suggesting a conception of legal professionalism as specially obliged to address fairness and to deliver on the promise of equal justice to all actors within the legal system. But one also discerns, in the texts of the reports, the anxiety engendered when legal professionals describe failings of a system with which they are deeply affiliated.

Experiencing Identity Differences

The task force reports provide an empirical basis for examining lawyers' and judges' beliefs about the nature of the legal profession: the kinds of people it comprises, the ways in which those people can serve the courts and the profession, and the types of behavior that are appropriate when dealing with judges, lawyers, and parties of diverse heritages and identities. Task force reports paint a picture of a profession that has not yet caught up to the demographic changes in its profile and of members of the profession who are not universally ready to accept women of all colors and men of color as full-fledged professionals. Task force reports tell stories (in qualitative and quantitative form) of groups not fully represented in the upper strata of professional hierarchies, of adversary techniques that use identity characteristics to undermine individuals appearing in formal and informal proceedings, and—poignantly—of failures to recognize women and people of color as lawyers and judges rather than as defendants, witnesses, or administrative support personnel.[35]

Such data about inclusionary and exclusionary practices might be relevant to any inquiry into many contemporary institutions, be they schools, businesses, or professional organizations. But these issues have special purchase for lawyers. To be a lawyer—especially a litigator—is to participate in social exchanges, whether in the formal setting of a hearing or the more informal setting of the judge's chambers or lawyers' offices. To be a successful lawyer requires not only performing well in such interchanges but also obtaining recognition by others of one's abilities. While lawyers who are lobbyists officially market their access to decision makers, access is also relevant to lawyers who work in courts and agencies. Law firms and some clients make choices about which lawyers appear in court, who is given "first chair," and who is chosen to argue an appeal. When judges select lawyers to serve in certain positions (such as special masters or as committee members) or to speak at judicial conferences, those choices both confirm and create the authority of the lawyers thus chosen.

Further, law in the United States is specially connected to an ideology of inclusion and the impermissibility of relying on distinctions based on identity. The stated goal is "equal justice for all," and the stated means is to exclude "irrelevant" information when making decisions. Thus, the treatment of members of identifiable groups *by* law and *in* law has particular import *for* law.

Representation

As women of all colors and men of color have increased their numbers in law schools, the demographics of the profession have begun to change. Nationwide, by 1990, women accounted for about 24 percent of practicing attorneys. Men and women of color accounted for about 7 percent of all lawyers; women of color accounted for 12 percent of all female practitioners.[36]

Task forces found that women of all colors and men of color are represented in greater numbers at lower echelons of the profession than in higher echelons—as that hierarchy is currently understood. There are smaller fractions of women of all colors and men of color among lawyers who practice in federal courts than in the profession as a whole.[37] And there are smaller fractions of women of all colors and men of color on the bench than in the profession as a whole.[38] Women and men of color are more likely than white men to serve as public defenders or other government lawyers or in legal aid practices; they are less likely to hold more lucrative positions, such as in-house counsel.[39] Women of all colors and men of color are represented in very small numbers in special (sometimes fee-bearing) positions such as special masters and members of court-appointed committees.[40]

With only a small fraction of all attorneys serving in some of these positions, women of all colors and men of color are likely to find few people in positions of power who share their gender, race, and ethnicity. Even when a few of those persons hold such positions, people of color and white women may assume that the relative absence of women or persons of color is a sign of systemic exclusion. For example, the Special Committees of the District of Columbia's Circuit asked on surveys about participation on committees and also reviewed lists of those appointed. The Special Committee on Race and Ethnicity learned that in 1992, 16 of 91 attorneys on a committee were African Americans.[41] But 80 percent of African American attorneys surveyed by the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias said that African American attorneys had fewer opportunities to serve than nonminority attorneys. Only 7 percent of white attorneys agreed.[42]

While women of all colors and men of color are only sometimes statistically under represented in upper-echelon positions, the small numbers in such positions lead women and men of color to perceive their professional worlds as under-

inclusive.[43] White men, however, continue to assume that race and gender play little role in professional assignments.[44] As the Ninth Circuit Gender Bias Task Force described: "Taken together [the findings] suggest that the women and men of the Ninth Circuit inhabit different worlds, one characterized by feelings of exclusion and the other by feelings of acceptance."[45]

The task forces found similar patterns of perceptions when they turned to law firms. Some women lawyers and attorneys of color told task forces that they were less likely than white men to be given important assignments, such as first chair, lead counsel, or the responsibility for examining a key witness. For example, in the Ninth Circuit, 14 percent of female civil litigators and 25 percent of female criminal practitioners said they had lost an assignment to a case as a result of gender bias.[46] The District of Columbia task force also found that gender and race were relevant to appointments; respondents reported both losing and gaining appointments based on race and/or gender. Markedly, fewer white and male attorneys reported such experiences.[47]

Exclusionary Practices

The task forces found that women of all colors and men of color are sometimes deliberately excluded from professional activities. Some such instances are overt, as when a female attorney in the Ninth Circuit was asked to leave a judge's chambers during a settlement conference so that he could tell a dirty joke.[48] Other task force reports describe less conscious actions, such as when judges and lawyers direct "their comments and attention to male counsel and seemingly ignor[e] opposing female counsel; asking male counsel to speak before female counsel in situations where the woman attorney was in a position in which she as counsel would normally have been asked to speak first; and cutting off female counsel during argument more abruptly than male counsel."[49] (Male attorneys who hear women relate such examples say that they themselves have never noticed such behavior.[50]) The task forces found that attorneys of color share the experience of exclusion: one-third of African American male attorneys surveyed by the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force reported sometimes feeling that federal judges ignored or did not listen to them because of their race; 45 percent of African American female attorneys believed that both their race *and* their gender caused their nonrecognition. In contrast, 1 percent of white males and 28 percent of white female attorneys reported such encounters.[51]

Nonrecognition

Exclusionary practices take vivid form when they result in a failure to recognize a person as the professional that she or he is. A poignant example is provided by the task force on race and ethnicity from Massachusetts, which described (as an animating event for commencing its work) how an African American assistant attorney general, approaching a judge in a court, was barred by a staff member from coming

close to the bench; the government lawyer was assumed to be the defendant rather than the lawyer for the state.[52] An Eighth Circuit attorney reported that, after 18 years of practice, she was still frequently mistaken for a court reporter. Another attorney in that circuit said that she was asked in open court if she was an attorney, and then asked to produce her license to practice to verify her assertion; on another occasion, a court employee called her law firm to verify that she was really an attorney.[53] A female attorney of color told the Second Circuit Task Force: "I have been an attorney for ten years and for some reason I'm still mistaken for someone off the street."[54] Nonrecognition of women of all colors and men of color as fellow professionals is a finding reported by many task forces.[55]

While patterns of "mistaking" women of all colors and men of color for someone other than who they are may be depressingly commonplace, these "mistakes" have special power when they occur in law. Not only are there many social cues to forestall such errors, but the misidentification may itself have an adversarial edge. Whether inadvertent or deployed strategically, attributing lower status to an opposing attorney who is a white woman, a woman of color, or a man of color signals to clients, jurors, or judges that the person should be assumed to be less credible and authoritative than is appropriate. The expectation of such behavior may, in turn, become an excuse for denying assignment of important cases or denying important positions in cases to women of all colors and to men of color.

Adversarial Posturing

When lawyers are outside circles of power, it becomes more difficult for them to be effective adversaries. It may also become easier for other lawyers—be they colleagues or opposing counsel—to undermine them. In deploying gender and racial or ethnic stereotypes in professional interactions, lawyers send subtle (and, sometimes, not-so-subtle) signals to other actors that the lawyer-target is not a full-fledged member of the profession.

Stereotypes may be used in formal proceedings, judges' chambers and courtroom corridors, in alternative dispute processes, and in lawyers' exchanges outside of court. While some deployment of gender or race-biased stereotypes stems from judges, task forces generally have found that lawyers are a more frequent source of such conduct than judges, and that cruder examples of stereotyping behavior are more likely to occur outside judges' presence than in formal court proceedings.[56] Targets include opposing counsel, parties, witnesses, and (less frequently) judges.

Lawyers introduce gender or racial and ethnic bias into lawyering in a variety of ways, ranging from addressing women of all colors and men of color in an unprofessional fashion, to commenting on appearance when such comments are not expected in a particular context (e.g., a formal court proceeding), to more directly attacking a fellow lawyer's (or party's or witness's) competence, seemingly because of the person's gender, race, ethnicity, or language. Some of this behavior may seem innocuous to

some observers (although not to the targets), such as a judge addressing a female attorney in a familiar fashion ("dear").[57] Other behavior is more blatant, such as a judge calling a lawyer "little girl" or trying to undermine the credibility of a female witness by suggesting that she is "emotional, unstable, or irrational."[58] All these forms of stereotyping can be found in the bias task force reports.[59]

Identity stereotyping and exclusionary practices have special power in legal practice because they can be deployed to gain an "edge" for one's own client or to "score points" for one's own interests. Just where adversarialism leaves off and unacceptable disparate treatment begins is a subject of debate and disagreement, as reflected in this comment from the Eighth Circuit Gender Fairness Task Force: "Issues of incivility are often dismissed as 'legitimate advocacy' or just 'part of the game' and female attorneys admonished that they are 'overly sensitive' or 'too thin-skinned' for the practice of law."[60]

Stereotyping individuals based on their identity and feeling discomfort with fellow professionals who look different from oneself are sometimes described as holdovers from an earlier era that will be left behind as time passes. But task forces' analyses of survey data show that differences in experiences and perceptions persist through younger generations.[61] Rather than fading away, adversarial use of identity differences may be passed down from older to younger professional cohorts. In short, deciding what behavior is legitimate "lawyer-like" adversarialism and what behaviors should be pushed outside the boundaries of legal professional behavior is an issue not only for today but for the future.

Identity and Obligation

What to make of the results of their fact-finding was a challenge that all task forces faced. Many task force members believed that the data they had collected indicated a need for corrective action; they turned to judges and lawyers to take the lead in efforts at improvement. Others, however, focused on task forces' positive findings—the relatively few instances of "on the record" bias from judges and the perceived improvements in the treatment of women and people of color—and celebrated, proclaiming that since there were "no statistically significant incidents of bias (as normally defined) in our courts,"[62] no action was necessary. As the task forces' efforts garnered more attention from bench and bar, their work became a symbol for political conservatives of perceived dangers in focusing on identity in the United States. Nearly twenty years after their inception, whether task forces were projects *of, about,* and *for* the legal profession was again a subject of debate.

Proposals for Change

In the wake of the publication of task force reports, many jurisdictions authorized remedial responses, ranging from educational programs on diversity to handbooks

on how to improve the conduct of court proceedings, and from informal efforts expand the diversity of those appointed by courts to revising internal policies on employment practices and sexual harassment.[63] From task force projects grew thousands of conversations in courthouses, bar associations, and law firms about how women and men of all colors experience the legal system and about how the legal system treats all of its participants.

In some instances, task force efforts also engendered formal rulemaking, encompassing a host of issues from the administration of courts to the conduct of legal proceedings. Some jurisdictions adopted policies to increase the inclusion of women of all colors and of men of color in court appointments; the methods varied from heightened efforts to disseminate information about opportunities, to targeted outreach, to mandated affirmative action.

