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RACE AND REPRESENTATION: A STUDY OF LEGAL AID ATTORNEYS AND THEIR PERCEPTIONS OF THE SIGNIFICANCE OF RACE

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I. INTRODUCTION

> *The story of law in the United States is largely a story about one group of people, middle to upper class white males . . . making law for all others in society.*[1]

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[1] Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987).

Professor Menkel-Meadow's statement is paradigmatic of the views of many Feminist and Critical Race scholars that law in the United States has a long history of exclusion. By formally excluding African-Americans and women from legal education and licensure,[2] and creating barriers for immigrants and "non-nativist" men attempting to become lawyers,[3] the middle to upper class white males in this country ensured that the legal profession remained relatively homogeneous in terms of race, gender, and class.[4] Within the predominately white, relatively homogeneous American legal profession, race had little, if any, impact on the law or lawyering.

Today, however, things may be changing as the legal profession arguably becomes more diverse. As law schools successfully recruit and retain students and faculty members of color, and as increasing numbers of lawyers come from previously excluded minority groups,[5] competing visions of the impact that race has on the law and lawyering have developed in the United States.

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[2] *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950) (involving equal protection challenge by African-American denied admission to University of Texas School of Law based solely on race); Gaines v. Canada, 305 U.S. 337 (1938) (challenging a Missouri statute prohibiting the admission of negroes to law school); Bradwell v. Illinois, 83 U.S. 130 (1873) (upholding state's refusal to grant woman a license to practice law).

[3] JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE 15 (1976).

[4] *See* Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 625 (1994); *see also* ERWIN N. GRISWOLD, LAW AND LAWYERS IN THE UNITED STATES 59 (1965) ("[P]rospective lawyers come disproportionately from one element of the population, . . . the educated upper middle class.").

[5] *See* Menkel-Meadow, *supra* note 1. Although the overall number of minority attorneys is increasing at the 25 largest firms in New York City, some groups are still underrepresented. *See* Edward A. Adams, *Firms' Minority Hiring Benefits Asian-Americans*, N.Y.L.J., Apr. 18, 1996, at 1, 2. African-Americans, who comprise 7.5 percent of the student body at the nation's 178 ABA approved law schools during 1994-95, account for only 4.6 percent of the associate positions at New York's 25 largest law firms. *See id.* Latinos, who make up 5.3 percent of the entire law school student body, are also vastly under-represented--they account for only 2.6 of all associate positions at New York's 25 largest firms. *See id.* While African-Americans and Latinos are under-represented at New York's largest firms, Asian-Americans are over-represented. Asian-Americans account for approximately 7 percent of all associate positions at the 25 largest firms but make

One view, with probable roots in the legal profession's history of exclusion, posits that race has, or should have, no impact on the law or legal representation.[6] Part II of this paper sets forth this Neutrality Model, or the Professional Identity Model as it is sometimes called, of law, society and lawyering. Under this model, lawyers, because of extensive socialization and training in law school, apply their skills equally to all clients, regardless of the race, ethnicity, gender, or sexual orientation[7] of the attorney or client. Part II begins by discussing the importance of neutrality, or the appearance of neutrality in the law. This part then briefly discusses the movement in the United States that seeks to eliminate race consciousness in order to eliminate racism. Part II concludes with a discussion of lawyering under the Neutrality Model.

Part III of this paper sets forth a view in opposition to the Neutrality Model, the Race Consciousness Model of lawyering. The Race Consciousness Model is based on the premise that individuals who share common personal identity factors such as race feel an affinity for one another that enhances communication and understanding between them. Since communication and understanding is vital to the attorney-client relationship, the race of both the attorney and the client has an impact on lawyering and is a factor that should be taken into consideration. Part III begins by discussing the flawed concept of neutrality in a culture that has been dominated by one race for centuries. Part III then discusses specific criticisms of Professor Sanford Levinson's theories of lawyering,

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up only 5.6 percent of the law school student body. *See id.*

[6] *See, e.g.*, AUERBACH, *supra* note 3, at 261 (noting that in modern professional history lawyers have repeatedly offered neutral principles to achieve particular results).

