
WHITE LAWYERING: RETHINKING RACE, LAWYER IDENTITY, AND RULE OF LAW

*Russell G. Pearce**

The triumph of what might be termed the standard version of the professional project would, I believe, be the creation, by virtue of professional education, of almost purely fungible members of the respective professional community. Such apparent aspects of the self as one's race, gender, religion, or ethnic background would become irrelevant to defining one's capacities as a lawyer.

- Sanford Levinson¹

I am one-of-a-kind as a person—as is everyone who reads this chapter. I am also a member of the white racial group—as everyone who reads this chapter is a member of a racial group. I am male—as everyone who reads this chapter has a gender-group membership. In these three psychological conditions, we all participate. Even if I were to try to escape my racial—or gender—group memberships, members of my own and other racial and gender groups would treat me as if I were a member of my groups.

- Clayton P. Alderfer²

This Essay will explore what it means to be a white person in the legal profession³ and how recognition of whiteness as racial identity⁴ requires a

* Professor of Law, Fordham University School of Law; Co-Director, Louis Stein Center for Law and Ethics. I would like to thank Clay Alderfer, Regina Austin, Noran Camp, Clark Cunningham, Sheila Foster, Brian Glick, Jennifer Gordon, Bruce Green, Isabelle Gunning, Craig Gurian, Robin Lenhardt, Robert Smith, David Thomas, Paul Tremblay, and Amy Uelmen for their comments. I would also like to thank my research assistant Jadhira Rivera for her wise counsel and excellent work.

1. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 *Cardozo L. Rev.* 1577, 1578-79 (1993).

2. Clayton P. Alderfer, *A White Man's Perspective on the Unconscious Processes Within Black-White Relations in the United States*, in *Human Diversity: Perspectives on People in Context* 201, 202 (Edison J. Trickett et al. eds., 1994).

3. Although this Essay focuses on whiteness, it makes no claims—and indeed rejects the notions—that race is the only significant identity in lawyering or that racial identity does not intersect and interact with other identities. See *infra* Parts II, IV. A number of scholars have discussed how nonracial identities influence lawyering. See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculating on a Woman's Lawyering Process*, 1 *Berkeley Women's L.J.* 39, 45-58 (1985) (gender); Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 *Case W. Res. L. Rev.* 127 (2004) (religion); William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 *Hastings L.J.* 1101 (1997) (sexual orientation). For a discussion of intersectionality, see, for example, Kimberle Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of*

dramatic rethinking of professional norms. As white people, we too often view racial issues as belonging to people of color.⁵ We tend to do that in one of two ways. Some whites believe that race generally does not matter except in the rare case of an intentional racist. Other whites view whites generally as racists and look to people of color to tell them how to understand issues of race. This Essay rejects both of these approaches. The Essay argues that for white lawyers, as well as lawyers of color, increased “competence [in] dealing with racial matters” and “speak[ing] openly, frankly, and professionally about relations”⁶ is necessary both to competent client representation and equal justice under law.

Applying the insights of intergroup theory, the Essay suggests that whether they view themselves as color-blind or racist, white lawyers understandably have a tendency to treat whiteness as a neutral norm or

Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139 (1989); Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 Mich. J. Race & L. 285 (2001); Mari Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 Stan. L. Rev. 1183 (1991); Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars As Cultural Warriors*, 75 Denv. U. L. Rev. 1409 (1998). Many commentators have previously written on racial identity and lawyering, either generally, *see, e.g.*, Jean Koh Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* 241-327 (2001); Sue Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clinical L. Rev. 33 (2001); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 Stan. L. Rev. 1807 (1993); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 Clinical L. Rev. 373 (2002), or from the perspective of lawyers of color, *see, e.g.*, Melissa Harrison & Margaret E. Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/Constructed Legal Spaces*, 6 Colum. J. Gender & L. 387, 410 (1996); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 Md. L. Rev. 1502 (1998). Fewer commentators have examined the issue through the lens of the white lawyer. *See, e.g.*, Harrison & Montoya, *supra*, at 410; Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 Fla. Coastal L.J. 219, 232 (2002).

4. There is an extensive literature on whiteness. *See, e.g.*, *Critical White Studies: Looking Behind the Mirror* (Richard Delgado & Jean Stefancic eds., 1997) [hereinafter *Critical White Studies*]; Ian F. Haney López, *White by Law: The Legal Construction of Race* (1996); Stephanie M. Wildman, *Privilege Revealed: How Invisible Preference Undermines America* (1996); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 Yale L.J. 2009 (1995); Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993); Peggy McIntosh, *Unpacking the Invisible Knapsack: White Privilege*, *Creation Spirituality*, Jan.-Feb. 1992, at 33.

5. *See infra* Part III.A.

6. Alderfer, *supra* note 2, at 218. Organizational theorist Clayton Alderfer finds this framing more useful than liberal use of the term “racist.” He argues that [t]he number of individuals who are deeply and profoundly racist characterologically is small in comparison to the amount of collective racism most of us participate in a good deal of the time. Moreover, labeling an individual serves mainly as a defensive function for the labeler and, if the expression is made directly to the individual, heightens resistance to learning by that person and by anyone who may observe the event.