A vivid example of an effort to change exclusionary patterns of judicial selection comes from Florida, where regional panels recommended individuals for judgeships to the governor. In 1991, after its two task forces reported the small numbers of judges who were women of all colors or men of color,[64] the Florida legislature enacted a statute requiring that one of the three members of the nominating panels selecting judges must be "a member of a racial or ethnic minority *or* a woman."[65] The statute included features that prompt criticism of simplistic versions of "identity politics": it appears to pit racial and ethnic minorities against women in competition for positions; it does not distinguish among women, with regard to race or ethnicity, and it similarly lumps all racial and ethnic minorities into one undifferentiated "other."[66] But a review of data on those appointed as nominators for judges in Florida indicates that the percentage of women and of minorities sitting on panels rose significantly after the statute was passed.[67]

In rulemaking and through case law, courts also addressed the use of gender, race and ethnicity as adversarial tools. Two national codes, promulgated by the American Bar Association, provide models, one for judges and one for lawyers. In 1990, the American Bar Association's Model Code, Canon 3(B)(6), governing *judicial* authority to regulate attorney behavior was amended to provide that judges shall "require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others."[68] By 1998, twenty-two states and the District of Columbia had adopted such provisions, and a few other states had written their own.[69] Efforts to alter the model code for *lawyers* did not succeed at a national level until 1998,[70] but a few states modified their codes, for example, by defining "professional misconduct" to prohibit lawyers from engaging in "conduct involving discrimination . . . because of race, color, religion, age, sex, sexual orientation, national origin, marital status, socioeconomic status or handicap where the conduct is intended or likely to create harm."[71] A few federal district courts also promulgated "local" rules specifically addressing bias in courts and in varying ways attempting to curb it.[72]

As the language of these codes suggests, prohibiting gender-based and race- and ethnicity-based bias is not the same as specifying what constitutes misconduct. Moreover, these prohibitions are usually accompanied by the caveat that "legitimate advocacy" does not constitution a violation.[73] To date, a few opinions consider challenges to lawyers (or judges) based on bias. Some appellate courts have found examples of lawyers or judges engaging on the record in behavior that undermines lawyers' or witnesses' credibility based on gender, race, or ethnicity; these courts have imposed sanctions, including, on rare occasions, reversing the underlying judgments.[74]

Opposition

The new policies soon came under attack, both individually and in the aggregate. In 1995, a white male lawyer attacked the Florida statute on the composition of judicial nominating panels. A federal district judge struck it as an impermissible form of affirmative action, unsupported by a "compelling state interest" and not sufficiently narrowly tailored to meet remedial goals.[75] In the Ninth Circuit, a district judge sanctioned an attorney for inappropriately using gender in the adversarial process; an appellate court reversed, finding the sanction to be based on too vague a professional regulation, broadly prohibiting lawyers from engaging in offensive behavior.[76]

At the national level, opposition to the task forces and their proposals mounted. In the 1990s, individual judges in one federal circuit "disassociated" themselves from the circuit's work on gender, race, and ethnicity.[77] One of these judges attacked task forces in a speech entitled "Political Correctness Rebuffed," given at a Federalist Society meeting and subsequently published in its journal.[78] These judicial opponents enlisted the support of other institutions. A few members of Congress entered statements into the *Congressional Record* regarding their views on the disutility of task forces; one senator, who in 1997 served as a co-chairman of the Federalist Society, argued that such studies were "ill-conceived, deeply flawed, and divisive, . . . [and] threaten the independence of the Federal Judiciary."[79] At another senator's request, the General Accounting Office investigated the projects, and concluded that because they dealt with "perceptions," their findings did not constitute "evidence that gender and/or racial bias exists."[80]

Mounting opposition chilled the federal task force efforts. Some circuits paused; others narrowed their efforts. Individuals also suffered professional hardship. For example, one nominee for a federal judgeship found herself addressing objections based on her service—at the request of the Executive Committee of the Ninth Circuit—on a judicially commissioned task force on gender bias.[81]

Defining Legal Professionalism in a Pluralist Society

Underlying the debate over the legitimacy of task force efforts and the proposals for change that they have engendered are conflicting visions of professional behavior

and obligations. We see this conflict in the different understandings of the adversarial interactions that the task forces described. For some, data about deploying identity stereotypes evidence behavior that breaches the promise of equal treatment under law. For others, the data reflect a more general problem of "incivility"—of lawyers' unfortunate tendency to engage in unduly aggressive conduct. For a third group, the behavior is simply an example of "zealous pursuit of client interests." Depending on which interpretation one adopts, one may favor specific judicial sanctions, generic codes of conduct, or silence.

At a deeper level, the conflict over task forces' legitimacy reflects division over the profession's obligation to promote full participation in the profession and in the wider society by men and women of all colors. On the one hand, the ABA has embraced the goal of equal treatment as its own. In 1991, the ABA adopted a revised mission statement that includes the goal of promoting "full and equal participation in the legal profession by minorities and women."[82] Similarly, other lawyers' organizations have also argued that such efforts are central for lawyers. For example, the Lawyers' Committee for Civil Rights under Law has requested that the president of the United States "call" on lawyers "to join in a common effort . . . to renew the advance for racial justice, a goal that can only be reached if the law and the legal profession support such a result."[83]

On the other hand, the Federalist Society has convened special meetings to consider whether task force efforts can be "reconciled with traditional conceptions of the rule of law and with our Founders' concerns about faction in a civil society."[84] Further, the Federalist Society reports with concern, "a rapidly-increasing focus by the ABA on gender and minority issues, many of which generate substantial controversy."[85]

Should lawyers and judges talk about diversity? Should they engage in efforts to reduce perceptions of unfair treatment in the legal system based on gender, race, and ethnicity? Should members of the legal profession take affirmative actions to ensure that the legal system makes good on its promise of equal treatment for all? What relationship do these questions have to problems of undue competition and unpleasant adversarialism? Our answers are that lawyers have a distinctive role in enacting law's commitment to equality and hence a special relationship to the problems represented contemporarily by the moniker "identity politics." Lawyers need to add a new element to their professional identity, that of advocate for equality, and to distinguish that role from the modes proposed to respond to the other problems of unduly aggressive, uncivil interactions and the reorganization of legal markets.

Our reasons are several. First, U.S. courts have long made a point of claiming that they treat individuals without regard to their race, ethnicity, and/or gender. In the later part of the twentieth century, the judicial system began to implement aspects of that claim through announcing that both de facto and de jure discrimination conflict with constitutional obligations of equality and fairness. The judiciary is not only concerned with rules of law. Judges also pride themselves on their keen ap-

preciation of the importance of specific contexts, and on their willingness to engage in fact-finding to obtain detailed knowledge of local situations to enable case-by-case appraisals. Judges care about law in practice as well as law on the books. Thus, even were other institutions to move away from addressing the experiences of identity groups, the legal system would need to continue to ask whether law is working, in practice, to deliver in all contexts and cases on its promises.

Second, law once maintained and authorized systems of discrimination. That history requires that lawyers and judges take special notice of and engage in special efforts to diminish the residue of that which they helped to create and to enforce and which they now know causes so much harm.

Third, law needs popular support and appreciation; it relies for its legitimacy on beliefs that legal institutions are equally responsive to all its citizens' legitimate claims.[86] To do its work, law not only needs to be fair, it must be perceived as fair. Lawyers and judges cannot simply assert that the citizenry accepts its claims, especially in the face of substantial evidence to the contrary. (Indeed, as we write, newspapers report survey data that indicate 47 percent of Americans believe the legal system to be less fair to minorities than to nonminorities.[87])

Fourth, constitutional jurisprudence does not purport to preempt ethical obligations. No matter how narrowly (or broadly) discrimination may be understood as a matter of federal constitutional law, lawyers and judges do not hold themselves up to meeting only such standards. Lawyers and judges make policies about what good and wise lawyering is, and sometimes, in good times, their judgments lead the way to understanding both the strengths and the limits of legal rules. That some sixty reports about fairness have been published in the name of lawyering provides significant promise for the profession. Task forces on gender, race, and ethnicity not only are projects *of* the profession and projects *on* the profession, they also identify hopes *for* the profession.

Some have argued that the route to take to fulfill these hopes is to insist on standards of civility and to embrace less adversarial modes of conduct, that the problems uncovered by the task forces stem from a profession that has failed to communicate how properly trained lawyers should talk to or oppose each other. But such a response diminishes the import of the findings of task forces, which documented problems much deeper than modes and manners of lawyering. Task forces have taught us that within courts, not all actors (lawyers and judges included) believe themselves to be full participants. The 1999 public opinion poll on attitudes toward courts echoed these two decades of task force work; a large fraction of people in the United States do not believe that courts treat all equally, and perceptions of inequality are linked to gender and race. For judges and lawyers to respond to such empirical work with programs to improve lawyers' manners is both distracting and insufficient.

Rather than conflate problems of adversarialism and entrepreneurship with obligations for equal treatment and build programs of reform from that amalgam, we urge a different agenda. The task force movement that we have analyzed, whil imbedded within the profession, also challenges lawyers to generate a distinctive an new dimension of their professional identity. The findings of the task forces demon strate that the list of professional descriptors—officers of the courts, entrepreneurs zealous advocates, agents of change, and "statesmen"—no longer suffices. Havin taken on the question of the degree to which legal commitments to equal treatmen translate into practice, lawyers and judges should not now turn away from the impli cations of what they have learned. Instead, they need to revisit their conception o professionalism and modify it by including, as a professional obligation, advocac for and insistence on the practice of equality.

Notes

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1. See, e.g., Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Harvard University Press, 1993); Sol Linowitz, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (New York: Charles Scribner's Sons, 1994); David Luban, *Lawyers and Justice: An Ethical Study* (Princeton, N.J.: Princeton University Press, 1988); Deborah Rhode, *Professional Responsibility: Ethics by the Pervasive Method*, 2d ed. (New York: Aspen Law & Business, 1998); and William Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, Mass.: Harvard University Press, 1998).

2. Critics outside the profession—in jokes, cartoons, opinion editorials, and other expository forms—characterize lawyers as untrustworthy, as self-serving entrepreneurs and disagreeable technocrats who engage alternately in "legal hair-splitting" and "Rambo-style" litigating. See generally Marc Galanter, "The Faces of Mistrust: The Image of Lawyers in Public Opinions, Jokes, and Political Discourse," 66 *U. Cin. L. R.* 805 (1998).

3. See Deborah L. Rhode, "Cultures of Commitment: Pro Bono for Lawyers and Law Students," 67 *Fordham L. Rev.* 2415 (1999).

4. See *ABA Policy and Procedures Handbook*, 2 1991–92 ed. (Chicago: ABA Press, 1991), 2.

5. Patrick E. Higginbotham, "The American Inns of Court," 25 *Colorado Lawyer* 41 (November 1996). See also Joryn Jenkins, "The American Inns of Court: Preparing Our Students for Ethical Practice," 27 *Akron L. Rev.* 175 (1993). For additional discussion about the need to address professional failings, see Linowitz. For survey data about lawyers' understandings of their own profession, see Deborah R. Hensler and Marisa E. Reddy, *California Lawyers View the Future: A Report to the Commission on the Future of the Legal Profession and the State Bar* (Santa Monica, Calif.: RAND, 1994).

6. The ABA has promulgated two codes of ethics, one for lawyers and one for judges. See Model Rules of Professional Conduct, 1998 ed. (Chicago: ABA, 1997); Model Code of Judicial Conduct, 1998 ed. (Chicago: ABA, 1997).

In addition, the divisions of the ABA have endorsed its members' participation in the American Inns of Court. See James A. George, "The American Inns of Court in Louisiana," 43 *Louisiana Bar Journal* 35, 36 (June 1995) (citing a resolution of the ABA's Judicial Administration Division that "[a]ll judges and senior lawyers are encouraged to become members of American Inns of Courts and . . . to assist in the creation of new . . . Inns").

7. See *ABA Policy and Procedures Handbook*, 133.

8. See, e.g., The Federalist Society for Law & Public Policy Studies, *The ABA in Law and Social Policy: What Role?* (1994); Federalist Society Project, *ABA WATCH*. The creation of the *ABA WATCH*, published twice a year, is described as "incit[ing] much-needed debate about the legal and political role of the American Bar Association." 1997 Annual Report of the Federalist Society for Law and Public Policy Studies, 9; "From the Editors," *ABA WATCH* 1 (August 1996).

9. See Judith Resnik, "Asking about Gender in Courts," 21 *Signs* 952 (1996), including an appendix listing reports as of that date. Note that such efforts are official projects of courts, as distinct from more general commentary on the effects of race, ethnicity, and gender on careers. See, e.g., Cynthia Fuchs Epstein, *Women in Law*, 2d ed. (Urbana: University of Illinois Press, 1993); and Linn Washington, *Black Judges on Justice: Perspectives from the Bench* (New York: New Press, 1994).

10. The founding and current directors of this program have described its inception and evolution. See Lynn Hecht Schafran, "Documenting Gender Bias in the Courts: The Task Force Approach," 70 *Judicature* 280 (1987); Lynn Hecht Schafran, "Gender Bias in the Courts: An Emerging Focus for Judicial Reform," 21 *Ariz. St. L. J.* 237 (1989); Norma Wikler, "On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts," 64 *Judicature* 202 (1980); and Norma Wikler, "Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts," 26 *Court Review* 6 (Fall 1989). See also Jennette F. Swent, "Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces," 6 *So. Calif. Rev. Law & Women's Studies* (1996).

