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Legal Ethics as a Means to Address the Problem of Elite Law Firm Non-Diversity

Akshat Tewary†

Elite law firms have historically been highly segregated on the basis of race against the favor of Blacks, Hispanics, and other minorities. Indeed, the legal profession on the whole has a rich history of discrimination. For instance, the American Bar Association (ABA), the most prominent of all bar associations, was initially formed as a voluntary association of white men. In 1912, the “inadvertent” conferral of ABA admission to three black men precipitated great turmoil within the ranks of the ABA, and ultimately led to a requirement that the membership applications of all future candidates for admission declare the applicant’s race. Until it was finally abandoned in 1963, this policy of racial

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1. Much of the scholarship on the issue of law firm diversity has focused on elite firms, whose clients are often Fortune 500 corporations. Although the designation of “elite” status is hardly objective, it is practical to conflate such status with having a large number of attorneys working at a firm. See Lewis A. Kornhauser & Richard L. Revesz, Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt, 70 N.Y.U. L. REV. 829, 854 n.58 (1995) (defining elite firms as those that the National Law Journal lists as the 250 largest in the country). Why should the profession care about the problems of elite law firms? As J. Cunyon Gordon points out, large law firms often exert “a massive influence that is economically, politically and culturally disproportionate to their numbers,” and many of the decisions litigated by these firms shape the course of the law. J. Cunyon Gordon, Looking Backward: Painting By Numbers: “And, Um, Let’s Have a Black Lawyer Sit at Our Table”, 71 FORDHAM L. REV. 1257, 1263-64 (2003) (internal footnote omitted).

2. The usage of racial categories in this article mirrors the usage of such terms in the source materials, which include the U.S. Census and law review articles, inter alia. Furthermore, such source materials rarely address law firm diversity with respect to individual racial/ethnic groups in any great detail. Consequently, the article generally focuses on firm diversity for minorities as a whole.

3. See Gordon, supra note 1, at 1274.

4. See id.
identification acted as a virtual bar to black membership due to the voting power of Southern members of the ABA Board of Governors.⁵

In this Article I argue that the best way to understand law firm non-diversity is to view it as the unhappy result of otherwise rational economic decision-making. Unlike most regular businesspeople, lawyers are constrained by ethical considerations.⁶ Thus, the doctrines of legal ethics can be utilized to motivate law firms (and the lawyers that compose them) to dismantle their racially segregated makeup. Part I introduces the problem of minority non-integration in elite law firms by arguing that such firms, and the profession in general, are not racially diverse. Part II exposes the flaws in the conventional quality- and interest-based explanations for the problem. Parts III and IV provide alternative—and—accurate, methods of understanding elite firm non-diversity; Part III discusses the traditional discrimination paradigm; and Part IV presents the issue from an economic perspective. Part V argues that legal ethics can and should be deployed to achieve diversity in these firms. It applies two models of lawyer professional responsibility—the public interest model and the client-centered model—to the problem of law firm non-integration. Under both of these models, elite law firms have an ethical duty to take affirmative steps to integrate themselves racially. I propose that the ABA recognize this duty by amending the Comments to the Model Rules of Professional Responsibility to recognize the need for firm diversity.

PART I: THE PROBLEM OF LAW FIRM SEGREGATION

A. Current Lack of Diversity Among Law Firms

Several important commentators have recognized the significant lack of diversity in the field of law, and have called for action to resolve it.⁷ To address this issue, the ABA created a Task Force on Minorities in the Legal Profession, which issued a set of recommendations and best practices that would improve law firm diversity.⁸ In Miles to Go 2000: Progress of Minorities in the Legal Profession, the ABA’s Commission on Racial and Ethnic Diversity in the Profession reported numerous disturbing statistics that demonstrate the gravity of the diversity situation.⁹

⁵. See id. at 1275.
⁸. See RHODE & LUBAN, supra note 7, at 49.
⁹. ELIZABETH CHAMBLISS, ABA COMM’N ON RACIAL & ETHNIC DIVERSITY IN THE
The field of law is already one of the least integrated professions in the country. In fact, the ABA found that only two professions, the natural sciences and dentistry, feature less diversity than law. For example, whereas African Americans and Hispanics comprised 14.3% of all accountants, 9.7% of physicians, and 9.4% of university professors in 1998, they made up a mere 7.5% of all lawyers. Another report indicates that, in 1996-1997, African Americans received 7.36% of all law degrees granted for that school year, even though they comprised almost 13% of the U.S. population at that time. The case of Asian American representation in the law is somewhat special in that Asian Americans are actually slightly overrepresented, but an analysis of Asian American representation across the professions still suggests a relatively lower presence in the law. The Asian American population according to the U.S. Census 2000 was 4.2% of the national population. According to statistics compiled by the U.S. Department of Education, in 1999-2000, Asian Americans received 10.7% of all professional degrees granted that year, including 18.8% of dentistry degrees, 17.3% of medicine degrees, 20.1% of pharmacy degrees, but only 6.4% of law degrees. Thus, although Asian Americans were overrepresented in virtually every profession, such overrepresentation was smallest in the law.

These statistics are an already troubling disapproval of commitment to diversity in the legal profession as a whole. Unfortunately, the nation’s elite law firms, in particular, suffer even more acutely from non-integration than the legal profession at large. Indeed, the Law School Profession, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (2000).

10. Id. at ix.
12. See CHAMBILSS, supra note 9, at ix.
17. Although one might be inclined to chalk up the disparity to disinterest among Asian Americans towards the law, I suggest below that something more may be at work.
18. Gordon, supra note 1, at 1258. Again, my usage of “elite” follows the legal community’s perceived equation of law firm size and elite status. See supra note 1. This is a fair if somewhat inexact equation, given that many “partners of large corporate law firms are among the elite class in the U.S.” and that “power and influence accompanies large law firm partnership...” U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N (EEOC), DIVERSITY IN LAW FIRMS, (2003) [hereinafter EEOC] (citing Christine M. Beckman & Damon J. Phillips, Interorganizational Determinants of Promotion: Client Leadership and the Promotion of Women Attorneys (Aug. 26, 2003) (unpublished manuscript)), available at http://www.eeoc.gov/stats/reports/diversitylaw.
Admissions Council’s research confirms that the number of minorities in private practice is disproportionately lower than their number in law schools. According to a survey conducted by David B. Wilkins and G. Mitu Gulati, minorities constitute 17.2% of the lawyers employed by government agencies in the Chicago area. By contrast, they found that minorities make up a mere 3.6% of the large Chicago firms. The disparity is starker at managerial levels: they found that minority lawyers make up 19.5% of supervisors in the government agencies, but only 1.6% of the partners in the elite law firms they had surveyed. Unless one is prepared to assume that the government’s lawyers are of a lower caliber, these numbers demonstrate that qualified minority lawyers are “out there,” but are underutilized. These statistics are confirmed by more recent research conducted by the National Association for Law Placement (NALP), an organization that surveys the nation’s largest law firms annually. The research indicates that, although almost 30% of the country is minority, attorneys of color comprise 15.06% of associate positions and a mere 4.32% of partner positions at major law firms. In fact, 43% of the offices of surveyed firms had no minority partners at all.

It is true that some progress has been made in firm diversity in recent times as compared to years ago. However, there is evidence that this

19. See LOLLIS, supra note 13, at 57. Interestingly, the number of women at large in private practice is proportional to the number of female law students. Id. This only highlights the lack of gains made by minorities in private practice.


21. Id.

22. Id.


24. See LOLLIS, supra note 13, at 1.

25. See Press Release, NALP, Women and Attorneys of Color Continue to Make Only Small Gains at Large Law Firms (Nov. 5, 2004) [hereinafter NALP, Women and Attorneys of Color Continue], at http://www.nalp.org/press/minrwom04.htm. Although this report observes an increase in minority representation from the year before, these gains were actually very modest. In 2002, “attorneys of color lagged in their representation,” comprising 14.27% of associates and 3.71% of partners at large law firms. Press Release, NALP, Presence of Women and Attorneys of Color in Large Law Firms Continues to Rise Slowly But Steadily (Oct. 3, 2002), at http://www.nalp.org/press/minrwom02.htm. This means that at a typical 250-member law firm, there was an increase of approximately 2 minority associates and 1 minority partner from 2002 to 2004.

26. NALP, Women and Attorneys of Color at Law Firms—2002, at http://www.nalp.org/nalpresearch/0104res.htm. Interestingly, the largest of the elite firms seem to have taken a lead in hiring minority attorneys. NALP reports that in 2002, minorities comprised 16.9% of associates at firms with over 500 attorneys, while the average among surveyed firms was 14.3%. NALP, Women and Attorneys of Color 2002 Summary Chart, at http://www.nalp.org/nalpresearch/mw02sum.htm (last visited Feb. 10, 2005). On the one hand, this highlights that such firms are relatively more committed to minority hiring. See id. On the other hand, this also indicates that for average-sized elite firms (most elite firms), the number of minorities is actually smaller than the figure reported by NALP.

27. See Gordon, supra note 1, at 1257-58. For example, a study by Professor Elizabeth Chambliss of ninety-seven elite firms across the country found a minority representation rate of 3.6% in 1980. Elizabeth Chambliss, Organizational Determinants of Law Firm Integration, 46 AM. U. L. REV. 669,
progress can oftentimes be ephemeral; as minorities take one step forward, they seem to take another one back. For example, a 2003 NALP study on associate retention found that 29.6% of male minority associates left within 28 months of starting, as compared to 21.6% of men overall, and 68% of minority males left within 55 months, as compared to 52.3% of men overall.28 Similarly, 64.4% of female minority associates left within 55 months, as compared to 54.9% of women overall.29 The ABA confirmed this trend by finding that over 50% of minority associates at law firms leave within three years.30 There is evidence that minorities suffer such high attrition rates partly because they feel social and professional isolation, and because they are not given quality work assignments.31 Thus, there is a real risk that, recent gains in hiring notwithstanding, a significant number of minorities at elite firms face difficulty in achieving something more than token advancement. This puts the contrast between the 15.06% figure for minority associates and 4.32% for minority partners, cited above, in startling perspective. These problems are more pronounced for female attorneys of color, who are even less likely than their male counterparts to begin their careers in private practice.32

Numerous other commentators have echoed these observations, finding that problems of diversity are especially distressing among elite law firms.33

B. The Insufficiency of Advances in Law School Diversity to Address Firm Diversity

Over the last two decades, and certainly compared to fifty or one hundred years ago, there has generally been an increase in the number of


28. EEOC, supra note 18 (citing NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., KEEPING THE KEEPERS II: MOBILITY AND MANAGEMENT OF ASSOCIATES (2003)).