[7] Personal characteristics such as race, ethnicity, gender, sexual orientation, religion, etc., will be collectively referred to as "personal identity factors" in this paper.

arguing that personal identity factors continue to play a part in the consciousness of law students and lawyers.

Part IV begins with a discussion of the relationship between poverty and the provision of legal services. Part IV also discusses the criticisms of poverty law expressed by Mary and Paul Lee in the Summer, 1993 Special Edition of *The Clearinghouse*. In their article, the Lees argue that most legal services offices are failing to adequately address the needs of their clients. The Lees attribute this failure to the lack of attorneys of color, particularly at the management level where policy is set, in offices that primarily serve people of color. Some of the Lees' points will be tested through our survey of Legal Aid attorneys.

Part IV also examines a survey of attorneys of the Civil Division of The Legal Aid Society of the City of New York (Legal Aid) as a test ground for both the Neutrality and Race Consciousness Models. Because Legal Aid's clients are overwhelmingly people of color, the survey presents an opportunity to examine white attorneys' interaction with people of color and attorneys of color interaction with either members of their own racial group or, if not their own racial group, with people who are not members of the dominant race. Part IV discusses this questionnaire and the methodology employed in surveying Legal Aid attorneys. Basically, the questionnaire focused on issues of race and the attorneys' relationships with their clients, the courts, and their colleagues. This part then discusses the demographics of the Civil Division of The Legal Aid Society, the test ground for the survey. Part IV concludes with an analysis of the survey results using the Neutrality or Race Consciousness Models.

This paper concludes that the majority of Legal Aid's attorneys recognize race as a significant factor in their professional lives. The perception of the significance of race in their work, however, differs markedly among attorneys of color and white attorneys. Attorneys of color view race as an advantage in facilitating and enhancing communications with their clients of color. Conversely, attorneys of color view race as a disadvantage in the treatment they receive in the workplace and the treatment they and their clients receive from the courts. White attorneys were less likely to perceive the effects of race on the attorney-client relationship, yet were aware that race has an impact on the treatment their clients receive from the judicial system.

While there are clearly differences in how attorneys of color and white attorneys perceive race and its impact on the attorney-client relationship, neither the Neutrality Model nor the Race Consciousness Model adequately explain the differences in the perceptions between the two groups of attorneys. Rather, it appears that Legal Aid attorneys are operating under a hybrid of the two models that results when attorneys exhibit their group and organization identities. The existence of this hybrid supports the conclusion that neither group of attorneys steadfastly adheres to the "Rule of Law" and its principles of neutrality. Perhaps, then, the time has arrived for law schools to abandon the pursuit of colorblindness and to begin teaching students to be conscious and sensitive to the issue of race. Our law schools must begin to teach students that race consciousness and sensitivity can be learned, regardless of one's race, class, ethnicity, or other personal identity factors.

II. THE THEORY OF NEUTRALITY

A. The Rule of Law

The government of the United States has been emphatically termed a government of laws, and not of men.[8]

One of the principles that allows our system of justice to continue functioning, to continue to be legitimate, is neutrality. The notion that the law functions through an impartial application of rules is probably the most important block in the legal system's foundation and is commonly referred to as "The Rule of Law."

Under this model, parties engaged in a dispute bring the matter to the court. The judge, or the jury, listens to the parties' stories, more than likely through the lens of the lawyer, and determines the facts. Once the "facts" have been uncovered, the judge simply applies the existing law to those facts.

In this scenario, there need be no mention of the race or ethnicity of any of the players. Presumably, an African-American

[8] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

judge has the same laws to apply as a white judge. The facts in the dispute should not change if one of the parties is Latino. Nor should the identity of the jury be of any relevance to the outcome of the trial.