11. New Jersey Supreme Court Task Force on Women in the Courts, *The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts* (1986), reprinted in 9 *Women's Rts. L. Rep.* 129 (1986).

12. Arline Tyler and Steven Montano, "State Panels Document Racial, Ethnic Bias in the Courts," 78 *Judicature* 154 (Nov./Dec. 1994). See also H. Clifton Grandy, *A New Paradigm for Fairness: The First National Conference on Eliminating Racial and Ethnic Bias in the Courts: Conference Proceedings* (National Center for State Courts, 1995).

13. 26 *S. Ct. Rev.* 5 (1989). See also Conference of Chief Justices, Resolution Urging Further Efforts for Equal Treatment of All Persons (adopted Jan. 28, 1993) (calling for implementation of reforms), available from the National Center for State Courts.

14. See Judith Resnik, *Summary of Activities and Publications Related to Gender, Race, and Ethnicity in Courts* (1997); Lynn Hecht Schafran, Norma J. Wikler, and Jill Crawford, National Judicial Education Program, *The Gender Fairness Strategies Project: Implementation Resources Directory* (National Judicial Education Program to Promote Equality for Women and Men in the Courts, Dec. 1998) (published with a grant from the State Justice Institute to the National Association of Women Judges, on behalf of the National Association of Women Judges, the National Judicial College, the National Center for State Courts, the ABA Commission on Women in the Profession, and the National Judicial Education Program to Promote Equality of Women and Men in the Courts, a project of the NOW Legal Defense and Education Fund in cooperation with the National Association of Women Judges) [hereinafter *Implementation Directory*].

15. See Ninth Circuit Gender Bias Task Force, *Executive Summary of the Preliminary Report of the Ninth Circuit Task Force on Gender Bias* (July 1992), reprinted in 45 *Stan. L. Rev.* 2153 (July 1993); Ninth Circuit Gender Bias Task Force, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force* (July 1993), reprinted in 67 *So. Cal. L. Rev.* 745 (May 1994).

16. See *Long Range Plan of the Judicial Conference of the United States*, 166 *F.R.D.* 49, 172-173 (1995) (Recommendation 78, calling for leadership of federal judges "to eliminate unfairness and its perceptions in the federal courts" and citing conference endorsement of studies).

17. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, 108 Stat. 1796, 1944 (codified at 42 U.S.C. §14001a) (1994) (encouraging circuit judicial councils to conduct studies of "instances, if any, of gender bias in their respective circuits and to implement recommended reforms").

18. See "Symposium: The Federal Courts, Commentaries on Bias in the Federal Courts," 32 *U. Rich. L. Rev.* 645-768 (May 1998) (compilation of essays by judges and circuit executives from eleven of the federal circuits); Judith Resnik, "Foreword: 'The Federal Courts': Constituting and Changing the Topic," 32 *U. Rich. L. Rev.* 603 (May 1998); and Lynn Hecht Schafran, "Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts," 32 *U. Rich. L. Rev.* 615 (May 1998).

19. See Lynn Hecht Schafran and Norma Juliet Wikler, *Operating a Task Force on Gender Bias in the Courts: A Manual for Action* (Washington, D.C.: Foundation for Women Judges, 1986); Edna Wells Handy, Desiree B. Leigh, Yolande P. Marlow, and Lorraine H. Weber, *Establishing and Operating a Task Force on Racial and Ethnic Bias in the Courts* (Washington, D.C.: National Center for State Courts, 1993); and Molly Treadway Johnson, *Studying the Role of Gender in the Federal Courts: A Research Guide* (Washington, D.C.: Federal Judicial Center, Foundation for Women Judges, 1995).

20. See *Implementation Directory*.

21. See, e.g., *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200 (1995). As we discuss infra, objections to task forces sometimes rested on the claim that they were poorly executed efforts to demonstrate discriminatory employment practices and to promote affirmative action. Addressing bias in hiring and promotion practices has, in actuality, been a minor theme of task forces' efforts. For such criticism, see Stephen Thernstrom, "Critical Observations on the Draft Final Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias," in *The Gender, Race, and Ethnic Bias Task Force Project in the D.C. Circuit*, Vol. 1 (1995), V App. 1-1 [hereinafter *D.C. Circuit Task Force Project*], also reprinted in 1995 *Public Interest Law Review* 119 (1995).

The two reports of the D.C. Circuit Task Force Project were also published in law journals. To facilitate access, subsequent citations to each of the committee reports will be to their respective journal citations. References to the technical appendices and statements of disassociation, only published as a part of the volume provided by the courts, will be indicated by citing to the *D.C. Circuit Task Force Project*.

22. For discussion of the framing of the reports and their relationship to other forms of legal documentation, see Judith Resnik, "Singular and Aggregate Voices: Audiences and Authority in Law & Literature and Law & Feminism," in *Law & Literature*, Michael Freeman and A. D. Lewis, eds. (Oxford: Oxford University Press, 1999).

23. Remarks of Circuit Judge Patricia M. Wald, *Aspen Law & Business, Third Annual Institute, Woman Advocate* 13 (June 1995).

24. Of 62 gender and/or racial and ethnic task force reports reviewed, 22 use the word "bias" in their titles; 16 use the word "fairness;" 16 use the words "equality," "justice," or "equal justice;" and 8 use the words "women in the profession," "women in the courts," or "women in the bar." Other titles include phrases such as "gender issues," "racial and ethnic issues," "oppor-

tunities for women and minorities," "where the injured fly for justice," "let justice be done: equally fairly and impartially," and "a difference in perceptions."

25. Press release; see also Dolores K. Sloviter, "Personal Reflections on the Creation of the Third Circuit Task Force on Equal Treatment in the Courts," 42 *Vill. L. Rev.* 1347, 1351 (1997).

26. See Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) (defining systemic racism broadly as "the social processes that produce racial inequality in decisions about people and in the treatment they receive"), ii. As noted, unlike the reports from the United States, the Canadian work was chartered by the government rather than by the court system specifically.

27. See Sheilah L. Martin, "Proving Gender Bias in the Law and the Legal System," in *Investigating Gender Bias*, Joan Brockman and Dorothy E. Chunn, eds. (Toronto, Ont.: Thompson Educational Publishing, Inc., 1993), 19-20 n. 3.

28. Federalist Society, Brochure on the Society's Program on Race and Gender Bias in the Legal System, Chicago, August 6, 1995. The society's program was held concurrently with the ABA's Annual Meeting.

29. New York Task Force on Women in the Courts, *Report of the New York Task Force on Women in the Courts* (1986), reprinted in 15 *Fordham Urb. L. J.* 11, 17–18 (1986–87).

30. Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts, *Final Report of the Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts* (Dec. 1989), 2.

31. *Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias* (1995), reprinted in 84 *Geo. L. J.* 1657, 1706 (1996).

32. Kentucky Task Force on Gender Fairness in the Courts, *Equal Justice for Women and Men* (Jan. 1992), 6 (also noting the "continued existence" of gender bias).

33. Georgia Commission on Gender Bias in the Judicial System, *Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System* (Aug. 1991), xi, reprinted in 8 *Ga. St. U. L. Rev.* 539 (1992).

34. Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness, *Final Report* (Aug. 1997), 9.

35. See Laura Gatland, "Courts Behaving Badly," 83 *ABAJ* 30 (Nov. 1997).

36. U.S. Department of Commerce, Census Bureau, *1990 Census of Population, Supplementary Reports, Detailed Occupation and Other Characteristics from the EEO File for the United States*, 1990 CP-S-1-1, Table 1, at 3.

37. About 16 percent of Ninth Circuit federal court practitioners surveyed were women, compared to about 22 percent in the Ninth Circuit bar as a whole. Ninth Circuit Gender Bias Task Force, *Effects of Gender in the Federal Courts*, 777. See also *Final Report & Recommendations of the Eighth Circuit Gender Fairness Task Force* (1997), reprinted in 31 *Creighton L. Rev.* 9, 43 (1997) (16 percent); *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts* (1997), reprinted in 1-2 *Annual Survey of American Law* 1, 35 (1997) (22 percent); *Report of the Special Committee on Gender to the D.C. Circuit Task Force* 1685–86 nn. 34, 36 (21 percent).

About 91 percent of federal practitioners surveyed in the Ninth Circuit were white, non-Hispanic Americans. *Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness*, 37. See also *Eighth Circuit Gender Fairness Task Force*, 44 (4 percent); *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, reprinted in 1–2 *Annual Survey of American Law* 117, 160–61 (1997) (6.6 percent, and among minority attorneys, 65 percent were male). *D.C. Circuit Task Force Project*, Vol. 2, app. D.2 (response to Question 3) (9 percent, 44 percent of whom were male).

38. As of 1996, about 19 percent of federal appellate judges and 17 percent of federal district court judges nationwide were women. In the Eighth Circuit, six percent of appellate judges and 11 percent of district court judges were women in 1997. *Eighth Circuit Gender Fairness Task Force*, 36–37. As of August 1991, women held 12 percent of judicial positions in the Ninth Circuit. Women were better represented among non–Article III judges than among Article III judges. Ninth Circuit Gender Bias Task Force, *Effects of Gender in the Federal Courts*, 773. In 1996, about 11 percent of Third Circuit Article III judges were women; about 17 percent of magistrate judges and 28 percent of bankruptcy judges were women. *Report of the Third Circuit Task Force on Equal Treatment in the Courts* (1997), reprinted in 42 *Vill. L. Rev.* 1355, 1369–70 (1997). In the Second Circuit, in 1996, there was one woman on the appellate bench (the only woman ever to have served on the Second Circuit appellate court); 19 percent of district court judges were women. *Report of the Working Committees to the Second Circuit Task Force*, 148 (calculations based on Table 7). In the D.C. Circuit, in 1994, 3 of 11 active appellate judges and 2 of 10 active district judges were women. *Report of the Special Committee on Gender to the D.C. Circuit Task Force*, 1678–79.

About 12 percent of judges responding to the Ninth Circuit's Racial, Religious and Ethnic Fairness survey identified themselves as members of ethnic and racial minority groups. *Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness*, 31. In the Third Circuit as of 1996, 11 of 107 Article III judges were members of minority groups; there was 1 minority group member among magistrate judges and none among bankruptcy judges. *Third Circuit Task Force*, 1369–70. In the Second Circuit, in 1996, about 10 percent of Article III judges and 9 percent of non–Article III judges were members of minority groups. *Report of the Working Committees to the Second Circuit Task Force*, 153 (calculations based on Table 13). In the D.C. Circuit, as of 1995, of 11 active appellate judges, 2 were African American and the rest were white; of 15 active district court judges, 3 were African American, 1 Hispanic, and the rest were white. *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias* (1996), reprinted in 64 *Geo. Wash. L. Rev.* 189, 201–2 (1996).

39. In the Ninth Circuit, 36 percent of federal public defenders surveyed and 31 percent of assistant U.S. attorneys surveyed were women, compared to 16 percent in all practice settings combined. Ninth Circuit Gender Bias Task Force, *Effects of Gender in the Federal Courts*, 778 (Table 2.1). About 9 percent of private federal practitioners surveyed by the Ninth Circuit were people of color, compared to 15 percent of assistant U.S. attorneys and 21 percent of federal defenders. *Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness*, 37. Ninety-one percent of male federal practitioners surveyed in the Eighth Circuit were in private practice settings, compared to 74 percent of female attorneys. *Eighth Circuit Gender Fairness Task Force*, 45. Women of all colors and men of color are overrepresented in the public sector of the bar in the Second Circuit. *Report of the Working Committees to the Second Circuit Task Force*, 164.