29. Id.

30. CHAMBLISS, supra note 9, at ix.

31. Id. at 7; see infra text accompanying notes 114-135.

32. GITA Z. WILDER & BRUCE WEINGARTNER, LAW SCHOOL ADMISSION COUNCIL, DATABOOK ON WOMEN IN LAW SCHOOL AND IN THE LEGAL PROFESSION 8 (2003). Coupled with the LSAC's finding that female private practitioners are proportional in number to female law students, see LOLLIS, supra note 13, at 57, this leads to the interesting logical conclusion that non-minority women are disproportionately more likely to enter into private practice than their number in law school would suggest.

minorrors enrolled in American law schools.34 Ostensibly, these improvements obviate the need for elite firms to concern themselves with diversity in their ranks, under the assumption that increased law school diversity must translate to increased elite law firm diversity. However, evidence indicates that this assumption is flawed for two reasons. First, increases in law school enrollment do not directly translate to increases in the legal profession: according to a survey conducted by NALP, of survey time, 78.9% of the white members of the class of 2000 had found full-time legal employment, as compared to 72.8% of their minority classmates.35 Secondly, even though improvements in law school diversity over the last half-century have led to appreciable gains by minorities in certain aspects of legal practice (such as in government, academia, and the judiciary), the “segment of the profession that seems to have the greatest resistance to the waves of change... is the nation’s elite law firms.”36 For example, a study of the job attainment of University of Michigan Law School graduates from 1970-1996 found that, among the 1990s cohort, 35.7% of minority students took first jobs with firms of over 150 lawyers, as compared to 55.9% of white students.37 Thus, the mere fact of increased law school diversity since the advent of the civil rights era should not be seen as a repudiation of the need for continued efforts to rectify the problems of diversity inherent to these firms, simply because firm diversity has not correlated directly with school diversity.

Furthermore, even though the famous Bakke standard for diversity in admissions has been in effect for a quarter of a century,38 some disparities


36. Gordon, supra note 1, at 1258.


38. In 1978, a 5-4 majority of the Supreme Court held in Regents of the University of California v. Bakke, 438 U.S. 265, 320 (1978), that public universities were to be proscribed from the usage of rigid numerical quotas in fashioning their admissions programs, but that such universities were still permitted the “competitive consideration of race.” This ruling allowed law schools and other institutions of higher learning to institute diversity-seeking admissions policies that utilized race as a factor, and the increase in the number of minority law students over the last two decades can be attributed largely to these policies. See Jonathan R. Alger, American Association of University Professors, Bakke—Still Breathing, But Barely (1998), at http://www.saaup.org/publications/Academe/1998/98jtaajabakk.htm (stating that colleges and universities have been relying on Powell’s opinion in Bakke for two decades in forming their diversity-based admissions programs). Bakke's holding has great significance to virtually all universities, not just to public universities. This is because the vast majority of private colleges and universities receive federal funding, and Title VI of the 1964 Civil Rights Act prohibits schools receiving federal funding from discriminating by race. 42 U.S.C.
in the racial composition of law schools continue to persist today.\textsuperscript{39} In 1999, minorities comprised 19.3\% of graduates of ABA-accredited law schools,\textsuperscript{40} far short of the roughly 30\% one should expect based on the 2000 Census.\textsuperscript{41} An analysis of admission rates by race/ethnicity indicates that, even though diversity is typically considered as a factor by law schools, a white applicant still enjoys a greater statistical chance of gaining admission, as compared to Black, Latino, Asian American, and other minority applicants.\textsuperscript{42} Thus, it would be inaccurate to assume that diversity-based law school admissions initiatives have led to a level playing field. In fact, there is some evidence that the gains of the past may be coming to a halt.\textsuperscript{43} According to the findings of the ABA, in 1999, the number of minority law school students and graduates decreased for the first time in almost fifteen years.\textsuperscript{44} Although enrollment has increased slightly since 1999,\textsuperscript{45} it is clear that the forward momentum in minority representation has leveled off, such that consistent improvements of the past have been replaced by the status quo of incomplete diversity in law schools in the present. The prospect for continued gains in law school diversity is itself on tenuous grounds, and it is therefore an uncertain and undependable basis for ameliorating firm diversity. Accordingly, elite firms cannot, in good conscience, complacently rely on law school diversity alone to effectuate integration within their ranks.

**PART II: THE INVALIDITY OF THE “LACK OF INTEREST” AND “POOL PROBLEM” DEFENSES OF CURRENT HIRING PRACTICES**

One might contend that the explanation for the lack of law firm diversity is obvious: the actual cause is that many minorities are simply not interested in or qualified for that type of work or work environment. Proponents of these views likely see America as an egalitarian meritocracy, and feel that the ills of racism ended with the civil rights movement.\textsuperscript{46}


39. WILLIAM C. KIDDER, SOC’Y OF AM. LAW TCHR’S. (SALT), AFFIRMATIVE ACTION IN HIGHER EDUCATION: RECENT DEVELOPMENTS IN LITIGATION, ADMISSIONS AND DIVERSITY RESEARCH 17 (2001), at http://www.saltlaw.org/affirmative.pdf (noting that disparities that advantage white applicants have existed throughout the post-*Bakke* era).

40. See LOLLISS, supra note 13, at 39.

41. See id. at 1.

42. KIDDER, supra note 39, at 17.

43. See Russell L. Hom, *Moving Forward*, SACRAMENTO LAWYER, May 2001, at http://www.sachar.org/members/saclawyer/may01/forward.html (contending that the number of minorities graduating from law school, being appointed to the judiciary, and advancing in law firms may be decreasing).

44. See CHAMBLISS, supra note 9, at ix.

45. LOLLISS, supra note 13, at 31.

Minorities have only themselves and their pathological cultures to blame for their lack of integration into elite law firms. The adoption of beneficial values such as hard work and discipline should be enough to overcome the effects of any putative racism. Proponents of this view suffer from a "myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." Those who see the lack of minorities at elite firms as a function solely of lack of quality or interest lose sight of the continued presence of structural discrimination in American legal institutions.

The interest argument suffers from the logical fallacy of "begging the question." When applied to law firm diversity, it assumes that the non-presence of minorities in law firms necessarily means they are disinterested in working there, even if qualified. However, there is no reason to think that minorities are systematically or intrinsically disinclined to take lucrative and high paying jobs at elite law firms. As Vicki Shultz has argued, where a certain group has been historically discriminated against, one should look askance upon assertions that disparate employment opportunities can be explained away as stemming from a mere lack of interest. A more plausible explanation is that discrimination and its effects continue to persist, and are to blame. By suggesting that minorities are not in elite firms because they choose not to be, the lack of interest argument legitimates and reinforces hiring criteria and expectations that deprive minority applicants of that choice. Thereby, the argument "negate[s] the very choice" it purports to describe.

There is also some statistical evidence that the interest argument is overstated. In a study of job preferences of students at nine law schools, David Chambers found that African American and Latino students at only one of the nine schools were less likely than white students to take job...
offers at large firms.\textsuperscript{56} Thus, the lack of diversity cannot be explained by disinterest or aversion to big-law practice.

Another non-explanation is that many minority applicants are simply not qualified to work at big-name law firms.\textsuperscript{57} Many law firms have deployed this rhetoric of the "pool problem," arguing that the pool of qualified law graduates of color is too small.\textsuperscript{58} However, firms typically define "quality" on the basis of easily visible signals such as grades and law review membership, which are imperfect approximations of substantive lawyering skill.\textsuperscript{59} What makes a law student candidate truly "qualified" for a position at a law firm? Certainly, factors such as speaking ability, analytical ability, ability to persevere despite economic disadvantage and other setbacks, leadership skills, practical intelligence, and commitment to the community should be subsumed into the definition of "qualified." Such factors should be material to the ultimate hiring decision, but when firms refer to the inadequate pool of "qualified" minorities, they refer above all to grades and other signals.\textsuperscript{60} It is troubling that proponents of the "pool problem" single out race for attack using the casuistry of "merit," often overlooking non-academic bases of lawyerly merit.

The validity of the "pool problem" has also been controverted by statistics that show that the percentage of minorities attending the nation's top law schools (presumably the warehouses of "quality") has been considerably higher than the percentage of minorities at firms.\textsuperscript{61} These findings are important because they contradict the argument, posited by the likes of Thomas Sowell, that racial disparities in employment can be attributed to cultural deficiencies and a lack of discipline and dedication.\textsuperscript{62} This argument is rendered irrelevant here because one cannot be lazy and incompetent and still gain admission to one of the nation's top law schools. Yet, something is holding minorities back from elite law jobs even when they have reached this level of achievement.

Certainly, modern science has disproved the notion that some minorities are biologically less intelligent than others.\textsuperscript{63} Given this

\textsuperscript{56} David L. Chambers, \textit{The Burdens of Educational Loans: The Impacts of Debt on Job Choice and Standards of Living for Students at Nine American Law Schools}, 42 J. LEGAL EDUC. 187, 201 (1992) (addressing the connection between law students' debt burden and first job choices); see also Wilkins & Gulati, \textit{Institutional Analysis}, supra note 20, at 508 ("If anything, blacks appear to be more interested in starting work at a corporate firm that whites.").

\textsuperscript{57} See Knapp & Grover, \textit{supra} note 33, at 305-06 (dispelling the lack of qualified applicants myth).

\textsuperscript{58} See Wilkins & Gulati, \textit{Institutional Analysis}, supra note 20, at 497 n.5.


\textsuperscript{60} See Knapp & Grover, \textit{supra} note 33, at 305-07.

\textsuperscript{61} See Wilkins & Gulati, \textit{Institutional Analysis}, supra note 20, at 504.

\textsuperscript{62} See SOWELL, supra note 47, at 42-47.

\textsuperscript{63} See, e.g., Am. Ass'n of Physical Anthropologists, \textit{AAPA Statement on Biological Aspects of
scientific truth, and given that truly qualified minority lawyers are “out there” and interested in working in law firms, it would be difficult to argue that racially discriminatory hiring practices and other aspects of big-firm culture are not an important factor in creating the disparities in elite law firm composition.

If, as I have argued above, law firm non-diversity cannot be properly explained via the rhetoric of “quality,” exactly what is holding minority attorneys back? Before attacking the lack of diversity in elite law firms, one must understand the processes and dynamics that create and contribute to it. In the next section, I argue that the problem of law firm non-diversity can be largely explained by either of two viewpoints. The first attributes non-diversity to unconscious institutional racism on the part of elite law firms. The second model applies the economic theory of path dependence to law firm diversity. While I find both arguments theoretically convincing, the second is ultimately a more useful model when it comes to actually effecting change because it explains institutional behavior in a less confrontational way.

PART III: THE LOGIC OF UNCONSCIOUS DISCRIMINATION IN LAW FIRM HIRING AND THE INEFFECTIVENESS OF ANTIDISCRIMINATION LAW AS A REMEDY

A. Law Firms Utilize Institutionally Racist Hiring Practices

Given the nation’s blighted history when it comes to race relations and discrimination, it is not surprising that one could see distributive inequities as being the result of latent racist and discriminatory thinking. With respect to law firm diversity, one might argue that law firms have been unable to integrate themselves because they suffer from what is known as “institutional racism.” Institutionally racist organizations conduct themselves in ways that are facially fair and race-neutral, but have a disproportionately disadvantageous effect on minorities.64 Institutional racism is separate from the intentional racism of individuals, so that an institution can be racist, even if its members are not.65 It is important to recognize that institutional racism operates primarily on an unconscious level, and I would certainly not argue that the problem of law firm segregation could be attributed solely to conscious efforts to keep minorities out.66 Rather, I would argue that elite law firms adopt

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64. See Wilkins & Gulati, Institutional Analysis, supra note 20, at 509.
65. See id.
66. Of course, “it is likely that a non-trivial number of whites working in these institutions hold some of these [consciously racist] views.” Id. at 510. Also, it is possible that there are at least some firms that explicitly discourage the hiring and retention of minorities, although this type of overt discrimination would be difficult to prove. See, e.g., Judith Lichtenberg, Racism in the Head, Racism in
unconsciously racist hiring policies, and that these policies have the effect of maintaining law firms' segregated constitutions.