Id. Alderfer instead advocates a “formulation emphasiz[ing] greater understanding and improved skill rather than blame.” *Id.*

baseline, and not a racial identity, and tend to view racial issues as belonging primarily to people of color, whether lawyers or clients.⁷ This approach is consistent with, and reinforces, the prevailing professional norm that lawyers should “bleach out” their racial, as well as their other personal, identities.⁸

As this Essay explains, this unfortunate symbiosis of whiteness and professionalism undermines the work of lawyers both in their representation of clients and in their systemic efforts to promote the rule of law.⁹ The latest research in the field of organizational behavior suggests that the assumption of lawyer neutrality so central to lawyer professionalism is not only wrong descriptively, but that it also undermines the very goals it seeks to promote. In particular the pathbreaking research of Robin Ely and David Thomas demonstrates that in a diverse society and legal profession an integration-and-learning perspective that openly acknowledges and manages racial identity would far better promote excellent client representation and equal justice under law than the currently dominant commitment to color blindness.¹⁰

I. INTERGROUP THEORY

Intergroup theory offers a way to “understand, explain, and predict relations between groups . . . in organizations.”¹¹ It suggests that group identities, such as racial identity, influence conduct in organizations.¹² The organizations comprising the legal system include the system itself, as well as constituent organizations such as law schools, law firms, courts, bar groups, and the profession as a whole.¹³ Within these organizations, individuals “are shaped by at least three sets of forces: their own unique personalities, the groups with whom they personally identify to a significant

7. See *infra* Parts II, III.

8. See *infra* Part III.

9. See *infra* Parts III, IV.

10. See *infra* Part IV.

11. Clayton P. Alderfer, *Problems of Changing White Males' Behavior and Beliefs Concerning Race Relations, in Change in Organizations* 122, 137 (Paul Goodman & Assocs. eds., 1982). Intergroup theory defines a group as

a collection of individuals (1) who have significantly interdependent relations with each other, (2) who perceive themselves to be a group by reliably distinguishing members from nonmembers, (3) whose group identity is recognized by nonmembers, (4) who, as group members acting alone or in concert, have significantly interdependent relations with other groups, and (5) whose roles in groups are therefore a function of expectations from themselves, from other group members, and from nongroup members.

Alderfer, *supra* note 2, at 222.

12. Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 *Cardozo L. Rev.* 1613, 1632 (1993); see Clayton P. Alderfer & David A. Thomas, *The Significance of Race and Ethnicity for Understanding Organizational Behavior, in International Review of Industrial and Organizational Psychology* 1, 6-7 (Cary L. Cooper & Ivan T. Robertson eds., 1988).

13. I have previously applied intergroup theory to the role of religious identity in the legal system. See Pearce, *supra* note 12, at 1631-34.

degree, and the groups with whom others associate them—whether or not they wish such an association.”¹⁴ The two major groups in organizations are “identity groups and organization groups.”¹⁵

As I noted in an earlier article, “[p]rofessional socialization as a lawyer is an organizational group identification.”¹⁶ Membership in organizational groups is “based on task, function and hierarchy.”¹⁷ Persons in organizational groups share “similar primary tasks, participate in comparable work experiences and, as a result, tend to develop common organizational views.”¹⁸ Being a member of the lawyer organizational group “involves similar tasks, comparable experiences, and comparable organizational views. Among the factors that make law a particularly powerful group experience is the shared three years of law school, often at a young age, combined with a long and often continuous membership in the profession.”¹⁹

While all lawyers are members of the lawyer organizational group, that group further divides into other organizational groups, such as partners and associates, or litigators and judges.

Identity group membership, such as race, derives from identities external to the organization. As a general matter, “[m]embers of identity groups share common biological characteristics, participate in equivalent historical experiences and, as a result, tend to develop similar world views.”²⁰ Identity group membership is sufficiently powerful that it influences conduct within organizations.²¹ Its power derives from its pervasive role in an individual’s life. Identity group membership often begins at birth and continues throughout an individual’s life “or, as in the case of age, changes as the result of natural development.”²² While powerful, organizational group memberships generally develop later than identity groups and “can change as people enter and leave organizations” or shift their role within organizations.²³

According to intergroup theory, “individuals and organizations are constantly attempting, consciously and unconsciously, to manage potential

14. Alderfer & Thomas, *supra* note 12, at 7.

15. David A. Thomas & Clayton P. Alderfer, *The Influence of Race on Career Dynamics: Theory and Research on Minority Career Experiences*, in *Handbook of Career Theory* 133, 145 (Michael B. Arthur et al. eds., 1989). The original source for this theory is Clayton P. Alderfer & Ken K. Smith, *Studying Intergroup Relations Embedded in Organizations*, 27 *Admin. Sci. Q.* 35, 38 (1982).

16. Pearce, *supra* note 12, at 1633.

17. *Id.* at 1632.

18. Thomas & Alderfer, *supra* note 15, at 145.

19. Pearce, *supra* note 12, at 1633.

20. Thomas & Alderfer, *supra* note 15, at 145. Although not directly relevant to this Essay’s analysis of racial identity, I have previously argued that biological characteristics are not necessary to the creation of an identity group. For example, “a religious identity group, such as Jews,” can share “‘equivalent historical experiences’ leading to ‘similar world views’” without sharing biological characteristics. Pearce, *supra* note 12, at 1632 n.122.

21. Pearce, *supra* note 12, at 1632.

22. Thomas & Alderfer, *supra* note 15, at 145.

23. *Id.*

conflicts arising from the interface between identity and organization group memberships.”²⁴ As Clayton P. Alderfer has noted, “[r]elations among identity groups and among organizational groups are shaped by how these groups and their representatives are embedded in the organization and also by how the organization is embedded in its environment.”²⁵ Embeddedness is congruent “where power relations at a particular level within an organization are similar to those at other levels of the organization, or in society as a whole,” and incongruent where they are not.²⁶ Incongruent embeddedness causes increased strain for the individual and the organization.²⁷

II. DRAWING A PICTURE OF THE WHITE LAWYER

In 1991, I was part of a team that created an intergroup theory exercise for the first-year class at the University of Pennsylvania Law School.²⁸ I use a version of this exercise in my ethics seminar as a way to begin a unit on lawyer identity and justice. The students’ task is to work in identity groups to create a picture²⁹ describing their identity group’s experience as law students.³⁰

To facilitate the formation of identity groups, the exercise starts by dividing the students into four race- and gender-based groups: women of color, men of color, white women, and white men.³¹ The basis for this division is the hypothesis that for most students, their race and gender are the most salient identities. I then suggest that the students consider dividing their groups further according to other identities that result in significantly different experiences. These identities could include the various subgroups within the people of color group, including Asian, Black, or Latino; as well as identities found in all groups, such as sexual orientation, class, disability, and whether the student went directly from college to law school.³² When

24. *Id.*

25. Alderfer, *supra* note 11, at 142.

26. Pearce, *supra* note 12, at 1633 (citing Alderfer & Thomas, *supra* note 12, at 15-16).

27. Alderfer & Thomas, *supra* note 12, at 15-16.

28. The authors of the group were a four-person mixed-race and -gender team led by Professor David Thomas of Harvard Business School. The other members of the team were Professor Robin J. Ely of Harvard Business School, Professor Elaine Yakura of Michigan State University School of Labor and Industrial Relations, and me. The original exercise was a four-hour unit on diversity in the legal profession.