40. The Ninth Circuit Gender Bias Task Force found that while circuit-wide, women were represented on bench and bar committees in numbers that matched their presence in the federal bar, some local district committees contained no women or far fewer than chance would predict. Ninth Circuit Gender Bias Task Force, *Effects of Gender in the Federal Courts*, 789. The Third Circuit found fewer women serving on criminal justice (CJA) panels, and as arbitrators and mediators in district courts, than the numbers of women practicing in that circuit would lead one to expect. *Third Circuit Task Force*, 1443, 1452. The Second Circuit found that women of all colors received 16 percent of fee-bearing appointments and men and women of color received 3.5 percent of such appointments, although they comprise 22 percent and 7 percent of federal practitioners, respectively, in that circuit. Significantly, women received 25 percent of unrenumerated appointments, and attorneys of color received 17 percent of such appointments. *Report of the Working Committees to the Second Circuit Task Force*, 193–95.

41. *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force,* 239.

42. *D.C. Circuit Task Force Project,* Vol. 2, app. G.2, 10. See also *Third Circuit Task Force,* 1611 (noting that "numerous minority attorneys indicated that minorities are not well represented in appointments made by judges within the Third Circuit. They interpreted this lack of representation as bias and suggested that it fostered a perception within minority communities that such bias exists"); *Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness,* app. C, 2.56–2.58 (finding that all attorneys, regardless of color, reported serving on special committees and in fee-generating positions infrequently but noted that some attorneys believe that opportunities for attorneys of color to serve varies in some districts).

43.See, e.g., Ninth Circuit Gender Bias Task Force, *Effects of Gender in the Federal Courts,* 789 (the Federal Bar Association "is perceived to be the ultimate men's club in this district").

44. Ibid., 790–92.

45. Ibid., 787. See also *Eighth Circuit Gender Fairness Task Force,* 127 (finding that "professional exclusion" was a topic "of frequent comments by female attorneys, many of whom not only found it discomforting, but also feared that it results in, or is symptomatic of, actual gender bias in decision making").

46. Ninth Circuit Gender Bias Task Force, *Effects of Gender in the Federal Courts,* 802 (Table 3.9). In contrast, only 2 percent of male criminal practitioners and 1 percent of male civil practitioners reported losing a case because of gender bias. When asked for reasons that "important cases" were assigned to men, male practitioners were more likely to offer reasons based on level of expertise and qualifications of the attorney, while women were more likely to offer as reasons that such cases needed a "heavy hitter" or "aggressive counsel." Ibid., 804–5.

47. Sixteen percent of the female attorneys surveyed in the D.C. Circuit reported losing an assignment while 9 percent reported gaining an assignment for reasons "associated with gender." In contrast, less than 2 percent of male attorneys reported either losing or gaining an assignment because of gender. *Report of the Special Committee on Gender to the D.C. Circuit Task Force,* 1735. Eleven percent of African American attorneys reported losing an assignment while 9 percent reported gaining an assignment for reasons associated with race or ethnicity. Of white attorneys surveyed, less than 2 percent reported losing an assignment and 1 percent reported gaining an assignment because of their race or ethnicity. *D.C. Circuit Task Force Project,* Vol. 2, app. G.2, at 14-15 (responses to questions 15 and 16).

48. Ninth Circuit Gender Bias Task Force, *Effects of Gender in the Federal Courts,* 824.

49. Ibid., 816–17.

50. Deborah Hensler, "Studying Gender Bias in the Courts: Stories and Statistics," 45 *Stanford L. Rev.* 2187, 2191 (1993).

51. D.C. Circuit Task Force Project, Vol. 2, app. G.2, at 66.

52. Massachusetts Supreme Judicial Court Commission to Study Racial and Ethnic Bias in the Courts, *Final Report: Equal Justice: Eliminating the Barriers* (1994), 3.

53. *Eighth Circuit Gender Fairness Task Force,* 133.

54. *A Report of the Perceptions and Experiences of Lawyers, Judges, and Court Employees Concerning Gender, Racial and Ethnic Fairness in the Federal Courts of the Second Circuit (Baruch Report to the Second Circuit Task Force)* (1997), reprinted in 1–2 *Annual Survey of American Law* 415, 450 (1997).

55. See, e.g., *Third Circuit Task Force,* 1405; *Eighth Circuit Gender Fairness Task Force,* 133; *Baruch Report to the Second Circuit Task Force,* 466 (Table 15); *D.C. Circuit Task Force Project,* Vol. 2, app. G.2 at 34-36, app. D.2 (responses to question 28).

56. Ninth Circuit Gender Bias Task Force, *Effects of Gender in the Federal Courts,* 810; *Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness,* app. C, 2.9; *Eighth Circuit Gender Fairness Task Force,* 129; *Baruch Report to the Second Circuit Task Force,* 452.

57. Ninth Circuit Gender Task Force, *Effects of Gender in the Federal Courts,* 812.

58. *D.C. Circuit Task Force Project,* Vol. 2, app. D.2 (responses to question 43). More than twenty reports describe how women as witnesses sometimes face special hurdles of credibility, and how women as parties find their claims undervalued. Judith Resnik, "'Naturally' Without Gender: Women, Jurisdiction, and the Federal Courts," 66 *N.Y.U. L. Rev.* 1682 (1991).

59. See. e.g., Ninth Circuit Gender Bias Task Force, *Effects of Gender in the Federal Courts,* 811–30; *Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness,* app. C, 2.9-2.47; *Eighth Circuit Gender Fairness Task Force,* 126–36; *Third Circuit Task Force,* 1422–25, 1570–82; *Baruch Report to the Second Circuit Task Force,* 450–70.

60. *Eighth Circuit Gender Fairness Task Force,* 136.

61. Ninth Circuit Gender Bias Task Force, *Effects of Gender in the Federal Courts,* 830-31; *Baruch Report to the Second Circuit Task Force,* 442.

62. Hon. Laurence H. Silberman, "The D.C. Circuit Task Force on Gender, Race, and Ethnic Bias: Political Correctness Rebuffed," 19 *Harv. J. L. & Pub. Pol'y* 759, 765 (1996). The issue, of course, is not only what standards should be used to "define" bias in courts and hence what is "normal" for litigation but also whether such definitions should be relied upon when considering the experiences of litigants.

Judge Silberman's remark illustrates another difficulty task forces faced, that some judges are uncomfortable with quantitative data. His use of the phrase "statistically significant incidents of bias" is puzzling. Statisticians speak about statistically significant differences and statistically significant relationships to note those that occur more frequently than would be expected by chance; what is meant by "statistically significant incidents" is unclear.

63. See generally Vicki C. Jackson, "Gender Bias: What Judges Can Learn from Gender Bias Task Force Studies," 81 *Judicature* 15 (July-August 1997); *Implementation Directory,* 11–110 (including bench books, case law, codes of conduct, complaint procedures, handbooks, employment and court rules, jury instructions, newsletters, and videos); *Implementation Directory,* 111–42 (detailing changes in substantive law).

64. *Report of the Florida Supreme Court Gender Bias Study Commission* (1990); *Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission, "Where the Injured Fly for Justice"* Vol. 1 (1990), Vol. 2 (1991).

65. Fla. Stat. Ann. § 43.29 (West Supp. 1993, emphasis added) (enacted in 1991).

66. See, e.g., Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," 43 *Stan. L. Rev.* 1241 (1991).

67. Of 520 people, 1976–90, 20 percent were women, 11 percent minorities (8 black, 3 hispanic); 16 percent not identified but most likely white. Of 247 appointments, 1992–95, 36 percent women, 31 percent minorities (3 percent not identified); of 77 people of color, 30 women. (Review of records provided by the Florida system; on file with the authors.)

68. Model Code of Judicial Canon S 3 B(6) (Chicago: ABA, 1990).

69. *Implementation Directory,* 24.

70. The ABA added a new comment to its rule on misconduct that states:

> A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status" violates its code when "such actions are prejudicial to the administration of justice."

Model Rules of Professional Conduct, Rule 8.4, Comment 2 (amended 1998), also reprinted in *Implementation Directory,* 32.

71. New Jersey, Rules of Professional Conduct, Rule 8.4 (1990). For provisions from Florida, Rhode Island, Colorado, and Massachusetts, see *Implementation Directory*, 29–30.

72. For example, U.S. Dist. Ct. Rules E.D. Wash., Local Rule LR 83.4. (promulgated March 18, 1993) ("Judges, attorneys and judicial employees shall fulfill their roles under the highest standards of professionalism. Unjustified treatment will be avoided in both language and action. All are aware of the need to act without regard to gender, race, or religion or other inappropriate bias."). See also Arizona (U.S. Dist. Ct. Rules D. Ariz., Rule 1.20), Idaho (U.S. Dist. & Bankr. Ct., D. Idaho, Order 112), and the Northern District of Washington (U.S. Dist. Ct. Rules S.D.W. Va., LR Gen. PO. 3.02). Many state courts have promulgated rules on these issues as well.

73. See, e.g., ABA Model Code of Judicial Conduct, Canon 3B(6); ABA Model Code of Professional Responsibility, Rule 8.4, Comment 2.

74. See, e.g., *State v. Pace*, 425 SE 2d 73 (S.C.App. 1992), rev'd 447 S.E. 2d 186 (S.C. 1994). *Catchpole v. Brannon*, 36 Cal. App. 4th 237 (Ct. App. 1995); *Powell v. Allstate Ins. Co.*, 652 So. 2d 354 (Fla. 1995). Cases invoking task force reports are listed at *Implementation Directory*, 12–21.

75. See, e.g., *Mallory v. Harkness*, 895 F. Supp. 1556, 1560 (D. Fla. 1995).

76. An assistant U.S. attorney in the Central District of California sought sanctions after receiving a letter from her male opposing counsel who had just been disqualified. His letter included an attachment, announcing in bold print that "MALE LAWYERS PLAY BY THE RULES, DISCOVER TRUTH AND RESTORE ORDER. FEMALE LAWYERS ARE OUTSIDE THE LAW, CLOUD TRUTH AND DESTROY ORDER."

Federal district court judge Alice Marie Stotler found that the letter, while not a part of formal court proceedings, was a part of the litigation process and hence subject to the court's jurisdiction; further, she found it to violate California's professional rules (applied within that district to lawyers appearing before the federal courts), which prohibited lawyers from demonstrating "offensive personality." On appeal, however, the offending lawyer, assisted by the American Civil Liberties Union, successfully argued that the California prohibitions were overly vague, and therefore, unconstitutional limitations on free speech; the sanctions were reversed. See Matter of Swan, 833 F. Supp. 794 (D.Cal. 1993); rev'd *U.S. v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996).

77. "Statement of Disassociation by Circuit Judges Buckley, Ginsburg, and Randolph," in *D.C. Circuit Task Force Project*, Vol. 1, V-1.

78. See Silberman, "D.C. Task Force."

79. Statement by Orrin Hatch, *Cong. Rec* S.14691 (Sept. 29, 1995). The Grassley-Gramm-Hatch colloquy was followed by a counter-colloquy by nine democratic senators—Paul Simon, Edward Kennedy, Joseph Biden, John Kerrey, Bill Bradley, Dale Bumpers, Barbara Boxer, Frank Lautenberg, and John Glenn—and one member of the House (Constance Morella, of Maryland), expressing their support for federal task force work and reminding everyone of enacted legislation—The Violence Against Women Act—supporting these projects. 141 *Cong. Rec.* S18127-05 (Dec. 8, 1995); 141 *Cong. Rec.* E2302-02 (Dec. 6, 1995). The federal judiciary was nonetheless reluctant to distress members of Congress who opposed task force work. Bruce D. Brown, "Judiciary Won't Fight for Court Bias Studies," *Legal Times of Washington*, Nov. 13, 1995.

80. General Accounting Office, Letter to Hon. Charles E. Grassley, GAO/GGD-96-72R, *Circuit Bias Task Force Reports* (March 8, 1996). As indicated above, most task forces collected many forms of data, from self reports to analyses of demographic materials and sometimes case law. And most task forces took as a given that it is important for the nation's judicial systems to be perceived as fair by all citizens.

81. Robert T. Nelson, "Conservatives Make an Example of Seattle Lawyer: Past Liber Activism Haunts Federal Appeals Nominee," *Seattle Times* March 24, 1997, B1.

82. See *ABA Policy and Procedures Handbook* 3.

83. Submission by the co-chairs of the Lawyers' Committee for Civil Rights under La to Deputy Attorney General Eric Holder and proposing that a "Presidential Call to Action t the Legal Profession on Racial and Ethnic Justice," Jan. 15, 1999, 3. President Clinton re sponded by doing so the following July.