1. Initial Screening Phase of Law Firm Recruiting: The Primacy of Signals over Substantive Skill

In making their hiring decisions, law firms place inordinate importance on "signals" of lawyerly skill and merit, such as grades, law review membership, and law school status. These signals are used as an inexpensive and simple way to initially sort through a large applicant pool. More substantive indicators of merit, such as assessments of the student by professors and relevant course work in a practice area, are avoided simply because they are costly and require a more in-depth review of each candidate. However, law firms are presumably interested in hiring lawyers with substantive skills, and grades and other signals are only attenuated and limited approximations of substantive lawyering skill. For instance, oftentimes the courses that students take in law school do not prepare them substantively for the type of work they will do as lawyers, either because that subject is not taught in law school, or it is not taught with enough practical detail to be useful in praxis. Also, given that many law school courses culminate in a three or four hour exam despite the wealth of material covered during the course, law school grades may be a better predictor of mere exam-taking skills than of actual lawyering skill and knowledge. Other factors such as "course-shopping," and differences in grading standards by different professors and even different law schools further complicate the reliability of grades. Indeed, many lawyers have admitted that law school does a poor job of preparing students for successful practice. If these concerns are valid, academic success during law school may offer poor predictive value of a candidate's effectiveness as a lawyer. Not surprisingly, a study by James B. Rebitzer and Lowell J. Taylor found no statistical correlation between partner income and law school grades or law review membership.

Law firms' emphasis on signals is not just bad hiring practice; it has a discriminatory effect on minorities as well. In 1998, Wilkins and Gulati

the World, 12 REP. FROM INST. FOR PHIL. & PUB. POL'Y 3-5 (Spring/Summer 2002) (arguing that minorities conceptualize racism differently than non-minorities); Charles R. Lawrence III., The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987). Still, it would be simplistic and reductionist to ascribe the problem as it exists today solely to continued racial animus, even if that were the primary agent in minority lawyer disenfranchisement half a century ago.

68. Id.
69. Id. at 1219.
70. See id. at 1225.
71. Wilkins & Gulati, Institutional Analysis, supra note 20, at 526.
72. See id.
73. See Wilkins & Gulati, 3L Survey, supra note 59, at 1219.
conducted an extensive survey of over 1000 law students from ten law schools of differing reputations, and asked students to give their assessment of the emphasis that they thought employers placed on certain hiring criteria. To a statistically significant degree, they found that minority students perceive grades to play a less important role in the hiring process than white students do.

Here, perception must be separated from reality. The study says nothing about the grades that minorities actually receive, or the amount of relative emphasis or work they actually put into achieving high grades. Rather, it focuses on student expectations and perceptions of the hiring process. On the one hand, given the disparity in perception that the study finds, one might suspect that some minority students do not divert as much attention towards their own grades as whites, possibly focusing on other developers of lawyering skill, such as extracurricular and clinical activities or public interest advocacy work. In that case, white students would be at an advantage during the first phase on law firm recruitment (which screens applicants primarily on the basis of grades) simply because they placed a relatively greater emphasis on grades. However, as we have seen, grades are an incomplete indicator of success as a lawyer, and are not coterminous with substantive skill. Thus, law firms' preoccupation with them unfairly discriminates against non-minorities to the extent that they are disproportionately denied jobs due to grades. On the other hand, it is entirely possible that minority students actually place a relatively greater (or equal) emphasis on achieving high grades in their law school careers as compared to their white counterparts, but they still perceive grades to play a smaller role in the hiring process (as found by the study). In such a scenario, minorities would probably overemphasize their extracurricular or clinical experience during interviews, simply because of their (mis)perceptions of what is important in hiring. But in reality, grades are by far the most important factor in hiring, and so minorities would again be disadvantaged by the hiring process. In either case, regardless of minority law students' actual grades, the process disadvantages minority law students.

2. Interview Phase of Law Firm Recruiting: "Fitting In"

Once applicants have been screened on the basis of signals, they are interviewed. One might think that during the interview phase, candidates would be assessed on the basis of non-signal indicators of substantive skill.

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75. Wilkins & Gulati, 3L Survey, supra note 59, at 1217-20.
76. There was not enough data to create any further subdivisions based on race. Id. at 1223.
77. Id. at 1230.
78. Id.
79. See id. at 1225; Knapp & Grover, supra note 33, at 305-06.
80. See Knapp & Grover, supra note 33, at 305-07; Wilkins & Gulati, 3L Survey, supra note 59, at 1220, 1225.
However, according to Gulati and Wilkins, interviews almost never entail such a personalized investigation of a candidate’s substantive skill, but rather consist of generalized discussions about the candidate’s background and about the firm.\textsuperscript{81} Thus the discriminatory effect of the initial emphasis on grades is never ameliorated.

The interview phase of law firm recruiting presents another instance where law firm institutional racism manifests itself. During this phase, representatives of law firms interview potential candidates to see if they would “fit” into the firm.\textsuperscript{82} Needless to say, the standards for “fitness” are amorphous and subjective, and are not tightly correlated with quality.\textsuperscript{83} This lack of objectivity allows unconscious racist thinking to deny employment opportunities to those minorities who passed the initial screening, but simply did not “fit in.”\textsuperscript{84} In fact, the usage of these subjective criteria is the prime enabler of unconsciously racist decisionmaking.

One might dispute the relevance of racism in hiring decisions, but relevant scholarship clearly suggests that unconscious racism is likely to assert itself in a white law firm recruiter’s subjective judgment. For instance, Professor Charles Lawrence has described how members of the dominant group are likely to make decisions in line with popular stereotypes since these stereotypes are self-rewarding.\textsuperscript{85} Minorities are considered the out-group, and a white recruiter would have a subconscious incentive to reject a candidate from the out-group because it would reinforce his superiority.\textsuperscript{86} Ambiguous social situations are likely to be interpreted in line with these stereotypes, against the favor of minorities.\textsuperscript{87} For example, an off-color comment or joke by a minority applicant during an interview might be considered offensive, whereas the same comment made by a non-minority individual might be interpreted as evidence of an interesting personality. Lawrence further argues that when a racial category correlates with a trend, there is a tendency to exaggerate the correlation, and to disregard individual differences.\textsuperscript{88} For instance, on average, minority law school applicants score lower on the LSAT than white applicants.\textsuperscript{89} A law firm recruiter might overemphasize this correlation, and assume \textit{a priori} that every minority applicant would therefore be less qualified. In essence, there would be a rebuttable presumption that minority applicants would be inferior, whereas white applicants would be considered on a case-

\textsuperscript{81} Wilkins & Gulati, \textit{JL Survey}, supra note 59, at 1220-21.
\textsuperscript{82} Id. at 1220.
\textsuperscript{83} See Wilkins & Gulati, \textit{Institutional Analysis}, supra note 20, at 548.
\textsuperscript{84} Id.
\textsuperscript{85} Lawrence, supra note 66, at 337.
\textsuperscript{86} See id.
\textsuperscript{87} Id. at 339.
\textsuperscript{88} See id. at 337-39.
\textsuperscript{89} See \textit{WILDER}, supra note 16, at 18 (Table 14, showing mean LSAT by race/ethnicity). For instance, in 2000-01, white applicants scored higher, on average, than every other ethnic group, including Asians and “Others,” the next two highest-scoring groups.
by-case basis. The absence of minority lawyers in elite firms would also have a self-reinforcing effect, since a recruiter who had not come across many minority lawyers would correlate lawyer status with the norm of whiteness, and would therefore consider a minority applicant un-"fit" to be a lawyer.  

Generally speaking, corporate organizations are conservative structures that endeavor to remain static in terms of composition. In many white-dominated business organizations, exposure to members of a new race (such as Black, Hispanic, South Asian, etc.) creates psychic tension and anxiety in the minds of current employees. A minority candidate for a position at a non-minority firm is, quite simply, different. Thus, white members of such non-integrated environments have an incentive to eliminate this psychic tension, if possible. In terms of hiring in law firms, this translates into the proposition that recruiters from white-dominated law firms are likely to become subconsciously uncomfortable by meeting a qualified minority applicant, and are likely to resolve this discomfort by rejecting the applicant. Lastly, the psychological principle of cognitive dissonance probably applies in the context of law firm hiring; a white recruiter is unlikely to recognize unconscious racism in the recruiting process because that would create a sense of moral complicity in the recruiter's mind. 

Minorities are likely to be disadvantaged especially in cases where they are otherwise equally qualified as a white applicant. "Intangibles" are then likely to be determinative, and unconscious racism can unfairly advantage the white applicant in such cases. The ultimate decision often turns on minute issues such as appearance or demeanor, and these criteria are often racially coded. Quite simply, when subjective criteria are involved, institutional decision-making reflects unconscious racial biases, and this is what happens in law firm recruiting.

90. See Lawrence, supra note 66, at 341. The norm of whiteness is at work where, for example, a black person who is a lawyer is described as a "black lawyer," but a white lawyer is described as a "lawyer."

91. See David A. Thomas & Karen L. Proudford, Making Sense of Race Relations in Organizations: Theories for Practice, in ADDRESSING CULTURAL ISSUES IN ORGANIZATIONS: BEYOND THE CORPORATE CONTEXT 60 (Robert T. Carter ed., 2000) (finding that the costs of resisting dominant metaphors in the workplace were so great that few would risk such behavior and the concomitant ostracization). It is well known the elite law firms, in particular, are highly conservative in nature.

92. See id. at 61. Others have argued that this same anxiety also occurs in the minds of members of majority-white legal service organizations. See Paul E. Lee & Mary M. Lee, Reflections from the Bottom of the Well: Racial Bias in the Provision of Legal Services to the Poor, 27 CLEARINGHOUSE REV. 311, 314 (1993).

93. See Lichtenberg, supra note 66, at 3.

94. Lawrence, supra note 66, at 343.

95. See id.

96. See id.
If one were to accept, as the above analysis has suggested, that elite law firms unconsciously discriminate against minorities, thereby leading to disproportionately fewer minority attorneys working in these firms, a logical conclusion might be that federal employment discrimination law should be utilized to counteract and penalize these practices. However, Title VII has been largely unhelpful in combating non-overt forms of discrimination, both in general and with respect to law firms in particular. There is little reason to believe it could be of much utility to the cause for elite law firm diversity.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race (and other characteristics). If one were to accept, as the above analysis has suggested, that elite law firms unconsciously discriminate against minorities, thereby leading to disproportionately fewer minority attorneys working in these firms, a logical conclusion might be that federal employment discrimination law should be utilized to counteract and penalize these practices. However, Title VII has been largely unhelpful in combating non-overt forms of discrimination, both in general and with respect to law firms in particular. There is little reason to believe it could be of much utility to the cause for elite law firm diversity.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race (and other characteristics). A Title VII case can be brought on the basis of two theories: disparate impact or disparate treatment. Under a disparate treatment claim, the plaintiff seeks to prove that the employer intentionally discriminated against him on the basis of race, color, religion, sex, or national origin. The plaintiff has the burden of ultimately proving this discriminatory intent, although in some cases it can be established inferentially. By contrast, a disparate impact claim is (theoretically) easier to prove since it only requires a plaintiff to show that a facially neutral practice has a disproportionately adverse impact on a protected group (such as a racial group, a religious group, etc.). However, much of the usefulness of this doctrine has been eviscerated by recent cases that have required something akin to proof of discriminatory intent in disparate impact cases.