29. Students often object to drawing a picture, as did I originally as the only legal academic among the authors of the exercise. The rationale for drawing a picture, as well as for focusing on the student’s personal experiences, is that law students are verbally talented people who are adept at using verbal strategies to avoid connecting their personal feelings to their intellectual inquiries. My experience has been that my first reaction was wrong and that the exercise of drawing a picture leads to extraordinarily valuable results.

30. This should include work experiences during law school.

31. Not all students readily fit themselves into one of these four groups. Mixed-race students have asked to create their own group and Arab-American students have struggled with their identity.

32. While the students in the first-year class at Penn readily divided themselves into subgroups, most students in my seminar decide to stay together and reflect their diversity in

the identity groups complete their pictures, they post them on the wall and describe them. The class discussion begins with the role of identity group differences in the law school experience and moves to the role of these differences in the legal system and their implications for the rule of law.³³

For this Essay, I have essentially done what I have often asked my students to do. My picture of the law school offers a collage of views. To illustrate the ease I feel as a white person in a position of authority in a predominantly white institution, I would draw a picture of myself discussing the question of whether to invite students to call them by their first name in class with colleagues who are white women and people of color—I do and they do not. This ease sometimes makes me miss ways in which issues of race and gender influence my work. As I draw this picture, I realize that in recent years, I have become so complacent that I have not spent time thinking about how having a white man as the facilitator influences the students and me, and I am considering returning to a past practice of inviting faculty of color into the conversation with the students.

My picture will also identify how some students—usually but not always white—will reject identifying themselves on the basis of race and how some students—usually but not always students of color—will indicate that race is a significant part of their experience as law students. Students of color, but never yet a white student, will describe the experience, while working during the summer, of having lawyers mistake them for secretaries or messengers.

I would draw a similar picture of my Housing Rights Clinic. When the white students—or I—wear a suit and go to court to teach the Housing Rights Clinic, the first assumption of court personnel is that we are lawyers. Almost every year, we will have an incident where court personnel or opposing lawyers assume that a student of color is a party and not a legal representative.

These relations in the legal system mirror, in turn, relations in society as a whole. I would depict what I think of as well-dressed white man's privilege—the ability often (though less often since 9/11) to walk confidently past a security guard without being questioned, in contrast to friends of color who have had the opposite experience of more intense scrutiny. I would add to the societal section a picture of the judge of color who tells how white people assume he is a doorman when he holds a door for them as a courtesy.

My picture is informed both by my personal experience and by the literature on race relations. As a general descriptive matter, white people are the dominant racial group in legal organizations. They represent 83.2% of judges,³⁴ 89.2% of lawyers,³⁵ and 79.5% of law students,³⁶ percentages

their picture. I believe this occurs because the smaller number of students in the seminar makes it difficult for students both to separate into subgroups and to find colleagues with whom to share the exercise.

33. These classes are both pedagogically valuable and emotionally difficult.

34. Am. Bar Ass'n, Statistics about Minorities in the Profession from the 2000 Census,

which exceed the 75.1% of the American population that is white.³⁷ In elite legal jobs, the white domination is even greater. Whites represent almost 98% of partners in the 100 top law firms.³⁸

As the dominant racial group, whites can view ourselves as having no particular racial identity. An African-American friend recently described his impression that newspaper stories describing lawyers usually identified the race of lawyers of color but mentioned no race for white lawyers. As a member of the dominant group in the legal profession, the white lawyer is the norm.³⁹ With regard at least to our race, we start by looking around the room and feeling like we belong, as is so often the experience of white students, particularly the men, in my seminar who do not see race as a useful way to discuss their experience. We feel comfortable with authority. Accordingly, I do not worry that my students will challenge my authority when I invite them to call me by my first name.⁴⁰

Another aspect of viewing ourselves as having no particular racial identity is seeing issues of race as that of people of color and not of white people.⁴¹ I represent this phenomenon in my picture through my white students who do not see themselves as having a white identity and who object to exploring issues of race. Clayton P. Alderfer has observed that “[w]hite people do not easily discuss race relations. For most whites, the range of feelings goes from uncomfortable to severely uncomfortable.”⁴² He finds that whites’ “most common behavioral pattern is avoiding the issue, if at all possible. When that response is not feasible, the next line of defense is to deny the presence of racial dynamics.”⁴³

The experience of law students and lawyers of color is quite different. As a minority group in the legal profession, they have “no choice except to learn about white culture if they are to survive.”⁴⁴ When people of color

at <http://www.abanet.org/minorities/links/2000census.html> (last visited Feb. 21, 2005).

35. *Id.*

36. Am. Bar Ass’n, Statistics of J.D. Degrees Awarded from 1984-2002, at <http://www.abanet.org/legaled/statistics/jd.html> (last visited Feb. 21, 2005).

37. U.S. Census Bureau, USA: People Quickfacts, at <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Feb. 22, 2005).

38. Harvey Berkman, *Past Struggles Echo as Clinton Makes a Pitch for Pro Bono Work*, Nat’l L.J., Aug. 2, 1999, at A8. David B. Wilkins and G. Mitu Gulati have provided a comprehensive analysis of this phenomenon with regard to black lawyers. See David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 Cal. L. Rev. 493, 496 (1996) (noting that “[a]lthough the number of black students graduating from law schools has increased significantly in recent decades, blacks still make up a very small minority of the lawyers working in large corporate firms (emphasis omitted)).