84. Federalist Society, Brochure on the Society's Program on Race and Gender Bias i the Legal System, Chicago, Aug. 6, 1995. The society's program was held concurrently with th ABA's Annual Meeting.

85. ABA Commission Issues Reports on State of Women in Law Schools, 1 *ABA WATC* (Aug. 1996).

86. A persistent and distressing finding of recent surveys on public attitudes toward th judicial system is that large fractions of Americans believe that minorities and the less affluer receive less favorable treatment than do others. See Deborah R. Hensler, Do We Need a Re search Agenda on Judicial Independence?," in "Symposium, Judicial Independence," 72 *S. Calif. L. Rev.* 707 (1999).

87. Linda Greenhouse, "47% in Poll View Legal System as Unfair to Poor and Minor ties," *New York Times*, February 24, 1999 A2, discussing ABA, perceptions of U.S. Justice Sy tem (1999) (also describing confidence levels varying with gender, race, and ethnicity).

13

Cultures of Commitment

Pro Bono for Lawyers and Law Students

DEBORAH L. RHODE

Mark Twain once reminded us that "to do right is noble: to advise others to do right is also noble and much less trouble for yourself." For too many lawyers, the issue of pro bono service reflects too wide a gap between professional rhetoric and professional practice. Bar ethical codes have long advised attorneys that they have obligations to assist individuals who cannot afford counsel. Yet the percentage of lawyers who actually do so has remained dispiritingly small. Recent estimates suggest that most attorneys do not perform significant pro bono work, and that only between 10 and 20 percent of those who do are assisting low-income clients. The average for the profession as a whole is less that a half an hour per week. Few lawyers come close to satisfying the American Bar Association's Model Rules, which provide that "a lawyer should aspire to render at least 50 hours of pro bono public legal services per year," primarily to "persons of limited means or to organizations assisting such persons."[1]

The bar's failure to secure broader participation in pro bono work is all the more disappointing when measured against the extraordinary successes that such work has yielded. Many of the nation's landmark public interest cases have grown out of lawyers' voluntary contributions. And many low-income clients, including homeless or disabled children, victims of domestic violence, and elderly citizens without medical care, have found that pro bono programs are crucial in meeting basic human needs. For lawyers themselves, such work is similarly important in giving purpose and meaning to their professional lives. Our inability to enlist more attorneys in pro bono service represents a significant lost opportunity for them as well as for the public.[2]

How best to narrow the gap between professional ideals and professional practice has been a matter of considerable controversy. Proposals for mandatory pro bono requirements have come and gone, but mainly gone. The bar generally has resisted mandatory service, although a few jurisdictions require lawyers to accept judicial appointments for limited categories of cases.[3]

This resistance to required contributions, coupled with the limited success of voluntary efforts, has encouraged more pro bono initiatives in law schools. By enlisting students early in their legal careers, these initiatives attempt to inspire an enduring commitment to public service. The hope is that, over time, a greater sense of moral obligation will "trickle up" to practitioners. With that objective, an increasing number of schools have instituted pro bono requirements for students. So too, in 1996 the American Bar Association amended its accreditation standards to call on schools to "encourage students to participate in pro bono activities and to provide opportunities for them to do so." These revised ABA standards also encourage schools to address the obligations of faculty to the public, including participation in pro bono activities.[4]

Despite such initiatives, pro bono still occupies a relatively marginal place in legal education. Although most law schools support pro bono in principle, only about 10 percent require any service by students and only a handful impose specific requirements on faculty. At some of these schools, the amounts demanded are quite minimal: less than twenty hours by the time of graduation. While almost all institutions offer voluntary programs, their scope and quality varies considerably. About a third of schools have no law-related pro bono projects or projects involving fewer than 50 participants. In others, only a small minority of students participate. As the Association of American Law School's Commission on Pro Bono and Public Service Opportunities has noted, most students graduate without pro bono legal work as part of their educational experience.[5]

What the bar could or should do to expand public service commitments is subject to increasing debate. This essay attempts to place that debate in broader perspective. Although much has been written about the value of public service, too little attention has focused on the factors that encourage it or on the role of law school programs. The effort here is to increase our understanding of what can promote a culture of commitment to pro bono work.

To that end, discussion begins with the rationale for pro bono involvement by lawyers. Attention then turns to the characteristics and experiences that foster charitable work among Americans in general, and among lawyers and law students in particular. Subsequent analysis centers on legal education's efforts to encourage such work and the strategies most likely to increase their effectiveness.

The Rationale for Pro Bono Services

The primary rationale for pro bono contributions rests on two premises: first, that access to legal services is a fundamental need, and second, that lawyers have some responsibility to help make those services available. The first claim is widely acknowledged. As courts and commentators have long recognized, the right to sue and defend

is a right that protects all other rights. Access to the justice system is particularly critical for the poor, who often depend on legal entitlements to meet basic needs such as food, housing, and medical care. Moreover, in a democratic social order, equality before the law is central to the rule of law and to the legitimacy of the state. Social science research confirms what political theorists have long argued: public confidence in legal processes depends heavily on opportunities for direct participation.[6]

In most circumstances, those opportunities are meaningless without access to legal assistance. Our justice system is designed by and for lawyers, and lay participants who attempt to navigate without counsel are generally at a disadvantage. Those disadvantages are particularly great among the poor, who typically lack the education and experience necessary for effective self-representation. For example, studies of eviction proceedings find that tenants with attorneys usually prevail; tenants without attorneys almost always lose. Inequalities in legal representation compound other social inequalities and undermine our commitments to procedural fairness and social justice.[7]

While most lawyers acknowledge that access to legal assistance is a fundamental interest, they are divided over whether the profession has some special responsibility to help provide that assistance and, if so, whether the responsibility should be mandatory. One contested issue is whether attorneys have obligations to meet fundamental needs that other occupations do not share. According to some lawyers, if equal justice under law is a societal value, society as a whole should bear its cost. The poor have fundamental needs for food and medical care, but we do not require grocers or physicians to donate their help in meeting those needs. Why should lawyers' responsibilities be greater?[8]

One answer is that the legal profession has a monopoly on the provision of essential services. Lawyers have special privileges that entail special obligations. In the United States, attorneys have a much more extensive and exclusive right to provide legal assistance than attorneys in other countries. The American bar has closely guarded those prerogatives and its success in restricting lay competition has helped to price services out of the reach of many consumers. Under these circumstances, it is not unreasonable to expect lawyers to make some pro bono contributions in return for their privileged status. Nor would it be inappropriate to expect comparable contributions from other professionals who have similar monopolies over provision of critical services.[9]

An alternative justification for imposing special obligations on lawyers stems from their special role in our governmental structure. As a New York report explained, lawyers provide "*justice,* [which is] . . . nearer to the heart of our way of life . . . than services provided by other professionals. The legal profession serves as indispensable guardians of our lives, liberties and governing principles. . . ." Because lawyers occupy such a central role in our governance system, there is also particular value in exposing them to how that system functions, or fails to function, for the have-nots. Pro bono work offers many attorneys their only direct contact with

what passes for justice among the poor. To give broad segments of the bar some experience with poverty-related problems and public interest causes may lay critical foundations for change.[10]

A final justification for pro bono work involves its benefits to lawyers individually and collectively. Those benefits extend beyond the enormous personal satisfactions that can accompany such work. Particularly for young attorneys, public service also can provide valuable training, trial experience, and professional contacts. Through pro bono assistance, lawyers can develop capacities to communicate with diverse audiences and build problem-solving skills. Involvement in community groups, charitable organizations, and public-interest activities is a way for attorneys to expand their perspectives, enhance their reputations, and attract paying clients. It also is a way for the bar to improve the public standing of lawyers as a group. In one representative ABA poll, nearly half of nonlawyers believed that providing free legal assistance would improve the profession's image.[11]

For all these reasons, the vast majority of surveyed lawyers believe that the bar should provide pro bono services. However, as noted earlier, only a minority in fact provide significant assistance and few of their efforts aid low income clients. The reasons do not involve a lack of need. Studies of low-income groups find that over four-fifths of their legal problems remain unaddressed. Moreover, these legal needs studies do not include many collective problems where attorneys' services are often crucial, such as environmental risks or consumer product safety.[12]

The bar's response to inadequate access alternates between confession and avoidance. Some lawyers simply deny the data. Unburdened by factual support, they insist that "no worthy cause" goes unassisted, given voluntary pro bono efforts, legal aid programs, and contingent fee representation. A more common approach is to acknowledge the problem of unmet needs but to deny that mandatory pro bono service is the solution. Opponents raise both moral and practical objections. As a matter of principle, some lawyers insist that compulsory charity is a contradiction in terms. From their perspective, requiring service would undermine its moral significance and compromise altruistic commitments. And as a practical matter, opponents argue that mandatory contributions would be inefficient or unenforceable.[13]

There are several problems with these claims, beginning with the assumption that pro bono service is "charity." As the preceding discussion suggested, pro bono work is not simply a philanthropic exercise; it is also a professional responsibility. Moreover, in the small number of jurisdictions where courts now appoint lawyers to provide uncompensated representation, no evidence indicates that voluntary assistance has declined as a result. Nor is it self-evident that most lawyers who currently make public service contributions would cease to do so simply because others were required to join them. As to lawyers who do not volunteer but claim that required service would lack moral value, David Luban has it right. "You can't appeal to the moral significance of a gift you have no intention of giving."[14]

Opponents' other moral objection to mandatory pro bono contributions in-

volves the infringement of lawyers' own rights. From critics' vantage, conscripting attorneys undermines constitutional rights of due process and just compensation; it is a form of "latent fascism" and "involuntary servitude."[15]

Neither the legal nor the moral basis for such objections is convincing. A well-established line of precedent holds that requirements of uncompensated service are permissible as long as the amounts are not unreasonable, and do not involve incarceration or physical force. From a moral perspective, demanding the equivalent of an hour a week of uncompensated assistance hardly seems like slavery. Michael Millemann puts the point directly: "It is surprising, surprising is a polite word, to hear some of the most wealthy, unregulated, and successful entrepreneurs in the modern economic world invoke the amendment that abolished slavery to justify their refusal to provide a little legal help to those, who in today's society, are most like the freed slaves."[16]

The stronger arguments against pro bono obligations involve pragmatic rather than moral concerns. Many opponents who support such obligations in principle worry that they would prove ineffective in practice. A threshold problem involves defining the services that would satisfy a pro bono requirement. If the definition is broad, and encompasses any charitable work for a nonprofit organization or needy individual, then experience suggests that poor people will not be the major beneficiaries. Most lawyers have targeted their pro bono efforts to friends, relatives, or matters designed to attract or accommodate paying clients. A loosely defined requirement is likely to assist predominately middle-class individuals and organizations such as hospitals, museums, and churches. By contrast, if a pro bono requirement is limited to the low-income clients given preferred status in the ABA's current rule, then that definition would exclude many crucial public-interest contributions, such as work for environmental, women's rights, or civil rights organizations. Any compromise effort to permit some but not all charitable groups to qualify for pro bono credit would bump up against charges of political bias.[17]

A related objection to mandatory pro bono requirements is that lawyers who lack expertise or motivation to serve underrepresented groups will not provide cost-effective assistance. In opponents' view, having corporate lawyers dabble in poverty cases is an unduly expensive way of providing what may be incompetent services. The performance of many attorneys required to accept uncompensated appointments in criminal cases does not inspire confidence that unwillingly conscripted practitioners would provide acceptable representation. Critics also worry that some lawyers' inexperience and insensitivity in dealing with low-income clients would compromise the objectives that pro bono requirements seek to advance.[18]

Requiring all attorneys to contribute minimal services of largely unverifiable quality cannot begin to satisfy this nation's unmet legal needs. Worse still, opponents argue, token responses to unequal access may deflect public attention from the fundamental problems that remain and from more productive ways of addressing them. Preferable strategies might include simplification of legal procedures, expanded governmental subsidies for poverty law programs, and elimination of the professional monopoly over routine legal services.

These arguments have considerable force, but they are not as conclusive as critics assume. It is certainly true that some practitioners lack skills and motivation to serve those most in need of assistance. But the current alternative is scarcely preferable. If a matter is too complex for a nonspecialist lawyer, then those who cannot afford any attorney are unlikely to do better on their own.