98. Barbara J. Flagg, Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking, 104 YALE L.J. 2009, 2016 (1995). The plaintiff must first prove a bona fide case by establishing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications,” McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). At this point, the defendant would have to show that there was a legitimate, non-discriminatory reason for the plaintiff's rejection, which the plaintiff could rebut as a mere pretext for discrimination. Id. at 802-05.
100. See Flagg, supra note 98, at 2019. After the plaintiff makes a prima facie case by showing that the facially neutral employment policy had a discriminatory effect, the defendant employer can defend itself by showing that the policy had a legitimate, job-related function. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Then, the plaintiff can show that this asserted business purpose was a pretext because alternative methods could achieve the same result, but with less harm. See id.
101. See Flagg, supra note 98, at 2023. Flagg argues that the similarity between disparate impact's tri-partite order of proof and that of disparate treatment “laid the foundation for deeper theoretical convergence” between the two theories of employment discrimination liability. Id. The case of Alexander v. Sandoval, 532 U.S. 275 (2001), is a troubling example of this trend. In Sandoval, the Supreme Court held that no private right of action exists for disparate impact claims under Title VI. Id. at 291. Title VI disparate impact claims are brought against government agencies or entities receiving federal funding. Id. As a result of Sandoval, private parties can now sue government agencies only on
It has been exceedingly difficult to prove discriminatory intent in cases where employment decisions involve subjective decision-making.\textsuperscript{102} As we have seen, aside from the usage of (ostensibly) objective signals to screen applicants, law firms make their hiring decisions largely based upon whether the candidate would make a good "fit" for the firm.\textsuperscript{103} This is necessarily an amorphous and subjective determination.\textsuperscript{104} Even if that determination were tainted by unconscious, institutional racism of the type I have described, a plaintiff would probably be unable to establish that discriminatory intent was the motivating and causative factor, as required by Title VII's disparate treatment theory.\textsuperscript{105} Moreover, the plaintiff would have no way of: (a) identifying the discriminatory criterion that was actually used by the recruiter; or (b) showing that reliance on that specific criterion, as opposed to other non-discriminatory criteria, caused his rejection in a particular case.\textsuperscript{106} Lawsuits against firms on the basis of a disparate impact theory would likewise be frustrated by the ambiguity of the hiring process. In a disparate impact claim, the plaintiff must assert, as part of its prima facie showing, that the rejected applicants who were allegedly discriminated-against were "qualified."\textsuperscript{107} A conclusive showing of this type is difficult to achieve when the very definition of qualification (or "fitting in") is uncertain and subject to personal whimsy. A disaffected candidate's attempts to establish her qualification for the job, for purposes of establishing a prima facie showing, would be unavailing because the defendant firm could summarily dismiss her candidacy on the basis that her personality or presentation did not fit, thereby making her unqualified for the position.

Title VII is especially ineffective because it is burdened by what Alan David Freeman has term the "perpetrator perspective." In his view, antidiscrimination law perceives discrimination not as a continuing, psychological process, but rather as an atomistic action or series of actions whereby perpetrators inflict harm upon victims.\textsuperscript{108} By focusing solely on inappropriate conduct (malevolent, overt racism), the antidiscrimination regime does little to address the underlying conditions of racial

\textsuperscript{102.} Wilkins & Gulati, \textit{Institutional Analysis}, supra note 20, at 586.
\textsuperscript{103.} See supra text accompanying notes 81-95.
\textsuperscript{104.} Id.
\textsuperscript{105.} See Wilkins & Gulati, \textit{Institutional Analysis}, supra note 20, at 585-86. Indeed, because institutional racism operates on an unconscious level, the law firm would probably vehemently deny, in absolute good faith, the presence of any discriminatory intent in its hiring policies.
\textsuperscript{106.} Flagg, \textit{supra} note 98, at 2027.
discrimination, such as disparities in money, housing, and in the case of elite law firms, jobs.\textsuperscript{109} Freeman would prefer if antidiscrimination law adopted a victim perspective, which would require affirmative efforts to change these discriminatory conditions directly.\textsuperscript{110} The perpetrator perspective is also problematic because it is undergirded by the principle of formal equality. The implication of the formal equality principle is that all people have equal opportunities to succeed in society, regardless of race, and that compensating those few individuals who are discriminated against by blatantly racist acts will ensure that society remains equal.\textsuperscript{111} Under this thinking, members of each race are all placed on an even level, and any distributive inequalities that ensue are attributable to merit and worth.\textsuperscript{112} And, the compensatory mechanism of Title VII can realign a victim of the occasional deviant act of discrimination with the equal playing field. Of course, this reflects a myopic view of race relations in America. As Kimberlé Williams Crenshaw has argued, even though society is now formally equal and no longer expressly organized around the principle of white supremacy, this condition of white supremacy continues to exist in terms of the distribution of goods, status, and prestige.\textsuperscript{113} Despite the salutary changes over the last few decades, America has not attained an even playing field for all races.

Antidiscrimination law, shackled by the perpetrator perspective, is unable to look beyond the simplistic formal equality doctrine, and is therefore of little use in combating unconscious institutional racism in law firm hiring. Both disparate treatment and disparate impact claims are inherently compensatory and reactionary in that they focus on redressing obvious wrongs and not on effecting positive change. Ideally, the antidiscrimination regime would be premised upon the victim perspective and would take issue with both overt discrimination and unconsciously discriminatory practices, such as law firm hiring, which systemically privilege white applicants. This would be more useful than haphazardly scrounging, under the perpetrator perspective, for examples of purposeful exclusion by law firms. However, until these laws are molded to adopt the victim perspective, they are of little use for the purpose of law firm integration.

\begin{enumerate}
\item[109.] See id.
\item[110.] Id.
\item[111.] Id. at 1054.
\item[112.] Id.; see also Gary Peller, \textit{Frontier of Legal Thought III: Race Consciousness}, 1990 DUKE L.J. 758, 770 (1990) (noting that the formal equality principle holds that “the cure for racism would be equal treatment on an individual level and integration on an institutional level . . . [and] [o]nce neutrality replaced discrimination, equal opportunity would lead to integrated institutions.”).
\end{enumerate}
1. Judicial Disinclination in the Area of Institutional Racism: The Case of Lawrence Mungin

Not surprisingly, courts have been averse to finding discrimination in the subjective decision-making of firms.\footnote{114} The case of Lawrence Mungin serves as an excellent example of antidiscrimination law’s inability to correct discriminatory practices at law firms.

Mungin was raised by a single mother in a Queens housing project, and eventually worked his way to Harvard College and Harvard Law School.\footnote{115} After working at other firms, Mungin was hired as a lateral by the Washington, D.C. office of Katten, Muchin & Zavis as a senior bankruptcy associate.\footnote{116} Mungin claimed that while working at Katten, he was mistreated on a frequent and continual basis.\footnote{117} For example, he was excluded from the bankruptcy practice group’s meetings even though he was a senior bankruptcy associate.\footnote{118} In one instance, the firm called in a white associate from another office to speak with a client about the firm’s bankruptcy practice, even though Mungin had had experience dealing with complex bankruptcy transactions at prior firms.\footnote{119} Despite being a seventh year associate with extensive experience in bankruptcy, Mungin was consistently given work at a second or third year associate level, and at times at a paralegal level.\footnote{120} In fact, Mungin was once called for an important meeting with a client, and was notified that his only role at the meeting would be to carry the overhead projector for a presentation.\footnote{121}

Mungin did not receive performance reviews on schedule, but the ones he did receive were generally approbatory.\footnote{122} Understandably, Mungin became dissatisfied with his treatment at Katten, and after being passed up for partner, he sued the firm on the basis of Title VII employment discrimination.\footnote{123} At the district court level, a jury trial was held, and the jury found that the firm had indeed discriminated against Mungin, and awarded him $1 million in compensatory damages and another $1.5 million in punitive damages.\footnote{124} After interpreting the evidence, the jurors admitted that the defense had an extremely weak case, and that they had decided to award punitive damages in order to make sure

\begin{itemize}
  \item \textbf{114.} Wilkins & Gulati, Institutional Analysis, supra note 20, at 586.
  \item \textbf{115.} Emily Barker, Invisible Man, AM. L.A.W., May 1996, at 65.
  \item \textbf{116.} See Wilkins & Gulati, Institutional Analysis, supra note 20, at 587.
  \item \textbf{117.} See Lateef Mtima, The Road to the Bench: Not Even Good (subliminal) Intentions, 8 U. CHI. L. SCH. ROUNDTABLE 135, 167 (2001) (describing the lack of diversity among the judiciary).
  \item \textbf{118.} Id. at n.101.
  \item \textbf{120.} Mtima, supra note 117, at 167 n.101.
  \item \textbf{121.} Id.
  \item \textbf{122.} See Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 1552 (D.C. Cir. 1997).
  \item \textbf{123.} See id. at 1550.
  \item \textbf{124.} Id. at 1550-51.
\end{itemize}
that it did not discriminate against other attorneys in the way it had against Mungin.125

However, two white judges on the D.C. Court of Appeals voted over a single dissent to overturn this decision, holding that no reasonable jury could have found that Mungin had been discriminated against in violation of Title VII.126 The court held that Mungin had indeed been mistreated, but that this was no different from the kind of mistreatment that some other white associates also experienced.127 For example, both Mungin and Stuart Soberman, a white bankruptcy associate, had failed to receive raises.128 Using this reasoning, the court held that the firm had legitimate, nondiscriminatory reasons for its treatment of Mungin, and he could proffer no countervailing evidence to render these reasons to be pretextual.129 This holding was clearly short-sighted because, given that most firms are likely to be majority-white, the mere fact that some whites were also mistreated says nothing about whether Mungin was or was not mistreated on the basis of race.130 For instance, Soberman may have been denied a raise for any number of reasons—such as his work ethic, his dedication to the firm, or the quality of his work—but those reasons would probably have no bearing on whether Mungin's failure to receive a raise was discriminatory in nature. This legal sidestepping by the court highlights one of the basic flaws of Title VII burden shifting. Once a defendant has offered any plausible business reason for the mistreatment (e.g., many associates were treated the same way), the onus is on the plaintiff to essentially prove that the defendant's offered reason was not the one that actually applied, which is an exceedingly difficult task unless there is an overt and obvious act of discrimination.

Another interesting part of the Mungin holding has to do with the question of whether Mungin was qualified. Mungin clearly had done complex bankruptcy work at his prior firms, and received good reviews for the work that he did at Katten.131 However, the work that he received at Katten was at the junior associate level or lower.132 Eventually, his hourly billing rate was even reduced from $185 to $125.133 Mungin was overqualified for the work he was doing, and the fact that his hourly rate

125. See Barker, supra note 115.
126. Mungin, 116 F.3d at 1558. Wilkins has pointed out that the judges acted somewhat out of bounds, since questions of fact, such as whether discrimination had occurred, have traditionally been left to juries. Wilkins, The Good Black, supra note 119, at 1936. Here the court substituted its own interpretation of the facts for that of the jury, without the benefit of a full trial.
128. Mungin, 116 F.3d at 1556.
129. Id. at 1558 n.4 ("Mungin either failed to establish a prima facie case or failed to offer any evidence showing that Katten's nondiscriminatory reasons were pretextual.").
130. See Wilkins, The Good Black, supra note 119, at 1951.
131. See also Wilkins, The Good Black, supra note 119, at 1931 (describing Mungin's law firm work experience prior to joining Katten).
132. See Mtima, supra note 117, at 167 n.101.
133. Mungin, 116 F.3d at 1552.
was reduced should suggest that he was treated unfairly. Interestingly, the
judge in the appellate court used this fact to draw the opposite conclusion. In the judge's view, Mungin's former rate of $185 "imperfectly" reflected his capabilities. This point further highlights the vagaries involved in a Title VII analysis, under which evidence can often be interpreted to reach opposite conclusions. Since the plaintiff in Title VII actions bears the ultimate burden of proof, only the most incontrovertible pieces of evidence will suffice to surpass this evidentiary manipulation.