39. See, e.g., Wildman, *supra* note 4, at 14-20; Flagg, *supra* note 4, at 2013; McIntosh, *supra* note 4, at 33-34.

40. I have to admit, though, that I believe I am alone even among my white male colleagues in inviting students to call me by my first name although a number of faculty call students by their first name.

41. See, e.g., Harrison & Montoya, *supra* note 3, at 410; see also *infra* Part III.A.

42. Alderfer, *supra* note 2, at 217.

43. *Id.*

44. Alderfer, *supra* note 11, at 144.

look around the room, they know they are not the dominant culture and do not necessarily assume the same fit and the same authority. Enhancing this effect is the congruence of white dominance in the legal profession with white dominance in a society where whites have a greater share of wealth and power.⁴⁵ When white lawyers, judges, and court personnel assume my students of color are tenants and not legal representatives, or assume a summer associate of color is a member of the support staff, they are applying generalizations about race relations congruent with the relative distribution of racial power found in society in general.⁴⁶ The incongruence of the authority position of being a lawyer, or of having a position of authority within the legal profession, complicates the organizational tasks of lawyers of color.

While race makes a significant difference in our experiences as lawyers, intergroup theory reminds us that it is not determinative.⁴⁷ These experiences, like those relevant to organizational groups and other identity groups to which we belong, provide us with data. How we manage that data—whether we acknowledge it consciously and how we respond to it—is a matter of choice on both an individual and group level.⁴⁸ One way I choose to manage my white identity is to acknowledge and discuss issues of race with my students and colleagues and, indeed, to write this Essay as a way of communicating with a broader group of legal academics, lawyers, and law students. Although this Essay represents a preliminary account of the white experience in the legal profession, this part offers at least two conclusions: White racial identity exists and whites tend to avoid acknowledging their identity.

III. THE SYMBIOSIS OF WHITENESS AND PROFESSIONALISM UNDERMINES WHITE LAWYERS' WORK

Despite the persistence of racial identity group influences, white lawyers tend to deny the influence of their racial identity group on their work as lawyers. When professionalism's ideological commitment to color blindness reinforces this tendency, the resulting symbiosis undermines the capacity of white lawyers to represent clients to the best of their ability.

45. See, e.g., Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, and Unequal* (1995); CNN.com, *Wealth Gap Seen As Top Civil Rights Issue: Blacks Lag in Stock Market Investments, Home Ownership, at* <http://www.cnn.com/2005/US/01/17/wealth.gap.ap/index.html> (Jan. 17, 2005) (noting that "black families as a whole had only 10 cents in wealth for every dollar white families had").

46. For a more detailed description of experiences of lawyers of color, see Peggy C. Davis, *Law as Microaggression*, 98 *Yale L.J.* 1559 (1989), and for academics of color, see Cheryl I. Harris, *Law Professors of Color and the Academy: Of Poets and Kings*, 68 *Chi.-Kent L. Rev.* 331 (1992).

47. See Alderfer, *supra* note 2, at 202-03.

48. See *id.*

A. *The Symbiosis of Whiteness and Professionalism*

A dominant value common to the organizational identity of lawyers is professionalism's commitment to the color blindness of lawyers' conduct.⁴⁹ In Sandy Levinson's famous formulation, professional socialization "bleaches out" racial differences among lawyers, as well as other individual characteristics.⁵⁰ Under this view, all lawyers should be—and in most instances are—fungible. Not only should race play no role in how a lawyer approaches her work, but with few exceptions it will play no role. White lawyers who follow the dominant approach will actually believe that this is an accurate account and that they themselves are neutral as to race. Accordingly, they will reject the notion that they should examine the influence of their white identity on their lawyering.

Of course, in doing so, they are reinforcing their general tendency as white people to avoid issues of race. While a small minority of whites embrace their white racial identity, with both its positive and negative aspects,⁵¹ most whites tend to see themselves as the neutral norm, rather than as a particular racial identity.⁵² Race is for people of color.

Some whites with this perspective will view law practice, like society, as essentially color-blind.⁵³ In this world, racial influence is rare, generally extending only to those few whites who are openly racist. Accordingly, when people of color raise issues of race, they "play the race card"⁵⁴ and create phony issues to promote their own interests.

Other whites with a similar understanding of racial dynamics may reach an opposite conclusion. They believe that white racism is a significant societal problem. White people, lacking a proper claim to racial identity

49. An interesting illustration of this phenomenon is found in a study of the lawyers in the Civil Division of the Legal Aid Society. Roland Acevedo et al., *Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race*, 18 Buff. Pub. Int. L.J. 1 (2000). Although white lawyers and lawyers of color differed markedly as to whether race was a factor in representation and whether "clients take the race of their attorney into account," a majority of lawyers of all races agreed that they personally did not "take the race of their client into consideration." *Id.* at 33-45, 53. Accordingly, with regard to how they understood their own thought processes, lawyers of all races shared a commitment to color blindness derived from membership in the lawyer organizational group that apparently trumped differences based on membership in different racial identity groups.

50. Levinson, *supra* note 1, at 1578-79; see Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 11 Am. B. Found. Res. J. 613, 616-18 (1986); Wilkins, *supra* note 3, 1503-06, 1514-50.

51. Alderfer, *supra* note 2, at 220-21.

52. *Id.* at 217-21; see *supra* note 39.