To be sure, providing additional government-subsidized legal aid by poverty law experts would be a more efficient way of increasing services than relying on reluctant inexperienced practitioners. But the budget increase that would be necessary to meet existing demands does not seem plausible in this political climate. Nor is it likely, as critics claim, that requiring pro bono assistance would divert attention from the problem of unmet needs. Whose attention? Conservatives who have succeeded in curtailing legal aid funds do not appear much interested in increasing representation for poor people through government-subsidized programs, whether or not pro bono services are available. And as earlier discussion suggested, exposing more lawyers to the needs of poverty communities might well increase support for crucial reform efforts.[19]

Moreover, mandatory pro bono programs could address concerns of cost-effectiveness through various strategies. One option is to allow lawyers to buy out of their required service by making a specified financial contribution to a legal aid program. Another possibility is to give credit for time spent in training. Many voluntary pro bono projects have effectively equipped participants to provide routine poverty-related services through relatively brief educational workshops and materials, coupled with accessible backup assistance.[20]

A final objection to pro bono requirements involves the costs of enforcing them. It would be difficult to verify the amount of time that practitioners reported for pro bono work or the quality of assistance that they provided. However, supporters of mandatory pro bono programs have responded with low-cost enforcement proposals that would rely heavily on the honor system. In the absence of experience with such proposals, their effectiveness is difficult to assess. But there is a strong argument for trying pro bono requirements, even if they cannot be fully enforced. At the very least, such requirements would support lawyers who want to participate in public interest projects but who work in organizations that have failed to provide adequate resources or credit for these efforts. Many of the nation's most profitable law firms and corporate employers fall into that category, and need to be nudged toward greater support. As to lawyers who have no interest in public interest work, a rule that allowed financial contributions to substitute for direct service could materially assist underfunded legal aid organizations.[21]

In any event, however the controversy over mandatory pro bono service is resolved, there is ample reason to encourage greater voluntary contributions. Lawyers who want to participate in public interest work are likely to do so more effectively

than those who are fulfilling an irksome obligation. How best to encourage a voluntary commitment to pro bono service demands closer scrutiny.

The Roots of Pro Bono Commitments

Despite the substantial scholarly literature and bar resources focusing on pro bono contributions, surprisingly little attention centers on their origins. Few systematic attempts have been made to explore the roots of commitment among public-interest and poverty lawyers, and virtually none have addressed pro bono participants. Nor have there been significant efforts to draw on research concerning altruism and volunteer activity among the general public for insights relevant to the legal profession. The discussion that follows aims to fill some of those gaps. From the limited evidence available, attorneys' public service contributions seem motivated by the same range of internal and external factors that account for voluntary assistance by other individuals. Internal factors include the personal characteristics, values, and attitudes that influence decisions to help others. External factors involve the social rewards, reinforcement, costs, and other situational characteristics that affect voluntary assistance.[22]

Of the internal factors linked to volunteer activity, two personal characteristics appear most significant: a capacity for empathy and a sense of human or group solidarity. Volunteers generally seem able to identify with others and with the particular group giving or receiving aid. Lawyers who assist civil rights, women's rights, and community organizations often report a feeling of responsibility to give something back to others with whom they share common bonds. For many individuals, voluntary assistance also is a way to express deeply felt ethical and religious commitments. Socialization of children and young adults clearly plays an important role in encouraging such characteristics. Students who participate in volunteer activities and observe such participation by parents or other admired role models are much more likely to volunteer later in life than individuals who lack such experiences. By the same token, those who observe others' failure to assist people in need also tend to replicate such behavior. In this, as in other contexts, actions speak louder than words and example works better than exhortation.[23]

External factors also influence the likelihood of pro bono assistance. The rewards and costs of such conduct play the most obvious role. Volunteer work is more likely if it presents opportunities to gain knowledge, skills, and personal contacts. Individuals are more willing to contribute if they feel competent to help or if they receive specific requests for aid. The chances of involvement similarly increase when individuals are asked to focus on others' needs and their own ethical obligations, or when they are given some face-to-face contact with the misery of others. As Arthur Koestler put it: "Statistics don't bleed." Personalized appeals work better than abstract references to unmet needs. But no appeal will be successful if the costs appear excessive in relation to benefits because of the time and resources required or the controversial nature of the activity.[24]

The influence of these factors on voluntary assistance is not, however, quite as straightforward as simple cost-benefit analysis might suggest. Social science research finds that individuals who receive praise or money for their assistance are less likely to volunteer aid in other settings than individuals who believe that their actions reflect altruistic concerns. As one study concluded, "extrinsic incentives can . . . decrease intrinsic motivations to help. A person's kindness, it seems, cannot be bought." So, too, research on civil rights activists indicates that individuals motivated by internalized values are more likely to make substantial and sustained contributions than individuals responding to external rewards.[25]

Taken together, these research findings offer some useful insights about pro bono programs for lawyers and law students. As a threshold matter, the capacities of even the best designed programs should not be overstated. By the time individuals launch a legal career, it is too late to alter certain personal traits and experiences that affect public-service motivations. If positive formative influences are lacking, pro bono programs may have limited impact.

Yet while the potential effectiveness of such programs should not be overestimated, neither should it be undervalued. The preceding research suggests that well-designed strategies by law schools, bar associations, and law firms could significantly affect pro bono commitments. A request for involvement, coupled with an array of choices that match participants' interests with unmet needs, is likely to increase participation. Providing direct exposure to the human costs of social problems could prove similarly important. Pro bono commitments can be further reinforced by educational efforts that focus attention on the urgency of unmet needs and on the profession's obligation to respond. Enlisting well-respected practitioners and faculty as mentors and role models could promote those efforts. Adequate training can enable individuals to offer competent services; it can also reward participation by enhancing skills that are of value in other practice settings. Other incentives could include awards, publicity, recognition on academic transcripts, and credit toward billable-hour requirements. The point of all these efforts should be to help participants see pro bono service as a crucial part of their professional identity.

A more complicated question is whether a mandatory or voluntary program would better serve this goal. On this point, social science research yields no definitive answers, although it clarifies relevant tradeoffs. A pro bono requirement offers several advantages. Most obvious, such a requirement would make failure to contribute services morally illegitimate, and reinforce the message that such contributions are not only a philanthropic opportunity, but also a professional obligation. Institutionalizing that obligation could force organizations to provide greater support for pro bono projects. And at least some individuals who would participate only under a mandatory but not voluntary program are likely to become converts to the cause and to offer services beyond what a minimum requirement would demand.

The potential disadvantages of compelling service are equally clear. By diminishing participants' sense that they are acting for altruistic reasons, a pro bono re-

quirement could erode commitment and discourage some individuals from contributing above the prescribed minimum. If adequate programs are not in place to train participants, accommodate their interests, and monitor their performance, the results could be unsatisfying for clients as well as participants.

Similar tradeoffs are likely under voluntary pro bono initiatives. Their advantages are readily apparent. By reinforcing participants' sense of altruism, such programs may foster deeper commitments than mandatory approaches. Those who volunteer also are likely to pick an area of practice where they are competent or wish to become so; those compelled to serve may lack adequate choices or motivation. On the other hand, if purely elective programs fail to attract widespread participation, they undermine the message that pro bono service is a professional responsibility. In the absence of a formal requirement, some law firms and law schools may remain unwilling to provide appropriate pro bono resources or credit. And individuals who might learn most from direct exposure to unmet needs may be least inclined to volunteer.

How these tradeoffs will balance out in particular contexts is difficult to predict. Any adequate assessment would require much more research on mandatory and voluntary programs than is currently available. However, experience with law school public service programs yields at least some basis for comparative evaluation.

Law School Pro Bono Programs

The primary justifications for pro bono service by law students parallel the justifications for pro bono service by lawyers. Most leaders in legal education agree that such service is a professional responsibility and that their institutions should prepare future practitioners to assume it. During the formative stages of their professional careers, future lawyers need to develop the skills and values that will sustain commitments to public service.[26]

So too, many law faculties share the enthusiasm for school-based public service programs that are gaining support among other educators. Such programs share a common premise: that students benefit in unique and valuable ways from community involvement, particularly if it is coordinated with their academic experience. On that assumption, a growing number of secondary schools are requiring community service, and many colleges and graduate schools are expanding support for such service as part of their curricular and extracurricular offerings. Supporters of these requirements believe that public-interest experiences encourage future public service, and that they have independent educational value.[27]

The limited evidence available supports these views, although more adequate research remains necessary. Law schools with pro bono requirements have found that between two-thirds and four-fifths of participants report that their experience has increased the likelihood that they will engage in similar work as practicing attorneys.

However, no systematic studies have attempted to corroborate such claims by comparing the amount of pro bono work done by graduates who were subject to law school requirements and graduates who were not. Nor have researchers tested the long-term impact of community service by non-law students, although the short term impacts are positive. From the evidence available on adult volunteer activity, the safest generalization seems to be that positive experience with pro bono work as a student will at least increase the likelihood of similar work later in life. Such experience can also break down the rigid distinctions that prevail in many law schools between students who are preparing for public interest careers and those who are not. These "on the boat or off the boat" dichotomies send the wrong message about integrating private practice and public service.[28]

Moreover, there are reasons to support pro bono programs in law school whatever their effects on later public service. Like other forms of clinical and experiential learning, participation in public service helps bridge the gap between theory and practice, and enriches understanding of how law relates to life. For students as well as beginning lawyers, pro bono work often provides valuable training in interviewing, negotiating, drafting, problem solving, and working with individuals from diverse backgrounds. Aid to clients of limited means exposes students to the urgency of unmet needs and to the law's capacity to cope with social problems. As former Tulane law school dean John Kramer notes, pro bono work can help "sensitize professionals to worlds they usually ignore." It also can increase their awareness of ethical issues and the human costs of professional inattention or incompetence.[29]

So too, pro bono programs can provide other practical benefits to law students and law schools. For many individuals, public service offers valuable career information and contacts. For their institutions, pro bono programs offer opportunities for cooperation with local bar organizations and for outreach to alumni who can serve as sources, sponsors, and supervisors for student projects. Successful projects can contribute to law school efforts in development, recruitment, and community public relations.[30]

Yet too many schools have failed to realize these benefits. As noted earlier, only about 10 percent of schools make pro bono service mandatory, and they differ widely in what counts as service and how much is required. Some schools impose minimal demands, such as 10 or 20 hours, which can include nonlegal as well as legal assistance. Administrators generally believe that meaningful experiences are most likely to come from more demanding programs such as those requiring 40 to 70 hours of law-related service. Voluntary pro bono programs also vary, and again some are quite limited. At about a third of schools, most student involvement appears confined to traditional charitable activities requiring minimal time commitments and no legal skills. Common examples include blood or food drives, tutoring programs, food kitchens, and fund-raising events. Although few schools appear to collect data on the amount of voluntary service, administrators estimate that only about a quar-

ter to a third of the law students participate and that average time commitments are quite modest. Some individuals' involvement remains at token levels and seems intended primarily as resume padding.[31]

Not all faculty or administrators seem interested in setting a better example. Most law schools do not even have a policy requiring or encouraging professors to engage in such work. Nor does expanding pro bono participation appear to be a priority. About two thirds of law school deans report satisfaction with the level of pro bono participation at their schools. Given the absence of involvement among most students and the absence of data concerning faculty, that level of satisfaction is itself somewhat unsatisfying. But it is scarcely surprising. Why should deans see a problem if no one else does?[32]

And at most institutions, no one is complaining. Nor is the extent of any problem plainly visible. Neither ABA accreditors nor AALS membership review teams ask for specific information on pro bono contributions by students and faculty, and as noted earlier, there appears little interest in collecting it. The absence of data on nonparticipation makes it easy to draw unduly positive generalizations from examples of involvement that are easily visible and especially vivid. High-profile cases involving faculty or student clinics, or widespread participation in fund-raising events for public-interest activities are likely to skew perceptions in positive directions. That tendency is reinforced by natural cognitive biases. When an event is particularly vivid, individuals generally overestimate its frequency, especially if it reflects well on themselves. Particularly memorable experiences with pro bono work may similarly lead faculty and students to overestimate their own voluntary contributions, particularly if they are not asked to record the actual time spent.[33]

So too, although most alumni and university administrators undoubtedly support public service in principle, they have not translated rhetorical support into resource commitments. Public-service initiatives generally seem less pressing than other budget items more directly linked to daily needs and national reputations. National rankings, such as those by *U.S. News and World Report,* have become increasingly important. And not only are pro bono opportunities excluded from the factors that determine a school's rank, they compete for resources with programs that do affect its position.