Thus, where there is no "smoking gun" piece of evidence of discriminatory intent, Title VII claims are difficult to prove. In this respect, Title VII suffers from the perpetrator perspective, since only overt and obvious acts of racism end up being actionable. In the context of highly subjective law firm hiring decisions, Title VII's perpetrator perspective precludes its availability as a tool to integrate elite firms.

PART IV: THE LOGIC OF "PATH DEPENDENCE" AS APPLIED TO ELITE LAW FIRM DIVERSITY

The previous section highlights the unconscious discrimination at work in law firm hiring processes. In this part, I posit another framework that can serve as a useful tool to understand the systemic forces that contribute to the continued non-integration of elite firms: the economic theory of path dependence. Some key terms in this theory are first defined, and with this background, the theory is then applied to the case of firm diversity. Ultimately, the path dependence framework is the one that is likely to be more palatable, and consequently, more useful in bringing about diversity in big firms.

A. The Basics of Path Dependence Theory: Economies of Scale, Switching Costs, First-Mover Advantages and other Economic Mumbo Jumbo

The theory of path dependence is a concept that is borrowed from chaos theory, and it generally postulates that current events are shaped by past events, some of which may seem trivial in retrospect. Thus, the outcomes we are dealt are often not the result of our true preferences, but rather are the result of quirks of history. Applied to corporate law firms, path dependence shows that economic choices made by these firms, in the

137. See LaChance, supra note 136, at 289-90.
138. Id.
context of past discrimination, serve to reinforce racial non-integration regardless of intention.

Profit-seeking businesses conform their organizational behavior in accordance with the dictates of “path dependence” in order to achieve optimal results.\textsuperscript{139} In a path dependent market, the first competitor to gain even the slightest competitive advantage over the rest will eventually enjoy a monopoly over the entire market due to the workings of certain “barriers to entry.”\textsuperscript{140} One important barrier to entry is the phenomenon of “network effects.”\textsuperscript{141} Network effects are advantages any one consumer of a product gains from another consumer’s usage of the same type of product.\textsuperscript{142} For instance, as more people buy and use telephones, they become more valuable devices.\textsuperscript{143} In a path dependent market, the initial entrant benefits from network effects merely due to its initial size advantage.\textsuperscript{144} If these effects and other barriers to entry are strong enough, that initial advantage snowballs into an entrenched monopoly.\textsuperscript{145} Thus, the initial entrant can prevail regardless of its quality or competitive advantage.\textsuperscript{146}

The prototypical example of path dependence in economics literature has been the hegemony of the QWERTY typewriter layout.\textsuperscript{147} The first mass-produced, modern typewriters utilized this system, and it has been the dominant keyboard layout ever since.\textsuperscript{148} Thus, QWERTY benefited from the concept of “first-mover advantage,” which simply postulates that the first significant entrant to a new market enjoys an initial monopoly position in that market that is difficult to unseat.\textsuperscript{149} In 1936, August Dvorak patented the “Dvorak keyboard,” a typewriter layout that allowed a typist to achieve 20-40% improvements in speed over QWERTY.\textsuperscript{150} Nevertheless, the QWERTY layout prevailed over Dvorak and became the sole monopolist in the typewriter layout market.\textsuperscript{151} This is because certain “barriers to

\begin{itemize}
\item \textsuperscript{140} The term “barrier to entry” is important to monopoly and antitrust economics, and has been defined as “some source of disadvantage to potential entrants as compared with established competitors.” \textit{JOE S. BAIN, INDUSTRIAL ORGANIZATION} 239 (1959).
\item \textsuperscript{141} See Liebowitz & Margolis, \textit{ supra note} 136; \textit{Gregory J. Werden, Network Effects and Conditions of Entry: Lessons From the Microsoft Case, 69 ANTITRUST L.J. 87, 90-92 (2001)}.
\item \textsuperscript{142} Werden, \textit{ supra note 141}, at 89.
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{Id. at} 91.
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} \textit{LaChance, supra note} 136, at 291.
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} See \textit{Stanley M. Besen & Joseph Farrell, Choosing How to Compete: Strategies and Tactics in Standardization,} \textit{8 J. ECON. PERSP.} 117, 122 (1994).
\item \textsuperscript{150} See \textit{LaChance, supra note} 136, at 291.
\item \textsuperscript{151} See \textit{id. at} 292.
\end{itemize}
stifled the viability of Dvorak and other competitors. For instance, makers of the popular QWERTY enjoyed significant “economies of scale,”\textsuperscript{153} that is, production cost advantages resulting from larger size. Also, the QWERTY format benefited because, for most people, the “switching costs”\textsuperscript{154} were too high to justify a shift to the Dvorak system. Lastly, the communal benefits of a standardized and familiar typing format (“network effects”) made QWERTY ever more popular. QWERTY thus prevailed due to the path dependent nature of the market, which exhibited a first-mover advantage as well as barriers to entry in the form of economies of scale, switching costs, and network effects.

Scholars such as Professors Robert Cooter, Rich Meadows, and Daria Roithmayer have imported traditional monopoly theory’s analysis of profit-maximizing cartels into the realm of race theory, thereby suggesting that the dominant “racial cartel” (white lawyers, in the case of elite firms) can develop social norms and institutions to exclude and discriminate against other races for social and economic profit.\textsuperscript{155} In a similar vein, I argue that the economic theory of path dependence would be a useful model in explaining the case of white dominance in elite firms.

There is ample historical evidence that in the past, minority racial groups were denied entry into the legal profession.\textsuperscript{156} Thus, white lawyers had a “first-mover advantage”\textsuperscript{157} that resulted in their benefitting from an initial monopoly in the legal field, and in elite firms particularly.\textsuperscript{158}

One might wonder how elite firms, and the law in general, have managed to remain a monopoly while the rest of society has (mostly) diversified? Further, how does this theory comport with the “invisible

\textsuperscript{152} See Bain, supra note 140.

\textsuperscript{153} The Black’s Law Dictionary defines “economy of scale” as “[a] decline in a product’s per-unit production cost resulting from increased output” or the “savings resulting from the greater efficiency of large-scale processes.” Black’s Law Dictionary 553 (8th ed. 2004). In other words, a monopolist enjoys economies of scale if it pays less in production costs to produce a unit of output than a startup would pay. Thus, in the case of the QWERTY monopoly, the manufacturing and marketing facilities of QWERTY companies greatly overwhelmed the fledgling Dvorak companies, and so the former’s costs-per-unit were lower.

\textsuperscript{154} Switching to the Dvorak system would be very costly because this would require having to relearn typing.

\textsuperscript{155} For more on the theory and application of racial cartel theory, see Robert Cooter, Market Affirmative Action, 31 San Diego L. Rev. 133, 153-56 (1994); Daria Roithmayer, Barriers to Entry: A Market Lock-In Model of Discrimination, 86 Va. L. Rev. 727, 743-44 (2000) (applying Professor W. Brian Arthur’s theory of “feedback loops” to describe the lock-in benefits accruing to white law students and lawyers in general); Richard L. Abel, American Lawyers 40-73 (1989) (detailing the historical efforts of American lawyers to professionalize and create barriers to entry of new lawyers).


\textsuperscript{157} See supra note 149.

\textsuperscript{158} See Roithmayer, supra note 155, at 736 (“whites’ early anticompetitive behavior during Jim Crow segregation created a white monopoly on resources and opportunities in law schools.”).
hand” approach of traditional economic theory? After all, in classical economics, a monopoly is an unnatural condition that cannot survive in a perfectly competitive marketplace featuring equally or better-qualified competitors. There was discrimination in the past, but does that explain continued non-diversity? It could be argued that the white monopoly in elite firms would not continue to stand if lawyers of other races were actually qualified enough to make it to such firms. In this view, the problem is not the system, but the minority lawyers themselves.

However, the essential flaw in this argument is that the market for elite firm lawyers is not perfectly competitive, as the argument presupposes. Rather, numerous factors act as “barriers to entry” of non-white lawyers into the elite firm marketplace. In other words, the elite firm market does not feature a level playing field upon which all candidates can compete. Rather, certain barriers to entry—economies of scale, network effects and switching costs—have the collective effect of congealing white lawyers’ first-mover advantage into an enduring monopoly.

As monopolists, whites in elite firms enjoy the benefits of “network effects” that ensure their continued monopolistic dominance. A network effect can be defined as an added benefit that accrues to an entire group or network whenever that group increases in size. Imagine two identical telephones, marked A and B. Telephone A is a part of telephone system A, which connects together hundreds of telephones. However, Telephone B is only connected to a handful of other telephones, in system B. Due to System A’s larger size, Telephone A is more valuable than telephone B and is more likely to be used, even though both are otherwise identical. Thus, Telephone A benefits from a network effect. Oftentimes, getting hired by a law firm or being promoted from associate to partner is not based solely on merit but also on the contacts one has and who one knows. Due to the initial monopoly, whites in elite firms, as a group, have better access to influential contacts, informal relationships, and networking opportunities than minorities, and they are therefore at an advantage in gaining new

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159. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 164 (14th ed. 1992) (characterizing a monopoly situation as the extreme of imperfect competition).

160. See GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 16-17, 43-45 (2d ed. 1971) (arguing that where “Negro” and “White” workers are perfect substitutes in terms of quality, non-discriminating firms will expand relative to other firms due to lower costs); Richard A. Epstein, Standing Firm, on Forbidden Grounds, 31 SAN DIEGO L. REV. 1, 2 (1994) (“One tendency of competitive markets is to drive out inefficient forms of behavior, with discrimination as with anything else.”).

161. See supra note 141 and accompanying text.

162. See id.

163. See Wilkins & Gulati, Institutional Analysis, supra note 20, at 558 (“[B]lacks on average have less access to influential contacts and other informal networks that allow some other candidates to bypass the formal screening requirements.”).

164. See id. at 566 (“[F]irms look for two things when they select partners: legal ability and marketing potential.”).
business. Like in telephone system A, there is likely to be considerable activity and exchange in their network, simply due to its relatively larger size.

Law firms, unaware of the systemic forces of domination at work, internalize this networking advantage into pre-formed notions of minority candidates' diminished likelihood of success. The highly subjective “fitting in” interview process provides the backdrop in which these notions ultimately detract from a minority candidate’s chances of success. It is important to note that these pre-formed expectations are unfair because minority applicants are likely to be attuned to alternative networks of business that can be just as robust as those of non-minority applicants. Further, minority attorneys who are excluded on this basis are never given the opportunity to cultivate and co-opt existing connections within a firm.