53. See Alderfer, *supra* note 2, at 217.

54. A famous example of this approach is found in the critique of Johnnie Cochran "playing the race card" in the O.J. Simpson trial. See Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, New Republic, Dec. 9, 1996, at 27, 41-42. For responses to this critique, see Frank I. Michelman, Foreword: "Racialism" and Reason, 95 Mich. L. Rev. 723, 735 (1997); Margaret M. Russell, *Representing Race: Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straightjacket of Legal Practice*, 95 Mich. L. Rev. 766, 788-94 (1997); Wilkins, *supra* note 3, at 1514-50; David B. Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 Mich. L. Rev. 795 (1997).

and colluding in white racial dominance, have little to offer on racial issues. Under this view, people of color have—and whites lack—the ability to understand, or to engage in productive discussions regarding, race. White people should defer to people of color who are experts on race.⁵⁵

Professionalism's "bleaching out" approach and these tendencies of white people mutually reinforce certain conduct. They discourage white lawyers from acknowledging that their race is an influence and from exploring the extent to which their white identity plays a role in their work settings. They further discourage white lawyers from engaging in dialogue regarding issues of race with each other, as well as with people of color. In a diverse legal system, where white lawyers work with colleagues, adversaries, judges, clients, and witnesses of color, the potential negative impact of these practices on a lawyer's work is quite significant.

B. How the Symbiosis Undermines Lawyer's Work: An Illustration

White law professor Clark Cunningham has provided an extraordinarily thoughtful and nuanced analysis of the representation he and two white students provided an African-American man facing a misdemeanor charge of disturbing the peace arising from a traffic stop.⁵⁶ The police officer had described the African-American client as having told the police he had been stopped "because he was black" and the Judge "described [the] client as 'hollering racism.'"⁵⁷ Nonetheless, even though Cunningham suspected that "what happened . . . was a 'racial incident,' . . . as a lawyer [he] did not talk about 'the case' that way, and therefore [he] ceased to think in terms of

55. See, e.g., Alderfer, *supra* note 2, at 219-20 (describing white "true-believer antiracism"); *Treason to Whiteness Is Loyalty to Humanity: An Interview with Noel Ignatiev of Race Traitor Magazine*, in *Critical White Studies*, *supra* note 4, at 607, 609 (asserting that "[b]lackness means total, implacable, and relentless opposition to that system. To the extent so-called whites oppose the race line, repudiate their own race privileges, and jeopardize their own standing in the white race, they can be said to have washed away their whiteness and taken in some blackness"); Peter Halewood, *White Men Can Jump: But Must Try a Little Harder*, in *Critical White Studies*, *supra* note 4, at 627, 628 (asserting that the notion that white scholars can proceed with "a feminist or anti-racist" analysis is "fundamentally flawed" and that white scholars should instead study "[a] particular form of subordination . . . from those who actually live that perspective rather than attempting to master it in the abstract"); Harrison & Montoya, *supra* note 3, at 410 (observing that "[a]t first, . . . I thought no one was interested in hearing what I termed my 'white or Anglo angst,' but, among other things, . . . by only seeing myself as white and privileged and Margaret as an oppressed person of color, I essentialized her and forced her to do most of the work"). Whites are not alone in taking this position. See, e.g., Paul E. Lee & Mary M. Lee, *Reflections from the Bottom of the Well: Racial Bias in the Provision of Legal Services to the Poor*, *Clearinghouse Rev.*, Special Issue 1993, at 311, 312-14.

56. Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 *Cornell L. Rev.* 1298 (1992). This article has been the subject of extensive commentary. See, e.g., Anthony V. Alfieri, *Stances*, 77 *Cornell L. Rev.* 1233 (1992); Harrison & Montoya, *supra* note 3, at 420-21; Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 *Golden Gate U. L. Rev.* 345 (1997); Silver, *supra* note 3.

57. Cunningham, *supra* note 56, at 1370.

racial issues”⁵⁸ Accordingly, Cunningham and the students did not discuss with their client, or argue to the court, that the treatment of their client had a racial dimension.⁵⁹ After the prosecution dismissed the case, the client angrily assailed Cunningham and the students for patronizing him and treating him the same way that other white authority figures did.⁶⁰

Cunningham attributes the failure to address the racial aspects of the case to two factors. First, the client never raised the claim with his white lawyers. Cunningham suggests that his African-American client might not have believed he could share with his white lawyers the view he expressed after the completion of the case—that the white lawyers would have been just as skeptical as other white authority figures were.⁶¹ Second, Cunningham and his students did not reach the racial issue because as lawyers they turned first to readily available “race neutral” defenses.⁶²

What Cunningham does not explore is the possibility that race influenced his own conduct and that of his students. Perhaps as whites and lawyers, they began assuming the norm that race is not a factor. Therefore, they would not on their own initiative raise the possibility that race played a role either in the matter or in their relationship with their client. Indeed, their expectation that the African-American client would raise issues of race if they existed suggests that the white lawyers might have applied the assumption that race is an issue for people of color and not for whites.

The lawyers’ white identity could also have attributed to their failure to follow up on specific evidence indicating that they should explore how racial identities influenced the case. Here, the police report revealed that the African-American client had suggested that his race was a factor in his stop. When the white judge described the charge against the African-American defendant as an “attitude”⁶³ charge, he may very well have been signaling that the charge resulted from the defendant’s inappropriate and racially based response to the police officers. Even though Cunningham as a progressive white person had an “impression” that the incident was racial, he may not have pursued this intuition⁶⁴ because the embeddedness of the authority relationship with his client was consistent with that of the white police officer and judge. After the case ended, the African-American client certainly noted that this was his perception—that the white lawyers had treated him in the same paternalistic way as the other white authority figures.

Last, Cunningham’s explanation that the white lawyers naturally turned to a race-neutral strategy represents a symbiosis of whiteness and of professional values. The professional ideal that lawyers and law should be

58. *Id.* at 1370-71; *see also id.* at 1325-26, 1368.

59. Interestingly, even though they did not discuss with their clients whether the incident was a racial one, they did ask whether the officers were white. *Id.* at 1323.

60. *Id.* at 1329-30.

61. *Id.* at 1378.

62. *Id.* at 1371, 1377.