Meeting these challenges is no small task, and appropriate responses will vary across institutions. Designing an appropriate strategy will require schools to assess their own priorities, capacities, and constraints. However, for most law schools, the primary objectives of pro bono programs are likely to involve encouraging future public service and providing an effective educational experience for students. The difficulties in designing programs arise from the absence of consensus on how to achieve the first of these objectives, and on the conflicts involved in trying to achieve both.

If the principal goal of law school pro bono programs is to maximize future contributions by lawyers, it makes sense to maximize current contributions by students. And the simplest way to accomplish that is to require service. Such a requirement sends the message that pro bono work is a professional obligation. A mandatory program generally increases resources for public service programs and reaches individuals who would not voluntarily participate. By their own accounts, some of these individuals become converts to the cause, and most students report a greater interest in future pro bono service as a result of required participation.[34]

Yet as noted earlier, we lack sufficient information to determine whether mandatory programs yield greater pro bono contributions than well-supported optional alternatives. Some law school administrators are concerned that requiring participation will undermine the voluntary commitment that is necessary to sustain involvement after graduation. Such concerns are consistent with research indicating that internal commitment is more likely to encourage public-service contributions than external rewards or sanctions. Students who see pro bono work simply as one more graduation requirement are missing the message that program supporters intend.[35]

When participants are unmotivated or end up in unsuitable placements, the results can be counterproductive for all concerned. Program administrators do not lack for examples of students who feel ignored, bored, and unchallenged by their assignments. For these reluctant participants, client contact often confirms adverse stereotypes of poverty communities. For example, one Pennsylvania student's work on welfare appeals left him with disgust for undeserving "able bodied" claimants who were abusing the system. Experience with such participants can, in turn, breed resentment among client communities and discourage overburdened supervising lawyers from accepting further placements or from spending the time necessary to structure and monitor assignments. They prefer working with more motivated volunteers or students doing externships or clinical coursework. These preferences compound the challenges of finding appropriate placements for mandatory service, particularly if a school has small networks of local service providers and restrictive definitions of pro bono work. Under such circumstances, administrators often report difficulties identifying sufficient positions to accommodate students' time constraints, academic schedules, and skill levels.[36]

A further difficulty with mandatory pro bono programs involves the definition of public service. Should it include only legal work or only assistance targeted to the poor? What kind of assistance should qualify? Expansive definitions pose fewest problems in securing student placements. Nonlegal community service also can provide many participants with broader perspectives on their law-related work. But inclusive definitions also offer fewest opportunities for training students to meet the legal needs of underserved groups. And programs that settle for minimal contributions of routine assistance may reinforce an inadequate understanding of poverty-law practice, which is insufficiently responsive to the broader needs of low-income communities. By contrast, more restrictive criteria for pro bono service bump up against shortages in supervised positions and claims of ideological bias. Organizations such as the Washington Legal Foundation have criticized law schools' public-interest placements for being skewed in favor of liberal causes.[37]

Related problems involve enforcing pro bono requirements and ensuring the quality of client service provided. The difficulties of monitoring students and their supervisors have led some experts to prefer voluntary programs or school-based clinics. Other educators worry about the hypocrisy of having a faculty impose a requirement on students that it is unwilling to impose on itself. Of course, pro bono requirements serve educational values apart from reinforcing a service ethic and these provide some basis for including only students. But if the primary goal of a mandatory program is to create a culture of commitment to public service, then exempting faculty role models is counterproductive. As research on giving behavior makes clear, individuals learn more by example than exhortation. Unless and until faculty are willing to include themselves in any mandatory program, a voluntary alternative has obvious advantages.[38]

In short, the single most important insight from law school pro bono efforts is that no single model is clearly preferable. Different approaches create different tradeoffs, which vary at different institutions. Designing an appropriate program requires schools to assess their own resources, community networks, faculty support, and student culture. But certain strategies are critical no matter what kind of program is in place. The most obvious and essential initiatives must come from law school administrations. They need to provide adequate resources, recognition, and rewards for public service. At a minimum, as the Association of American Law Schools' Commission has recommended, law schools should seek to make available for every student at least one well-supervised pro bono opportunity and to insure that the great majority of students participate. Special awards and publications can honor outstanding pro bono service by students, faculty, and alumni. Law schools could also encourage faculty involvement by requiring professors to report their annual pro bono activities, and by valuing those activities in promotion and tenure decisions.[39]

Finally, and most important, pro bono strategies need to be part of a broader effort to deepen professional responsibility for public interests. As research on legal education has long noted, the "latent curriculum" at most law schools tends to erode these efforts. Issues of legal ethics and access to justice are not well integrated in core courses. Nor are such concerns reinforced by other aspects of law school culture. The low pay and tight market for public-interest work, coupled with high debt burdens, discourage many students from pursuing such careers and from focusing on problems of social justice during legal education.[40]

Traditional teaching methods can further erode professional ideals. Faced with a steady succession of hard cases and doctrinal ambiguities, students often conclude that there are no right answers: "there is always an argument the other way and the devil often has a very good case." The result is to leave many future lawyers "skeptical at best, cynical at worst." Legal work seems largely a matter of technical craft, divorced from the broader societal concerns that led many students to law school.[41]

Countering these forces is no modest enterprise; it is a central challenge of modern legal education. To create cultures of commitment, professional responsibility and access to justice must become higher priorities. Legal educators should focus more attention on the structural forces that undermine public interest values in legal practice. In short, pro bono efforts are only a modest part of the reform agenda facing legal education. And increases in lawyers' pro bono work are an equally modest part of the answer to the nation's unmet legal needs. Yet while we should not overstate the value of public-service initiatives, neither should we overlook their potential. Pro bono opportunities reinforce the profession's best instincts and highest aspirations. By making those opportunities a priority, lawyers and legal educators can translate rhetorical commitments into daily realities.

Notes

1. For an earlier discussion of the issues raised in this essay, see Deborah L. Rhode, "Cultures of Commitment: Pro Bono for Lawyers and Law Students," 67 *Fordham Law Review* 2415 (1999). See the sources cited in Tigran W. Eldred and Thomas Schoenherr, "The Lawyer's Duty of Public Service: More Than Charity?," 96 *West Virginia Law Review* 367, 384 (1994), and in Deborah L. Rhode, "The Professionalism Problem," 39 *William and Mary Law Review* 283, 291 (1998); ABA Model Rules of Professional Conduct, Rule 6.1 (1994).

2. Richard C. Reuben, "The Case of a Lifetime," *ABA Journal,* April 1994, 73. American Bar Association, *Promoting Professionalism* (Chicago: American Bar Association, 1998), 77–80.

3. The first draft of the ABA Model Rules of Professional Conduct required a minimum contribution of forty hours a year for no or reduced fees, or the financial equivalent. See *Legal Times of Washington,* Aug. 27, 1979, 45. For a history of unsuccessful state proposals, see Esther F. Lardent, "Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question," 49 *Maryland Law Review,* 78, 92–99 (1990); for local requirements, see Deborah L. Rhode and David Luban, *Legal Ethics* (Westbury, New York: Foundation Press, 1995), 792, 803–8.

4. John Kramer, "Law Schools and the Delivery of Legal Services—First, Do No Harm," in *Civil Justice: An Agenda for the 1990s,* (Esther F. Lardent, ed. Chicago: American Bar Association, 1989), 47, 57; American Bar Association, Recodification of Accreditation Standards 302 and 404 (1996).

5. William B. Powers, *Report on Law School Pro Bono Activities* (Chicago: American Bar Association, 1994), 2–5 (reporting pro bono requirements for faculty in 3 of 105 responding schools and noting the lowest minimum requirement for students as 8 hours); Association of American Law Schools, Commission on Pro Bono and Public Service Opportunities in Law Schools, *Learning to Serve: A Summary of the Findings and Recommendations of the AALS Commission on Pro Bono and Public Service Opportunities* (1994), 4; Association of American Law Schools, Commission on Pro Bono and Public Service Opportunities in Law Schools, Focus Group Interviews, June 1998.

6. See David Luban, *Lawyers and Justice: An Ethical Study,* (Princeton, N.J.: Princeton University Press, 1988) 252–55, 263–64; E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1998), 102–3.

7. Committee to Improve the Availability of Legal Services, "Final Report to the Chief Judge of the State of New York," reprinted in 19 *Hofstra Law Review* 755, 773, (1991) [hereinafter New York Report]; Access to Justice Working Group, State Bar of California, *And Justice for All: Fulfilling the Promise of Access to Civil Justice in California* (San Francisco: State Bar of California, 1996), 33–34.

8. Marvin E. Frankel, "Proposal: A National Legal Service," 45 *South Carolina Law Review* 887, 890 (1994); New York Report, 782.

9. David Luban, "Mandatory Pro Bono: A Workable (and Moral) Plan," 64 *Michigan Bar Journal* 280, 282 (1985). For example, nonlawyers in other countries can provide legal advice. See Deborah Rhode, "The Delivery of Services by Nonlawyers," 4 *Georgetown Journal of Legal Ethics* 209, 231 (1990).

10. New York Report, 782.

11. Donald W. Hoagland, "Community Service Makes Better Lawyers," in *The Law Firm and the Public Good,* (Robert A. Katzmann, ed., Washington, D.C.: Brookings Institution, 1995), 104, 109; Jack W. Londen, "The Impact of Pro Bono Work on Law Firm Economics," 9 *Georgetown Journal of Legal Ethics* 925, 926 (1996); Gary Hengstler, "Vox Populi," *ABA Journal,* September 1993, 61.

12. Eldred and Schoenherr, "The Lawyer's Duty," 390 and n. 94; see studies cited in Roy W. Reese and Carolyn A. Eldred, Institute for Survey Research, Temple University for Consortium on Legal Services and the Public, American Bar Association, *Legal Needs among Low-Income and Moderate-Income Households: Summary of Findings from the Comprehensive Legal Needs Study* 7–30 (1994); Rhode and Luban, *Legal Ethics,* 729.

13. See sources quoted in Deborah L. Rhode, "Ethical Perspectives on Legal Practice," 37 *Stanford Law Review* 589, 609 (1985); Vito J. Titone, "A Profession under Siege," *New York Law Journal,* May 20, 1992, 2; "Few Attorneys Willing to Help with 'Access' Problem," *California Bar Journal* November 1994, 16; Frankel, "National Legal Service," 890–91.

14. Esther F. Lardent, "Structuring Law Firm Pro Bono Programs: A Community Service Typology," in Katzmann, *The Law Firm and the Public Good,* 59, 83–84; see also Michael Millemann, "Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question," 49 *Maryland Law Review* 18, 64 (1990) (noting experience with Maryland bar that casts doubt on the assumption that contributions would decline); and Luban, "Mandatory Pro Bono," 283.

15. See sources cited in Rhode, "Ethical Perspectives on Legal Practice," 610; Eldred and Schoenherr, "The Lawyer's Duty," 391 and n. 97; and Frankel, "National Legal Service," 890.

16. *Family Division of Trial Lawyers v. Moultrie,* 725 f.2d 695 (D.C. Cir. 1984); *Stephen v. Smith,* 747 p.2d 816, 846–47 (Kan. 1987); Amendments to Rules Regulating the Florida Bar, Rules 1–3.1(a) and Rules of Judicial Admin. –2.065, 573 So. 2d 800, 805 (Fla. 1990). According to *Powell v. Alabama,* 287 U.S. 45, 73 (1932), "[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment." In *Sparks v. Parker,* the Alabama Supreme Court upheld an uncompensated assignment system for indigent criminal defense, and the Supreme Court summarily dismissed an appeal, *Sparks v. Parker,* 368 So. 2d 528 (Ala. 1979), appeal dismissed, 444 U.S. 803 (1979). Both *Powell* and *Sparks* involved criminal proceedings. In civil cases, because the courts have found no right to counsel except under narrow circumstances, the scope of judicial appointment powers is less clear. The Supreme Court reserved decision on the issue in one case involving interpretation of federal statutory authority. *Mallard v. United States District Court for the Southern District of Iowa,* 490 U.S. 296, 310 (1989). For the moral objections, see Millemann, "Mandatory Pro Bono," 70.