Economies of scale are essentially advantages one competitor gains by virtue of being larger than another. One such advantage can be a reputational or marketing advantage. For instance, a Home Depot store would be more likely to attract a new customer than a “mom-and-pop” hardware store, due to the Home Depot’s relative size and visibility alone. This would be the case even if the mom-and-pop store offered the same quality of services. Likewise, due to the monopolistic dominance of whites in the law, white lawyers would find it easier to attract new business due to their relative dominance and visibility. Indeed, it can be argued that the very image of “lawyer” is white. I would ask the reader, in your mind, imagine what a lawyer looks like. Was the imagined lawyer white? Because of their numerical dominance, white lawyers are likely to be seen as more “lawyerly,” and as a consequence, are more likely to be seen as: (a) “fitting in” within a firm’s culture during interviews; and (b) capable of attracting business from new clients who themselves have pre-formed conceptions of a lawyer’s image.

Economies of scale are also defined more rigorously as cost advantages, which a competitor enjoys due to its size. These cost advantages come from having already paid for start-up or sunk costs early on. By way of analogy, the white legal establishment that dominates elite firms has already incurred the startup costs of creating an extensive and robust network of business contacts. This allows a white lawyer to expend fewer resources and energy in producing each additional dollar of business

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165. Id. at 558.
166. See supra note 153.
167. See Lawrence, supra note 66, at 341; see also supra note 90 and accompanying text.
168. Another consideration beyond the scope of this article is, was he a “he”? To be fair, the image of lawyer also is colored white because the vast majority of the country is white. However, this consideration only supports the proposition that non-white lawyers do not “seem” the lawyerly type.
169. See Roithmayr, supra note 155, at 744-45.
170. See id.
as compared to a minority lawyer. Each new client gained by a minority attorney would be hard-won, whereas a white attorney with extensive contacts could benefit from greater recommendations from her existing, relatively large client pool. Thus, economies of scale help to maintain the advantage that whites already enjoy, both by virtue of marketing advantages as well as production/cost advantages. As with network effects, firms can subconsciously construe the disadvantages of economies of scale against the favor of minorities while making hiring decisions.

White candidates for jobs at big firms also benefit from the effects of "switching costs." Elite law firms are averse to investing extra resources to seek, hire, and understand qualified minority lawyers, especially when there are plenty of white lawyers to fill the ranks. Elite firms are bureaucratic machines with solidified formalities and rules that remain as individuals come and go. Such a firm would incur significant transaction costs in adjusting its subjective ideologies and hiring framework to be more accommodative to minority applicants. Gulati and Wilkins argue that the work required of junior associates is often relatively simple and routine, and that a large number of lawyers would be capable of performing it. Thus, even if the current hiring framework disadvantages minorities, it adequately serves the firms' needs of finding legal "foot soldiers," and the firms do not incur additional inefficiencies as a result. Given this situation, it is easy to see why a firm would be reluctant to change its hiring paradigm and incur "switching costs" as a result. A firm would view it as economically rational to continue with the status quo and avoid these unnecessary costs, especially when its staffing needs are currently adequately met.

Even though the Civil Rights Act and other changes in society have removed many of the historical impediments to minority lawyers, path dependence theory suggests that whites might continue to enjoy a virtual monopoly in terms of elite law firm composition. In economic terms, a potential entrant into a path dependent market has no prospects for competing with the monopolist's economics of scale, absent a significant offsetting advantage. This offsetting advantage can come in the form of:

172. As Thomas and Proudford note, the psychic costs are high for a firm to hire a minority when its current composition is virtually all white. See Thomas & Proudford, supra note 91. In my application of path-dependence theory, these same psychic costs are the "switching costs" of shifting to a diversified makeup.

173. See Roithmayr, supra note 155, at 753; Thomas & Proudford, supra note 91, at 41.


175. See id.

176. This analysis tries to explain the economic thinking behind elite firms' continued non-diversity. However, as I suggest below, in actuality it may make economic sense for firms to integrate. See infra text accompanying notes 236-242. In other words, firms may think status quo non-diversity makes economic sense, and many certainly act in line with such thinking, but they may do so to their economic detriment.

177. Werden, supra note 141, at 91.
(a) offering lower prices; (b) offering a better product; or (c) dominating a small niche component of the broader industry. Since, as I have argued, the white lawyer “racial cartel” benefits from path dependence, the analogy suggests that a competent minority applicant must either: (a) be willing to do the same work as a white attorney, but for less money; (b) be objectively smarter, more diligent, etc. than a white competitor; or (c) work in a practice area normally eschewed by white lawyers (such as representing minorities in day-to-day legal concerns), in order to succeed. This is an unfair burden to place on competent, aspiring attorneys of color.

The “rational” firm (in the economic sense of a profit-maximizing agent) will always choose that course of action that it perceives as profit-maximizing and cost-minimizing. Metaphorically speaking, even if an elite law firm comes across a Dvorak minority candidate, it is likely to choose the QWERTY white candidate. This occurs as a result of economic decision-making by firms, and is separate from other types of institutional racism that the firms may exhibit. Thus, due to the effects of path dependence, whites benefit from overtly nondiscriminatory hiring procedures that are ostensibly open and fair to all.

B. The Utility of Path Dependence in Effecting Change in Firm Diversity

If the proponents of elite firm diversity are to succeed in convincing firms to integrate, simply highlighting the statistical disparities along racial lines will not be enough. In a highly traditional and formalistic profession, the discourse of quality and merit prevails; firms must be convinced that other forces play a significant part in explaining the lack of diversity, such forces having little to do with inherent worth or skill. Thus far, I have presented two different explications of the forces that may be behind disparate hiring: unconscious institutional racism in the hiring process, and the structural effects of path dependence. I believe both theories are accurate in explaining some part of the problem: I feel that current hiring structures are innately and covertly racist, and also that the lack of diversity is an accident, that is, the unhappy confluence of “rational” economics and historical racial domination. However, the second explanation would likely be better utilized in interactions with firms and the bar at large. This is because firms are likely to become understandably defensive and unreceptive to change after being labeled the “r-word,” even if only its unconscious form. After all, it is easy to conflate “institutional racism” with the more visible and obvious “intentional racism” and all of its attendant diabolical implications. Virtually all big-name firms take pains to publicize their antidiscrimination policies on their website and in the NALP.

178. See id. at 91-92.
179. Needless to say, I do not mean to imply that minorities are inherently more “Dvorak” than whites.
Thus, most firms are likely to be more amenable to the second theory, which posits the status quo as an accident of history, and which features racism only as an initial condition. In any case, we have seen that Title VII has been ineffective in the nuanced and delicate context of law firm hiring, and so the traditional discrimination and anti-discrimination paradigm seems to be the wrong "path." The theory of path dependence might be a better tool because it holds that inequitable results can occur despite seemingly innocuous and rational economic decision-making.

Therefore, the ideal plan of action for the proponents of elite firm diversity would be to educate firms about "the numbers" behind firm non-diversity, and to help them understand the reasons (path dependence) and non-reasons (dearth of "quality") behind the problem. At this point, ideally, firms would accord weight to the issue, get serious about diversity, and take the initiative on their own to bolster minority hiring and retention by reformulating their hiring procedures and continuing to be sensitive to these issues beyond the recruitment phase. Unfortunately, this ideal scenario is unlikely because, as described above, firms would be reluctant to suffer the transaction costs in reforming their hiring and retention procedures, and the firm cultures behind them. Even if firms were convinced that non-diversity is unfair and should be remedied, they would also be reluctant to act due to the "collective action" problem. No firm would want to risk being the only firm to undertake the costs, time, and effort to diversify since such a solitary effort would put the firm at a relative competitive disadvantage compared to other firms that did not undertake such costs. There is incentive for an individual firm: (a) hope that all the other firms undertake the costs to diversify, thereby ridding the lot (including that firm) of its negative diversity reputation; and (b) to enjoy a competitive advantage by avoiding any such costs itself. Thus, even a firm that is fully cognizant of the structural inequities that cause non-diversity at firms is likely to wait and hope that the rest of the industry, or at least a competitor, starts the process of diversification. Worse yet, firms may insist that current recruitment practices fairly and accurately reflect the "best and brightest," and thus remain complacent or averse to diversity.


181. See supra text accompanying notes 97-135. In all but the rarest of cases, firms can blithely point to their antidiscrimination policies and facially-neutral hiring criteria to avoid judicial scrutiny. Even if the odd law firm could be successfully sued, that would not render Title VII a robust and effective integration instrument.

182. The collective action problem is a situation where, "[a]lthough it is in the collective interest of a group to undertake some action, e.g., defend the country from foreign attack, individual members of the group lack a sufficient incentive to act unilaterally and coordination among members of the group is difficult." Werden, supra note 141, at 92 n.25.

183. By doing so, such a firm would be considered, in the parlance of collective action theory, a "free rider," or "[o]ne who obtains an economic benefit at another's expense without contributing to it." BLACK'S LAW DICTIONARY 691 (8th ed. 2004). Of course, the firm would lose out on the economic benefits of diversifying, discussed infra. See infra text accompanying notes 230-246.
issues. Accordingly, properly theorizing the issue of firm diversity and making normative and moral pleas to firms on the basis of fairness or theory will not be enough; there must be a change-effecting agent. I argue that legal ethics can and should serve as this agent.

PART V: THE ROLE OF LEGAL ETHICS IN ALL OF THIS

In order to improve diversity in elite law firms, principles of legal ethics should be utilized instead of either mere advocacy/exhortation, or the conventional antidiscrimination regime. There are some questions as to whether business organizations need concern themselves with moral or ethical considerations, as long as their actions are legal. However, unlike many other professions, the field of law requires its members to uphold rigid ethical standards in their professional lives. As we have seen, law firm non-diversity can be explained primarily by hiring processes that unfairly disadvantage minorities due to the structural effects of the hiring process and rational economic decisionmaking. In this section I argue that such practices are clearly in contravention of principles of ethical lawyering, and that the ABA and state ethics boards should incorporate these considerations into currently inadequate ethics rules. By doing so, these entities would transform legal ethics into an effecting agent that would impel law firms to act beyond mere tokenism or rhetoric within the realm of firm diversity. Legal ethics could be used to accomplish internally and organically what Title VII and mere exhortation cannot: the integration of elite law firms.

A. The Antidiscrimination Regime in the ABA Model Rules and State Ethics Rules

Typically, state legislatures act in concert with the ABA when it comes to the promulgation of legal ethics rules that bind members of the bar of particular states. Although each state is certainly free to adopt and modify its own state ethics rules, the ABA holds inordinate influence in codifying ethical guidelines and in broaching dialogue on new issues of interest. In 1970, the ABA promulgated the Model Code of Professional

184. See David B. Wilkins, Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars, 11 GEO. J. LEGAL ETHICS 855, 871-72 (1998) [hereinafter Wilkins, Diversity Wars] (the critique that "corporations are not subject to the ordinary rules of morality ... is not so easily dismissed").