63. *Id.*

64. *See supra* note 58 and accompanying text.

neutral provides support for preferring a race-neutral strategy if readily available, as in this case. It also supports the tendency of whites to avoid confronting racial issues. In this way, whiteness and professional values are mutually reinforcing.

This example is but one illustration of how the symbiosis of whiteness and professionalism undermines white lawyers' ability to provide their clients with optimal representation. Of course, as intergroup theory suggests, quality lawyering requires attention to race on the part of all lawyers, not just white lawyers, and in all situations, not just cross-racial ones. The dominant professional paradigm of "bleaching out" race (and other differences) is wrong both as a matter of description and as a matter of maximizing the effectiveness of a lawyer's work.

IV. RETHINKING THE CONSTRUCTION OF PROFESSIONAL IDENTITY AND RULE OF LAW

Two central goals lawyers share through their organizational group identity as members of the legal profession are commitment as an individual or firm to excellence in representing clients, and commitment as a community to maintaining a legal system that adheres to the rule of law. In order for lawyers to improve their ability individually and communally to attain these goals, the legal profession should discard the bleaching out assumption in favor of an integration-and-learning perspective that acknowledges the influence of identity group affiliations on lawyers' work.⁶⁵

A. *The Integration-and-Learning Approach Works Better Than a Color-Blind Model*

In two recent studies, leading organizational scholars Robin Ely and David Thomas have demonstrated that the "integration-and-learning" paradigm is more effective in achieving organizational goals than the "discrimination-and-fairness" model currently dominant in the legal profession.⁶⁶ In the integration-and-learning approach, members of a work

65. David Wilkins has eloquently argued that a lawyer can possibly reconcile race consciousness with prevailing professional norms. Wilkins, *supra* note 3, at 1567-94. Even if it were possible for most lawyers to "[l]earn[] to [l]ive in the [c]ontradictions," *id.* at 1569, as Wilkins urges, (and I am skeptical that it is), this Essay deals with a slightly different question—not whether consciousness of racial identity is permissible under professional norms but whether it is preferable in order to achieve professional goals. Wilkins seeks to delineate the moral obligations of black lawyers and to preserve a commitment to social justice amidst "market-based diversity arguments." David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 *Harv. L. Rev.* 1548 (2004); see also David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 *Geo. J. Legal Ethics* 855 (1998) [hereinafter David B. Wilkins, *Do Clients Have Ethical Obligations?*]; Wilkins, *supra* note 3.

66. Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 *Admin. Sci. Q.* 229,

force “are receptive to the notion that racial differences may underlie team members’ expectations, norms, and assumptions about work and that these differences are worth exploring as a source of insights into how the group might improve its effectiveness.”⁶⁷ Co-workers “openly acknowledge and negotiate their differences in service of their goals.”⁶⁸

In contrast, in the discrimination-and-fairness approach, such as the “bleaching out” paradigm dominant in the legal profession,⁶⁹ “cultural diversity is a mechanism for eliminating racial injustice, and . . . is of no use in furthering the group’s work.”⁷⁰ Under this paradigm, “group members aspire to be color blind” and confine “discourse about race . . . to the possibility of racial biases in the group.”⁷¹

Ely and Thomas found significant advantages for the integration-and-learning approach.⁷² In one study, they examined organizations employing competing models. The integration-and-learning workplace benefited from “cross-cultural exposure and learning and . . . work processes designed to facilitate constructive intergroup conflict and exploration of diverse views”; while the discrimination-and-fairness workplace displayed “low morale of employees, lack of cross-cultural learning, and the inability of employees of color to bring all relevant skills and insights to bear on work.”⁷³ In the integration-and-learning model, “all employees fe[lt] fully respected and

260-65 (2001) [hereinafter, Ely & Thomas, *Cultural Diversity*]; Robin J. Ely & David A. Thomas, Team Learning and the Racial Diversity-Performance Link 23-35 (2004) [hereinafter Ely & Thomas, Team Learning] (Harvard Business School Working Paper No. 05-026) (on file with author). David Wilkins has noted the importance of their work to lawyering. See, e.g., David B. Wilkins, *Do Clients Have Ethical Obligations?*, *supra* note 65, at 861-67; Wilkins, *supra* note 3, at 1592.

67. Ely & Thomas, Team Learning, *supra* note 66, at 9. Applying intergroup theory, the integration-and-learning perspective recognizes the continuing influence of identity group membership and “assume[s] that cultural differences, such as those stemming from race, are useful to the group because they give rise to different life experiences, knowledge, and insights.” *Id.*

68. *Id.*

69. See Sanford Levinson, *Diversity*, 2 U. Pa. J. Const. L. 573, 584 (1999) (observing that “bleaching out” is the Ely and Thomas “discrimination-and-fairness” paradigm).

70. Ely & Thomas, Team Learning, *supra* note 66, at 11.

71. *Id.* at 12. Ely and Thomas also explore a third perspective—“access-and-legitimacy.” *Id.* at 11. Like the discrimination-and-fairness approach, the access-and-legitimacy model “assum[es] that cultural differences have limited value or are irrelevant to the group’s work.” *Id.* This model promotes “cultural diversity . . . insofar as it enables the organization to match market segments to parts of its workforce as a way to gain access and appear legitimate to those market segments.” *Id.* Organizations following this model “do not incorporate the cultural competencies of their members into their core functions but, instead, define circumscribed roles for racial minorities that limit their contributions to market-interfacing functions.” *Id.* This Essay will not examine this model in detail because it does not reflect the dominant approach of legal professionalism and because Ely and Thomas found it less effective than the integration-and-learning model. See Ely & Thomas, *Cultural Diversity*, *supra* note 66, at 261 tbl.3; Ely & Thomas, Team Learning, *supra* note 66, at 8-9. Nonetheless, it may very well be that some law firms apply this model in selecting lawyers of color to appeal to clients, adversaries, or juries of color, or that the selection procedures for judges might apply the model to selecting judges for communities of color.