17. Philip R. Lochner Jr., "The No Fee and Low Fee Practice of Private Attorneys," 9 *Law and Society Review* 431, 442–46 (1975); Esther F. Lardent, "Pro Bono in the 1990s," in *Civil Justice: An Agenda for the 1990s* (Esther F. Lardent, ed., Chicago: American Bar Association, 1989), 423, 434; Carrol Seron, *The Business of Practicing Law* (Philadelphia: Temple University Press), 129–35.

18. Roger C. Cramton, "Mandatory Pro Bono," 19 *Hofstra Law Review* 1113, 1137 (1991); Frankel, "National Legal Service," 890; Report of the Committee to Review the Criminal Justice Act, January 29, 1993, reprinted in 52 *Criminal Law Reporter* 2265 (March 1993).

19. For a representative overview of conservatives' position, see Jonathan R. Macey, "I All Pro Bono Work Helps the Poor," *Wall Street Journal,* December 30, 1992, A7.

20. John Greenya, "Partners in Justice: Mentoring in the Pro Bono Program," *Washing Lawyer,* May–June 1997, 26–28; Eileen J. Williams, "PSAC in Action," *Washington Law* May–June 1996, 36–38.

21. For objections, see Ted R. Marcus, "Letter to the Editor," *California Lawyer,* Aug 1993, 12; and Cramton, "Mandatory Pro Bono," 1128. For proposals, see Luban. "Mandat Pro Bono," 280; Marc Galanter and Thomas Palay, "Let Firms Buy and Sell Credit for Bono," *National Law Journal,* September 6, 1993, 17. For inadequacies among firms and c porate law departments see David E. Rovella, "Can the Bar Fill the LSC's Shoes?" *National L Journal,* August 5, 1996, A1.

22. For the most comprehensive research effort, and discussion of the absence of st work, see Carie Menkel-Meadow, "Causes of Cause Lawyering," in *Cause Lawyering* (Aus Sarat and Stuart Scheingold, eds., New York: Oxford University Press, 1998), 31, 38. For fluential factors, see, e.g., Richard Bently and Luana G. Nissan, *Roots of Giving and Serv* (Indianapolis, Ind.: Center on Philanthropy, 1996), 9; Jane J. Mansbridge, "On the Relati of Altruism and Self-Interest," in *Beyond Self-Interest,* (Jane J. Mansbridge, ed., Chicago: U versity of Chicago Press, 1990), 133–34; Neera Kapur Badhwar, "Altruism Versus Self-Int est: Sometimes a False Dichotomy," in *Altruism* (Ellen Frankel Paul, Fred D. Miller Jr., a Jeffrey Paul, eds., New York: Cambridge University Press, 1993), 90, 93; Margaret S. Cla "Introduction," in *Prosocial Behavior* (Margaret S. Clark, ed., Newbury Park, Calif.: Sa 1991). For lawyers, see Reuban, "Case of a Lifetime;" Lochner, "No Fee and Low Fee Pr tice;" David Rosenhan, "The Natural Socialization of Altruistic Activity," in *Altruism a Helping Behavior* (Jacqueline R. Macaulay and Leonard Berkowitz, eds., New York: Acaden Press, 1970), 251.

23. For empathy and group identification, see Samuel P. Oliner and Pearl M. Oliner, *Altruistic Personality* (New York: Free Press, 1988), 165–67, 173–75; Menkel-Meadow, "Cau of Cause Lawyering," 39; David Horton Smith, "Determinants of Voluntary Association P ticipation and Volunteering: A Literature Review," 23 *Nonprofit and Voluntary Sector Quarte* 243, 251–52 (1994); David B. Wilkins, "Two Paths to the Mountain Top? The Role of Le Education in Shaping the Values of Black Corporate Lawyers," 45 *Stanford Law Review* 19 1996–2002 (1993). For ethical commitments and moral identity, see Robert Coles, *Call of S vice: Witness to Idealism* (Boston: Houghton Mifflin Co., 1993), 91; E. Gil Clary and Mark Sn der, "A Functional Analysis of Altruisn and Prosocial Behavior: The Case of Volunteerism," Clark, *Prosocial Behavior,* 119, 125; Jerzy Karylowski, "Two Types of Altruistic Behavior: Doi Good to Feel Good or to Make the Other Feel Good," in *Cooperation and Helping Behavi Theories and Research* (Valerian J. Derlega and Janusz Grzelak, eds., New York: Academic Pre 1982), 397, 410. For socialization, see Joan E. Grusec, "Socialization of Altruism" in Cla *ProSocial Behavior,* 9, 13; Virginia Hodgkinson et al., *Giving and Volunteering in the Unit States,* (Washington D.C.: Independent Sector, 1996), 12–13, 87–88; Rosenhan, "The Natu Socialization of Altruistic Activity,"; and Gil Clary and Jude Miller, "Socialization and Situ tional Influences on Sustained Altruism," 57 *Child Development* 1358, 1359, 1365–66 (198 For observation of others' behavior, see Bibb Latane and John M. Darley, *The Unresponsive B stander: Why Doesn't He Help* (New York: Appleton Center Crofts, 1970), 38, 41, 90; and Alf Kohn, *The Brighter Side of Human Nature* (New York: Basic Books 1990), 68.

24. Clary and Snyder, "A Functional Analysis of Altruism," 125; Clark, *Prosocial Behavi* 119, 125; Smith, "Determinants of Voluntary Association," 251–52; Coles, *The Call of Servi*

93–94; Menkel-Meadow, "The Causes of Cause Lawyering," 59 n. 57; Mansbridge, "On the Relation of Altruism and Self-Interest," 137; Bently and Nissan, *Roots of Giving and Serving*, 8, 109–10; Nancy Eisenberg, *Altruistic Emotion, Cognition, and Behavior*, (Hillsdale, N.J.: Laurence Erlbaum, 1986), 207; Oliner and Oliner, *The Altruistic Personality*, 135–36. For exposure to need, see Kohn, *The Brighter Side*, 71; Hoffman, "Empathy and Prosocial Activism," 82; Janusz Reykowski, "Motivation of Prosocial Behavior," in *Cooperation and Helping Behavior*, 358–63; Arthur Koestler, "On Disbelieving Atrocities," in *The Yogi and the Commissar* (New York: Macmillan, 1945), 92.

25. C. Daniel Batson, Jay Coke, M. L. Jasnoski, and Michael Hanson, "Buying Kindness: Effect of Extrinsic Incentive for Helping on Perceived Altruism," 4 *Personality and Social Psychology Bulletin* 86, 90 (1978). Kohn, *The Brighter Side of Human Nature*, 202–3; Clary and Miller, "Socialization," 1367. For civil rights activity, see Rosenhan, "The Natural Socialization of Altruistic Activity," 263–67.

26. Ninety-five percent of deans responding to the AALS survey agreed that "[I]t is an important goal of law schools to instill in students a sense of obligation to perform pro bono work during their later careers." AALS Commission, *Learning to Serve*. See Thomas J. Schoenherr, Thomas M. Quinn, and Roslyn Myers, "The Fordham Model: Student Initiated Projects for the Public Interest," unpublished, 1999, on file with *Fordhan Law Review*, 2.

27. Some commentators distinguish between "community service learning" and "community service volunteering." The former term refers to service that is directly integrated into students' coursework. The latter term refers to volunteer activity that is not part of the formal curriculum. See Daniel F. Perkins and Joyce Miller, "Why Community Service and Service-Learning? Providing Rationale and Research," *Democracy and Education*, Fall 1994, 11–12. See Dirk Johnson, "Volunteers: Now That's an Order," *New York Times*, Sept. 13, 1998, E2; Dennis D. Hirsh and Suzanne Goldsmith, "Community Service Builds Citizenship," *National Law Journal*, Feb. 5, 1996, A19; Jeremy Cohen, "Matching University Mission with Service Motivation: Do the Accomplishments of Community Service Match the Claims?" 1 *Michigan Journal of Community Service Learning* 98 (1994).

28. For surveys, see John Kramer, "Mandatory Pro Bono at Tulane Law School," National Association for Public Interest Law, *Connection Closeup*, Sept. 30, 1991, 1–2; Committee on Legal Assistance, "Mandatory Law School Pro Bono Programs: Preparing Students to Meet Their Ethical Obligations," 50 *The Record*, 170, 176 (1995); AALS Focus Group Interview, Chicago, June 24–25, 1998; AALS Commission, Focus Group Interviews, Chicago; Kimberly M. Allen, "The University of Pennsylvania Public Service Program, Alumni Survey" (unpublished paper, 1994); Gregory B. Markus, Geoffrey B. Hazard, and David C. King, "Integrating Community Service and Classroom Instruction Enhances Learning: Results from an Experiment," 15 *Educational Evaluation and Policy Analysis* 410, 413 1993); and Cohen, "Matching University Mission with Service Motivation," 98, 103.

29. Law School Affinity Group, *From the Classroom to the Community: Enhancing Legal Education through Public Service and Service Learning* 5 (Washington, D.C.: Corportation for National Service, n.d.); Kramer, "Mandatory Pro Bono," 1.

30. Committee on Legal Assistance, "Mandatory Law School Pro Bono Programs," 174–75, 177. In the AALS survey, over 90 percent of deans agreed that pro bono activities had provided valuable good will in the community, and two-thirds felt that such work had proven similarly valuable with alumni. AALS, *Learning to Serve*.

31. AALS Focus Group Interviews, Chicago and Los Angeles. The few published references do not quantify the amount of pro bono service contributions provided.

32. AALS, *Learning to Serve*.

33. Richard Nisbett and Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (Englewood Cliffs, N.J.: Prentice-Hall, 1980), 54; David O. Meyers, *The Pur Happiness* (New York: W. Morrow, 1992), 110–12.

34. Kramer, "Mandatory Pro Bono;" Committee on Legal Assistance, "Mandator Bono," 176; AALS Focus Group Interviews, Chicago and San Francisco.

35. Pamela DeFanti Robinson, "Insurmountable Opportunities or Innovative Cl The Pro Bono Experience at the University of South Carolina Law School, 42 *South Ca Law Review*, 959–71 (1991); Kohn, *Brighter Side*, 202–3; Batson et al., "Buying Kindness,

36. Allen, "University of Pennsylvania Public Service Program Alumni Survey," Robinson, "Insurmountable Opportunities," 969.

37. Washinton Legal Foundation, *In Whose Interest? Public Interest Law Activism Law Schools* (Washington, D.C.: Washington Legal Foundation, 1990), 45; Alan M. Slot "Forced Pro Bono for Law Students Is a Bad Idea," 1 *Boston University Public Interest Law nal*, 199, 202–3 (1991).

38. For quality, see New York Report, 773; and Commission on the Future of the Profession and the State Bar of California, *The Future of the California Bar* (San Fran State Bar of California, 1995), 67. For faculty, see Saundra Torry, "On Public Service Issue fessors Urged to Teach by Example," *Washington Post*, January 7, 1991, F5. For social lear see Kohn, *Brighter Side*, 91; and Grusec, "Socialization of Altruism," 20–22.

39. AALS, *Learning to Serve*, 4. The Appleseed Foundation, *Sowing the Seeds of Ju Law Schools and the Public Interest* (Washington, D.C.: Appleseed Foundation, 1997 Robinson, "Insurmountable Opportunities," 964; AALS Focus Group Interviews, San cisco; Schoenherr, Quinn, and Myers, "The Fordham Model."

40. See Rhode and Luban, *Legal Ethics*, 906–8; Robert V. Stover, *Making It and Bre It: The Fate of Public Interest Commitment during Law School* (Urbana: University of Ill Press, 1989), 43–67; and Robert Granfield, *The Making of Elite Lawyers: Visions of Law S at Harvard and Beyond* (New York: Routledge, 1992), 178–83. For the absence of curricul tegration, see Deborah L. Rhode, "Into the Valley of Ethics: Professional Responsibility Educational Reform," 58 *Journal of Law and Contemporary Problems* 139 (1995).

41. Stewart Macaulay, "Law School and the World Outside the Doors" (working p 1982), 25; Jay Feinman and Marc Feldman, "Pedagogy and Politics," 73 *Georgetown Law nal* 875, 878 (1985).