185. See generally Zitrin & Langford, supra note 6; Rhode & Luban, supra note 7; MODEL RULES OF PROF'L CONDUCT (2002).


187. See ABA, CENTER FOR PROFESSIONAL RESPONSIBILITY (describing the activities of the ABA’s CPR in developing and interpreting legal ethics), at http://www.abanet.org/cpr (last visited Feb.
Responsibility ("Model Code"), and almost all the states eventually adopted their basic form. The Code comprised of three parts: Canons, Ethical Considerations, and Disciplinary Rules. The Disciplinary Rules were meant to be a basis for disciplinary action, while the Canons and Ethical Considerations were an "inspirational guide to the members of the profession." In the early 1980s, the ABA worked on a new set of model rules that would replace the Model Code's confusing tripartite structure with one with obligatory and discretionary rules, accompanied by explanatory comments. This effort culminated in the Model Rules of Professional Conduct ("Model Rules"), which has been adopted by a majority of the states.

State ethics codes, whether based on the Model Rules or Model Code, barely touch on issues of race in the legal profession in their current form. To the extent that they do, the focus is on acts of discrimination; none address firm diversity. Some state rules of lawyer professional responsibility expressly prohibit discriminatory practices in hiring and in employment. Unlike these state rules, neither the Model Code nor the Model Rules explicitly forbids discrimination in employment by lawyers. Certain commentators have criticized the ABA for not incorporating discrimination into the Model Rules, yet the criticism has gone unheeded. Model Rule 8.4(d) does prohibit "conduct that is prejudicial to the administration of justice." However, the comments to this rule impose burdensome limitations on the applicability of this Rule to the context of discrimination. The knowing manifestation of bias or prejudice by a lawyer, on the basis of race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status is a violation of 8.4(d) if it occurs "in the course of representing a client" and if "such..."
actions are prejudicial to the administration of justice.” It is somewhat unfortunate that the Model Rules did not make a more sweeping prohibition against discrimination in lawyering. Under the comment’s current form, it is unlikely that law firm hiring, a purely internal “non-billable” matter, would qualify as being “in the course of representing” a particular client.

In any case, even if the Model Rules adopted a broad prohibition of discrimination (as have states like New York and California), it is unlikely that the rule would be very useful in ameliorating law firm non-diversity for the same reasons that make Title VII ineffective. Indeed, if Title VII, which features a gargantuan amount of caselaw precedent, is poorly suited to address firm diversity, trying to effect change through the hodgepodge of state anti-discrimination ethics rules in their current form smacks of folly. Not surprisingly, there is no case of a firm being disciplined for a lack of diversity under any of the state codes that mirror Model Rule 8.4(d), or any of the stronger state anti-discrimination ethics rules either, and no ethics opinion of any state addresses the issue. Even if the ABA were bold enough to add a disciplinary rule barring discrimination in law firm practice at-large, a case under such a rule would likely suffer the same doomed fate as one under Title VII.

B. Elite Firm Non-Diversity: Conduct that is Prejudicial to the Administration of Justice

I would suggest that the Model Rules’ current prohibition of “conduct that is prejudicial to the administration of justice” should be applied to law firm non-diversity directly, instead of relying on the familiar anti-discrimination rote. Firstly, it can be argued that this language, in its current form, expressly prohibits law firm non-diversity. Secondly, even if the language does not serve this function, the ABA should amend the rule to include a comment that would make it do so.

1. Law Firm Non-Diversity is Prejudicial to the Administration of Justice

Law firms that forestall minority recruitment efforts or other attempts to disabuse their recruitment policies of their racially discriminatory effects may be at risk of facing disciplinary sanctions. Both the Model Rules and the Model Code, which together form the basis for virtually all states’ legal ethics codes, prohibit conduct by lawyers that is prejudicial to the administration of justice. The preamble to the Model Rules states that a lawyer, “as a member of the legal profession” is “an officer of the legal profession.”

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197. MODEL RULES OF PROF’L CONDUCT R. 8.4(d) cmt. 3 (2002).
198. For a review of the infirmities of the Title VII regime with respect to law firm diversity, see supra text accompanying notes 97-135.
200. The phrase “as a member of the legal profession” was added to the first paragraph of the
system and a public citizen.” It can be argued that any widespread practice that undermines this role is prejudicial to the administration of justice.

Above all, the ethical duty of a lawyer is to facilitate the institution of justice and fairness in society. When lawyers themselves engage in practices that are of questionable fairness, their professional legitimacy, and the legitimacy of the profession at large, is put at risk. Elite firm practices that structurally disadvantage minorities act to tarnish the reputation and credibility of lawyers as fair-minded and respectable officers of the legal system. Such a result is contrary to a lawyer’s caretaking role, which is to “further the public’s . . . confidence in the . . . justice system.” When the public loses faith in the credibility and fairness of the supposed facilitators of justice, it is hard to think of this result as being non-prejudicial to the administration of justice.

2. A Proposal to the ABA for an Amendment to the Comments of the Model Rules

Even if firm non-diversity is not explicitly subsumed within the bounds of the “prejudicial to the administration of justice” clause, I propose that the ABA, as the preeminent agent in promulgating legal ethics laws, include a comment in the next revision of the Model Rules that would refer to firm non-diversity as prejudicial. The adoption of such a comment finds support from a normative review of the competing principles of professional responsibility, which suggests (current state and model codes notwithstanding) that it is simply unethical for firms to continue hiring and retention practices that lead to significant non-diversity.

Of course, the precise bounds of ethical and unethical conduct are often unclear. Lawyers serve different functions in society, and different lawyers are likely to adopt different interpretations of their ethical duties.

Preamble to the Model Rules in 2002, presumably to emphasize that lawyers act as representatives of the legal profession, and that their individual conduct reflects on the profession at large. See ABA, THE 2002 CHANGES TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1 (2003). Previously, the first paragraph read: “A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” MODEL RULES OF PROF’L CONDUCT Preamble ¶ 1 (2002).

201. MODEL RULES OF PROF’L CONDUCT Preamble ¶ 1 (2002) (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”).

202. Alex M. Johnson, Jr., Representing Race: The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist’s Perspective, 95 MICH. L. REV. 1005, 1011 (1997) (arguing that the legal profession derives greater reputational benefits than other professions such as accounting and dentistry because lawyers are protectors and defenders of society’s norms and values).

203. See id. at 1008 (“[I]f lawyers are committed to the advocacy of individual liberties, one would expect them to keep their own ‘house’ in order. It would be hypocritical for elite lawyers as a group to ‘talk the talk without walking the walk.’”).

204. MODEL RULES OF PROF’L CONDUCT Preamble ¶ 6 (2002).

205. I propose the adoption of a comment because this would provide the necessary impetus for all firms (including elite ones) to integrate, without requiring significant changes to the Model Rules.
For example, one might expect lawyers who work at public interest law firms to interpret their ethical duties as requiring the promotion of the public interest. On the other end of the ethical spectrum, lawyers from elite law firms might be expected to focus more specifically upon duties towards their clients. Still, this correlation is far from inelastic. Even public interest lawyers have the inviolable obligation to uphold their client’s interest. Likewise, elite law practice has a public interest law component as well. Model Rule 6.1 states that every lawyer, regardless of affiliation, is expected to render at least fifty hours of pro bono service. Indeed, firms often advertise their commitment to public service, and compete with each other in this respect. Moreover, many individual lawyers in elite law firms retain a personal sense of commitment to the public good.

In reality, ethical lawyering (for lawyers at elite law firms and elsewhere) requires a combination of both public interest as well as client-centered considerations. However, I argue in this section that both of these conceptions of professional responsibility mandate that lawyers at elite law firms integrate their organizations. Regardless of whether a lawyer is motivated by the public interest, the client’s interest, or a combination thereof, there is an ethical duty to integrate. Therefore, the entire spectrum of legal ethics favors the inclusion of firm non-diversity considerations into the Model Rules.

a. Public Interest Models of Professional Responsibility

The public interest view of professional responsibility envisions the lawyer as a promoter of beneficial societal goals and policies. It generally exists on a spectrum that can be divided into two extreme branches: the “governing class” model and the “critical lawyer” model of legal
professional responsibility. Both of these models espouse the promotion of the public good, albeit for contradictory reasons and from differing perspectives. Furthermore, both would hold that corporate law firms have a duty to integrate.

(i) The Governing Class Model of Professional Responsibility

The governing class model holds that lawyers serve a special function in American society that compels them to ameliorate problems within that society. Under this view, in addition to their prescribed duty to facilitate the administration of justice, lawyers have a governmental role as well. This model bases itself on the essential shortcomings of the democratic system to fairly represent the views of all citizens; lawyers, as enlightened champions of the public good, would have to "pick up the slack." Indeed, it can be argued that this model is expressly written into the U.S. government's structure, which was created partly to quell the effects of majority tyranny. For instance, James Madison, in defending the newly written Constitution, argued that:

> it may be concluded that [under] a pure democracy, . . . [a] common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.

To be concise, the public would not be able take care of its own good; it would succumb to the will of the majority. Madison and the Founding Fathers were by no means alone in distrusting the vagaries of democracy. Even Plato recognized the importance of independent, intelligent judgment over the whims of "the multitude":

> A judge who is truly a judge must not learn his verdict from the audience, letting himself be intimidated into it by the clamour of the multitude and his own incompetence, nor yet, out of cowardice and poltroonery. . . . To tell the plain truth, the judge takes his seat not to learn from the audience, but to teach them. . . .

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213. Theorists might come up with numerous other models of professional responsibility, but for the sake of simplicity and efficiency, I would classify them within either the public interest or client-centered models, or somewhere in between.

214. See Pearce, supra note 206.

215. Id.

216. See id. at 79-80.


218. THE LAWS OF PLATO 659a-b (A. E. Taylor trans., M. Dent & Sons Ltd. 1934). Plato is not referring specifically to judges in the rigid legal sense, but rather as one who judges in matters of taste. However, Plato's distrust of the masses extends beyond the realm of aesthetics, as he was, for example,
Plato’s elitist distrust of the competence of the masses was echoed millennia later by John Stuart Mill, who in *Considerations on Representative Government*, cautioned that in a democracy, “the great majority of voters, in most countries . . . would be manual labourers; and the twofold danger, that of too low a standard of political intelligence, and that of class legislation, would still exist in a very perilous degree.” Good government necessarily discounts the role and influence of the common person.

But the question arises (if not the people) who possesses the political intelligence to pursue the common good? Under the governing class model, the answer would be the lawyer. It is not the public’s charge to administer the public good; rather, that is the role of the lawyer. De Tocqueville can be seen as the archetype of the governing class view. He observed that American society was structured in such a way that the lawyer was necessarily the leading civic figure.

Under this view of legal ethics, law firms have clearly been acting unethically in their hiring practices. As the governing class, lawyers are to be held to a higher standard in terms of the sanctity of their professional behavior. Indeed, as leaders of civic society and trustees of the public good, one would expect lawyers to champion the cause of fighting racial discrimination and segregation in important institutions in society. *A fortiori*, this includes fighting discriminatory practices within elite law firms themselves. Doing so would better enable firms to carry out their ethical duty to envision and spearhead societal improvement.

Even if one were unconvinced by my arguments that the lack of racial diversity in elite law firms is the result of unconscious racial discrimination and rational economic decision-making, it is established fact that the legal profession is the third most segregated profession in America. This finding is unbecoming, especially for an organization composed of the nation’s putative leaders.

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220. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA ch. XVI, pt. I (“the authority . . . entrusted to members of the legal profession, and the influence which these individuals exercise in the Government, is the most powerful existing security against the excesses of democracy”), available at http://www.gutenberg.org/etext/815 (last visited Feb. 10, 2005).

221. See Gordon, supra note 1, at 1280 (noting that the profession, already criticized for falling short in its governing role, is even more debilitated where its own ranks are “barely integrated”).