72. See Ely & Thomas, *Cultural Diversity*, *supra* note 66, at 261.

73. *Id.* at 261 tbl.3.

valued for their competence and contributions”; this is in contrast to the discrimination-and-fairness workplace, where “[e]mployees of color fe[lt] disrespected and devalued.”⁷⁴ Similarly, “racial identity at work” in the integration-and-learning model was “a source of value for people of color, a resource for learning and teaching, [and] a source of privilege for whites to acknowledge,” while in the discrimination-and-fairness model, racial identity was a “[s]ource of powerlessness for people of color [and a] source of apprehension for whites.”⁷⁵

Although race-related conflicts occurred in both organizations, under the integration-and-learning model, members of different identity groups perceived themselves as having “equal power and status” and “open[ly] discuss[ed] differences and conflict.”⁷⁶ In contrast, under the discrimination-and-fairness model, Ely and Thomas found “[i]ntractable race-related conflict stemming from entrenched . . . status and power imbalances; [with] no open discussion of conflict or differences.”⁷⁷

In another landmark study, Ely and Thomas compared the performance of more than “275 retail branches of a bank.”⁷⁸ They found that the integration-and-learning branches “significantly outperformed” the discrimination-and-fairness branches in key work performance criteria—“in new sales revenue and in total performance.”⁷⁹ Moreover, “racial diversity was negatively associated with all three performance measures in branches” with a color-blind approach, and “positively associated with them in branches with a positive racial learning environment.”⁸⁰

B. *Applying the Integration-and-Learning Model to Legal Practice*

The answer for the legal profession is to replace the “bleaching out” model, a discrimination-and-fairness approach, with an integration-and-learning strategy. As a preliminary step in this direction, this Essay will offer a framework for applying the teaching of Ely and Thomas to client representation and rule of law.

1. Integration-and-Learning in Client Representation

The integration-and-learning approach requires reflection and discussion in all aspects of client representation. As lawyers increase their “competence [in] dealing with racial matters,”⁸¹ they should consider how their identity group, as well as the identity groups of others with whom they are working, influences their relationships with colleagues, clients,

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Ely & Thomas, Team Learning, *supra* note 66, at 25.

79. *Id.* at 23.

80. *Id.* at 25.

81. Alderfer, *supra* note 2, at 218.

adversaries, and court personnel. Lawyers should then, with their colleagues and clients, make explicit that issues of race are open for discussion and “speak openly, frankly, and professionally about relations.”⁸² With this framework, lawyers will learn much more from their colleagues and clients, who in turn will learn much more from them.⁸³ As Ely and Thomas demonstrate, this framework will result in lawyers treating—and being perceived as treating—each other and their clients with more respect, moving beyond erroneous assumptions to more accurate analysis and more effective strategies, and working more successfully as a team with colleagues.⁸⁴

Ely and Thomas remind us that these strategies do not avoid conflict. Rather, they offer a more effective way to manage conflicts that are likely to occur or to exist even without open acknowledgement. As Ely and Thomas advise managers, lawyers should seek to maintain the trust necessary to implementing the integration-and-learning approach “by demonstrat[ing] commitment to the process and . . . by setting a tone of honest discourse, by acknowledging tensions, and by resolving them sensitively and swiftly.”⁸⁵

If the white lawyers had applied this approach in the case study described above, they would have acted quite differently. First, they would have asked themselves whether their white identity influenced how they perceived and were perceived by their African-American client, the white police officer, and the white judge. Second, from the beginning of the relationship and continuing throughout, they would have invited their client to engage with them openly on issues of race. Had they done so, they might have recognized the racial issues in the case themselves, have learned of those implications from their client, and have examined those issues in cooperation with their client. They most likely would not have missed the racial tension with their client, which existed throughout the representation but was only revealed by the client after the case was over.

While resembling some of the approaches in the literature on “cross-cultural lawyering,”⁸⁶ this approach has a different emphasis. Like cross-cultural lawyering, it rejects color-blindness and encourages self-reflection.⁸⁷ Like the better work on cross-cultural lawyering, it rejects the notions that cross-cultural lawyering is exclusively an issue for white

82. *Id.*

83. For an example of such learning, see Harrison & Montoya, *supra* note 3, at 410. *See also* Wilkins, *supra* note 3, at 1592 (asserting that “[t]o the extent that black lawyers help to open up a dialogue about the role of race and other forms of contingent identity on professional practice, they will have performed an important service for their own workplaces and for the profession as a whole”).

84. *Cf.* David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, Harv. Bus. Rev., Sept.-Oct. 1996, at 79, 89.

85. *Id.* at 90.

86. *See, e.g.*, Koh Peters, *supra* note 3; Bryant, *supra* note 3; Silver, *supra* note 3; Tremblay, *supra* note 3.

87. *See, e.g.*, Bryant, *supra* note 3, at 37, 56; Tremblay, *supra* note 3, at 383.

lawyers or in cross-cultural situations.⁸⁸ Nonetheless, as a matter of emphasis, this rejection is much clearer under an integration-and-learning approach that views all lawyers and all clients as members of both organizational and identity groups at all times.⁸⁹

In one respect, though, the integration-and-learning approach is irreconcilable with cross-cultural lawyering. Where cross-cultural lawyering seeks a “non-judgmental approach towards yourself and client,”⁹⁰ the integration-and-learning approach rejects this goal as a form of unrealistic and counterproductive color blindness or culture-blindness. It instead requires informed judgments, together with “open[],frank[], and professional[]” exchanges regarding those judgments.⁹¹ These very different goals also result in a different emphasis with regard to learning. While both approaches value learning of all types, cross-cultural strategies place a greater relative emphasis on learning about different cultural styles, while the integration-and-learning model places a greater relative emphasis on learning between and among lawyers and clients themselves during their relationships.⁹²

2. Rethinking Rule of Law

Intergroup theory also requires rethinking the connection between “bleaching out” and rule of law. As discussed above, the term “bleaching out,” a term with obvious racial resonance,⁹³ describes professionalism’s commitment that all lawyers are fungible⁹⁴ and therefore free of influence from aspects of the self external to organizational group identity, including race as well as gender, religion, and other identity group characteristics.⁹⁵ The organizational group value of professionalism requires that race and other aspects of the self “become irrelevant to defining one’s capacities as a lawyer.”⁹⁶

This conception, in turn, derives from the mutually reinforcing perspectives of role morality and rule of law. Professional role morality presumes that “the professional’s conduct is governed by the morality

88. See, e.g., Koh Peters, *supra* note 3, at 251; Bryant, *supra* note 3, at 52-53, 57.

89. See *supra* Part I.

90. Bryant, *supra* note 3, at 49. To be fair, Koh Peters and Bryant argue for “nonjudgmentalism” as a way to reduce defensiveness as a lawyer becomes aware of her own biases and not as grounds for ignoring bias altogether. Koh Peters, *supra* note 3, at 251-53; Bryant, *supra* note 3, at 59. Nonetheless, as a strategy, it does counsel an “accepting” approach to recognizing biases and does not clearly demand judgments regarding those biases once they are acknowledged. Koh Peters, *supra* note 3, at 251-53; Bryant, *supra* note 3, at 59.

91. Koh Peters, *supra* note 3, at 251; Alderfer, *supra* note 2, at 218.

92. Compare Bryant, *supra* note 3, at 40-48, and Tremblay, *supra* note 3, at 380-81, with *supra* text accompanying notes 69-85.

93. Levinson, *supra* note 1, at 1578-79; Pearce, *supra* note 12, at 1628-29; Wilkins, *supra* note 3, at 1506-07.

94. Levinson, *supra* note 1, at 1578-79.

95. *Id.*

96. *Id.* at 1579.

dictated by the profession and not from outside the profession.”⁹⁷

The dominant conception of rule of law makes the command of role morality even stronger for lawyers than for other professionals. Under this view, “[r]ule of law implies that the quality of lawyering and of justice an individual receives does not depend on the group identity of the lawyer or judge.”⁹⁸ This conception “posits that the clash of opposing views before a neutral fact finder is the best way to ascertain truth and justice.”⁹⁹ For the system to work properly, “all parties [must] receive equal representation” and for that to happen, lawyers must “function as extreme partisans who should not bring their own [identity] to bear on their representation.”¹⁰⁰

The theory of organizational behavior implicit in the “bleaching out” paradigm runs directly counter to intergroup theory. The professional socialization of organizational group affiliation within the legal profession denies the very existence of identity groups. But, as intergroup theory reminds us, demanding the exclusion of identity group influence from the classroom, courtroom, and law firm will not make it so.¹⁰¹ Individuals within organizations have both organizational group and identity group affiliations. No matter the organizational values, identity group influences persist.

Moreover, as an empirical matter, Ely and Thomas’s findings demonstrate that “bleaching out” paradigms are less effective in promoting organizational goals than a perspective that acknowledges the persistence of identity group influences. They found, for example, that a color-blind approach tends to perpetuate imbalances and injustices between identity groups that exist within society as a whole and fails to encourage people to achieve the highest functioning in pursuing common goals.¹⁰² In contrast, the integration-and-learning approach results both in a more equal distribution of “power and status” and a more effective strategy for achieving organizational goals.

The potential implications for the legal profession are profound. If our organizational goal is equal justice under law, an integration-and-learning approach will more likely have greater success than the dominant “bleaching out” paradigm. As Martha Minow has observed, in a world where differences matter, “a commitment to equality—to treating like[] [cases alike under the rule of law,]—will be caught in a contradiction.”¹⁰³

97. Pearce & Uelmen, *supra* note 3, at 143; *see also* Wilkins, *supra* note 3, at 1503. This is true not only of lawyers but also of professionals generally. *See, e.g.*, Alderfer, *supra* note 2, at 210-13.

98. Pearce, *supra* note 12, at 1629.

99. Pearce & Uelmen, *supra* note 3, at 143.

100. *Id.*

101. *See, e.g.*, Robert T. Carter & Ellen Gesmer, *Applying Racial Identity Theory to the Legal System: The Case of Family Law*, in *Racial Identity Theory: Applications to Individual, Group, and Organizational Interventions* 219 (C. Thompson & R. Carter eds., 1997).

102. Ely & Thomas, *Cultural Diversity*, *supra* note 66, at 261; *see also* Carter & Gesmer, *supra* note 101, at 219-30.

103. Martha Minow, *Making All the Difference: Intrusion, Exclusion, and American*

She, like Ely and Thomas, argues that “you cannot avoid trouble through ignoring difference; you cannot find a solution in neutrality.”¹⁰⁴ The task for the legal profession is to promote equal justice in the best way in light of the persistence of group identities.

This effort has yet to be made on any significant scale. Existing efforts to promote equality, such as judicial commissions on the status of racial minorities, continue to work within the limited confines of the “bleaching out” paradigm. The task for the future is for the legal profession to replace “bleaching out” with the goal of creating an integration-and-learning community for lawyers, so that we can join to explore the potential for rule of law in light of how we are all different from one another, and yet how we are all the same in sharing the goal of equal justice under law.

CONCLUSION

As intergroup theory teaches us, race provides data essential to understanding and managing organizational goals. To be a responsible and constructive member of legal organizations, a white lawyer must therefore acknowledge that whiteness is a racial identity and not a background norm. This acknowledgement, in turn, has two major implications. First, in assessing the legal workplace and legal system, a white lawyer (like all lawyers) must assess the role race plays and engage in learning with people of all races to determine how best to further organizational goals in light of racial differences. Second, the persistent influence of identity group membership in legal organizations requires, on both practical and theoretical grounds, discarding the dominant “bleaching out” approach to professionalism and rule of law in favor of an integration-and-learning approach to representing clients and creating a community that recognizes racial identity as a strength and not a failing.