222. See William Paul, supra note 11.
The critical lawyer model promotes the empowerment of subordinated people through the tool of legal representation. It seeks to advance the public good, not so much out of disdain for the masses, but rather out of a strong sense of optimism in their abilities. Critical lawyers seek to promote social change by providing legal access to subordinated peoples, thereby empowering them to take care of themselves in the future, without a lawyer's help. In this respect, the critical lawyer model is truly democratic, and envisions a much more limited role for the lawyer than the governing class model.

Under this model, corporate law firms and lawyers would have a duty to assist those in need of legal services, especially indigent and subjugated people. Firms can only meet this obligation by hiring those attorneys who would be willing to take on such cases. Numerous surveys indicate that minority attorneys in law firms are more likely than whites to participate in pro bono work and other community-building activities. Accordingly, elite law firms can better satisfy their community obligations by hiring and retaining more minority attorneys (and thereby indirectly improving diversity among their ranks).

Furthermore, as opponents of unfairness in society, critical lawyers have a special obligation, at the least, to fight systemic unfairness within their own organizations. In furthering their public interest oriented goals, critical lawyers are distrustful of traditional legal mechanisms (rules/litigation) and the discourse of rights/obligations. Rather, they favor direct and organized action, utilizing practical strategies. In light of this perspective, firms should recognize the inequity and non-diversity within their ranks, and address the issue themselves, instead of waiting to do so only if compelled by litigation or ethics board opinions. The critical lawyer model directs attorneys to take the initiative on behalf of disadvantaged groups. Thus, under this view, elite law firms must make

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224. See id. at 233.
225. Id.
226. Camille A. Nelson, Toward A Bridge: The Role Of Legal Academics In The Culture Of Private Practice, 10 J.L. & Pol’y 97, 125 (2001) (“Generally, students of color provide greater pro bono and community work than their white counterparts while attempting to achieve the same billable hours target.”); Wilkins & Gulati, Institutional Analysis, supra note 20, at 570 (same finding with respect to black attorneys specifically); Richard O. Lempert et al., Michigan’s Minority Graduates In Practice: The River Runs Through Law School, 25 Law & Soc. Inquiry 395, 401 (2000) (same finding with respect to the University of Michigan Law School’s minority alumni); Roithmayr, supra note 155, at 789-90.
228. Id. at 691.
229. Id. at 687.
special efforts to seek out more minority lawyers to the extent that the current recruitment and retention process disfavors such groups.

b. The Client-Centered Model of Professional Responsibility

At the other extreme along the continuum of legal professional responsibility is the client-centered model. Under this view, the lawyer is a "hired gun" whose only ethical duty is to zealously advocate on behalf of the client, no matter what the costs. This approach to lawyer professional responsibility can be encapsulated in Lord Brougham's maxim: "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."

One might attempt to utilize this rhetoric against my prior arguments. It could be argued that law firms should not worry about diversity in their ranks because attention to such extraneous details would divert attention and resources away from the law firm's zealous solicitude of the client's best interest. A corollary to this view would argue that law firms, as businesses, have the sole responsibility of increasing profits. Since lawyers make money by representing clients, the best way to increase profits would be to zealously and even recklessly advocate for the client, irrespective of whether any minority applicants get trampled along the way. Indeed, elite firms may exhibit a "natural monopoly," wherein the most efficient outcome of competition is that the firms' racial composition is relatively homogenous.

However, a closer examination of the client-centered view of legal ethics reveals that the corporate firm market does not exhibit a natural monopoly. As we have seen, there are significant barriers, embodied by the advantages of history and the selection criteria that reinforce them, that lead to a less than fair and fully competitive market for lawyers at elite firms. This inefficiency can only work to the clients' detriment because they may not be represented by the best-suited selection of attorneys. Indeed, client interests dictate that firms must take bold steps to reduce the non-integration in their ranks, simply because a law firm that is highly

230. See Pearce, supra note 206, at 80.
231. Id. Under this extreme view, the "public" can take its "good" and go jump in the lake.
232. See Wilkins, Diversity Wars, supra note 184, at 870. An extreme interpretation of this view would argue that artificial business entities, such as law firms, are incapable of having moral responsibility whatever. For example, one proponent of this view has argued that "[i]t is improper to expect organizational conduct to conform to the ordinary principles of morality. We cannot and must not expect formal organizations, or their representatives acting in their official capacities, to be honest, courageous, considerate, sympathetic, or to have any kind of moral integrity." Id. at n.54. However, this argument is simply inapplicable to law firms. Unlike conventional businesspeople, lawyers are governed by ethical codes, and unethical actions taken by lawyers, hidden under the artificial guise of a business entity, are not likely to evade scrutiny on that basis alone.
233. A natural monopoly is a rare case where a single competitor can supply the market more efficiently than all other competitors. SAMUELSON & NORDHAUS, supra note 159, at 339, 742.
234. See Roithmayr, supra note 155, at 791.
235. See supra text accompanying notes 160-179.
segregated in composition would be viewed negatively by society. This would result in less business for such a law firm and for clients associated with it. Not surprisingly, a number of corporations explicitly require the firms that represent them to be staffed by a certain number of minority attorneys. There is merit to these clients’ concerns aside from their public relations or humanitarian aspect: diversity makes economic sense. Segregated law firms are at a disadvantage because, in the real world, clients are likely to be comprised of, and focused on people of all colors. In order to compete in the 21st century, law firms must possess cross-cultural competence, or the ability to work easily with members of different races, and to view issues from different viewpoints. By eschewing diversity, lawyers are less likely to understand and get along with their integrated clients. Furthermore, jury pools generally reflect the general

236. See Johnson, supra note 202, at 1011 (arguing that public perceptions of non-diversity in the legal profession might jeopardize its reputational advantage over other professions); Wilkins, Diversity Wars, supra note 184, at 856.

237. See generally Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (1992) (suggesting that antidiscrimination laws are unnecessary because the market would turn against the favor of companies that discriminated). Epstein’s theory necessarily assumes that the public cares about non-diversity in firms, has knowledge of instances of such non-diversity, and is likely to use this knowledge in making its consumption choices against the favor of non-diverse firms. I think these are reasonably correct assumptions to the extent that discriminating businesses and firms do create some negative goodwill for themselves in the public eye, although I do not think that the link is strong enough to justify an abandonment of antidiscrimination law in favor of market-based corrections.

238. Knapp & Grover, supra note 33, at 304. A client corporation would have an incentive to make such requirements because doing so would support the public perception that it cares about diversity, thereby improving the goodwill associated with the client’s brand image. See Gordon, supra note 1, at 1259 n.10. For more on issues of diversity and the interplay between firms and their clients, see Wilkins, Diversity Wars, supra note 184.

239. Brief of Amici Curiae Gen. Motors Corp. at 12-18, Gutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (arguing in favor of the University of Michigan’s affirmative action program because a diverse law student body, and consequently a diverse legal profession is vital to businesses’ economic success in a cross-cultural world); see also Gordon, supra note 1, at 1278 n.106 (noting the example of Kmart, which after its bankruptcy filing, refocused its marketing towards minorities in order to take advantage of its relatively great urban presence).


241. Id. Critics may counter that the assumption that a client will generally communicate better with a lawyer of the same minority group than with another lawyer is demeaning, and smacks of essentialism. Gordon, supra note 1, at 1285. However, there is ample evidence that in actual practice, service industry clients oftentimes do prefer the rendition of services from others of their ethnic group, detached theorizing notwithstanding. Research indicates that, for instance, many minorities who seek social service counseling tend to feel more comfortable in interacting with a counselor of the same cultural, linguistic or ethnic background. Joseph Rowntree Found., Perceptions and Experiences of Counselling Services Among Asian People, Mar. 2001, at 2-3, available at http://www.jfg.org.uk/knowledge/findings/socialcare/pdf/341.pdf (last visited Feb. 10, 2005). The same should naturally apply to instances where minorities seek legal counseling, with regard to disputes that are likely to render them prone and uncertain as to their legal rights. Thus, it is hardly surprising to observe, for example, that Hispanic-owned law practices are omnipresent throughout Washington Heights in Manhattan, and that South Asian immigration lawyers concentrate themselves in areas that are heavily populated by South Asians, such as central New Jersey. In the context of big firms, it is hardly improper for such firms to recognize the proclivities that many minority clients have towards
The economic, client-centered case for diversity requires more than just redoubled hiring and recruiting efforts. Firms must take steps to counteract the unfortunate trend of newly hired minority associates leaving after a couple of years. By losing such associates, firms lose significant human capital into which they had undoubtedly expended significant resources, including bar preparation, CLE courses, and on-the-job training. It costs firms time and money to retrain a fresh crop of associates to catch up to the level of departed attorneys. Thus, if firms could find ways to retain their minority attorneys beyond the junior level, they would save significant costs and resources that could be better focused on serving clients zealously and efficiently. Thus, if law firms are to best promote their clients' interests, they must both create and maintain diversity within their ranks.

In summary, despite being comprised of multifarious perspectives, the spectrum of legal ethics is uniform in requiring that elite law firms (and specifically, the lawyers that compose them) have a duty to integrate firm composition. The ABA should give force to this duty by adopting a comment to the "prejudicial to the administration of justice" clause that would address the issue of firm non-diversity. Firms must be made to understand that continued non-diversity is not just unfair, but may render such firms in violation of their ethical responsibilities.

PART VI: FREUDIAN PSYCHOANALYSIS: A CLOSING ANALOGY TO THE CASE OF ELITE FIRMS

Speaking in Freudian terms, human beings in society cannot abandon all restraint in favor of their "id," and obey all of their innate and "natural" urges. The "super-ego," which embodies cultural and moral restraint, must inform one's decision-making by countervailing the id with concerns counselors of their own ethnicity. Quite the contrary, I argue in this section that it is the ethical duty of law firms, under the client-centered approach, to recognize these client preferences and integrate themselves to better serve these preferences. Of course, this hardly necessitates that hired minority attorneys be "shunted into an ethnic practice" and relegated to token "minority lawyer" status. Gordon, supra note 1, at 1285. This is a danger to be avoided, but not at the expense of client diversity preferences.

242. Wilkins, Diversity Wars, supra note 184, at 863.
245. Id.
246. See id.
247. Freud thought of the id as that component of human personality that favors acting on primitive, unconscious impulses like aggression, lust and greed. GALE ENCYCLOPEDIA OF PSYCHOLOGY 637 (Bonnie Strickland et al., eds., 2d ed. 2000). The other two components, ego and superego, embody reality and conscience, respectively, and are pitted against the id to modify actual behavior. See id.
of fairness and ethics. By way of analogy, one might conclude that the profit-motive is the most natural and base impulse for business entities, and is therefore their id. In the case of elite law firms, the economic id leads to the result that minorities are disadvantaged in recruitment and retention. This is the “natural” result of such firms continuing business-as-usual. Likewise, it is not fair or ethical for such firms to continue these profit-maximizing, disadvantaging hiring practices. Their superego, in the form of legal ethics, must come to bear on elite firms’ behavior. After all, as I have attempted to show, various principles of legal ethics mandate that firms have an ethical duty to redress their lack of diversity. It would behoove the ABA to acknowledge this duty and incorporate firm diversity considerations into the Model Rules, thereby reinforcing its laudable efforts thus far in the movement towards elite firm integration.