This commitment to neutrality can be seen in the above quotation from *Marbury v. Madison*. Since Chief Justice Marshall wrote these words in 1803, they have been cited in opinions over and over again.[9] In many instances, they are cited by a judge who seems to want the reader to think that she would like to rule otherwise, that she recognizes that the decision looks, on its face, to be unfair, but that she has no choice. We are, after all, a nation of laws.

Put another way, the Rule of Law demands that there be a high level of generality. As Professor Margaret Radin wrote, "Generality implies that the rules are broader (more general) than specific cases or particulars, which can be brought within them, or seen to be comprehended, subsumed, or covered by them. All particulars of specific cases that fall under the rule are covered by the rule."[10] Under Professor Radin's conception of generality, for example, if a rule states that no one under 21 years old is permitted in a saloon, that rule applies to *all* people under 21 years old and to *all* saloons.[11] A judge presented with a violation of this rule has no choice but to apply the neutral law to the facts of the case and, as noted above, the additional characteristics of the individuals involved are not important. The only two relevant facts for the judge in this

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[9] A Westlaw search found over one hundred Supreme Court cases citing this phrase.

[10] Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 785 (1989). Professor Radin discusses the "instrumental" components of the Rule of Law as discussed by LON FULLER in THE MORALITY OF LAW (rev. ed. 1969). According to Fuller, there are eight components of the Rule of Law: 1) Generality, 2) Notice or Publicity, 3) Prospectivity, 4) Clarity, 5) Non-Contradictoriness, 6) Conformability, 7) Stability, and 8) Congruence. *See id.* For the purposes of this study, we will focus only on generality. Professor Radin also discusses JOHN RAWLS'S theories in A THEORY OF JUSTICE (1971). According to Radin, Rawls believes that the Rule of Law is "'the regular and impartial administration of public rules.'" *Id.* at 787. Although the rule is formulated somewhat differently, the notion of the "impartial[ity]" of the Rule of Law is essentially the same as the idea of "generality" in Fuller's theories.

[11] *See id.*

case are: 1) the age of the customer; and 2) that the building was a saloon.[12]

When we discuss legal rights and remedies, issues of personal identity are not part of the equation. As Professor Jennifer Nedelsky points out, often the parties involved in the dispute are so abstracted that they are often represented by letters -- "If A does this to B . . . ."[13] Because the Rule of Law is neutral, is impartial, A's gender or race can be, in some ways must be, abstracted out of the hypothetical. As Nedelsky points out, "If . . . there are no interchangeable As and Bs, if each event is completely unique in its necessary specificity, then treating like cases alike will be of little help in achieving impartiality."[14]

Without this commitment to neutrality, law would cease to be legitimate. If people believed that the sort of justice that you were accorded depended on personal identity factors, such as race, rather than the impartial application of neutral laws, there would no longer be any reason to adhere to the law.[15]

B. A Raceless Nation

Our Constitution is color-blind . . . .[16]

Although Justice Harlan wrote these words in the dissent in *Plessy v. Ferguson*, his notion of the "colorblind" constitution survived and eventually prevailed. Today, the notion that laws must be passed and applied without notice of race is a fundamental part of

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[12] *See id.*

[13] Jennifer Nedelsky, *The Challenges of Multiplicity, Inessential Woman: Problems of Exclusion in Feminist Thought*, 89 MICH. L. REV. 1591, 1602 (1991) (reviewing ELIZABETH SPELMAN'S book, INESSENTIAL WOMAN (1988)).

[14] *Id.* at 1606.

[15] A recent example of a large group of people disregarding the law because of a strong belief that the law is not impartially applied is the riots in Los Angeles following the acquittal of a number of white police officers charged with brutally beating Rodney King, an African-American. *See, e.g.*, Ted Gest & Betsy Streisand, *A Question of Fairness*, U.S. NEWS & WORLD REP., Aug. 1, 1994, at 23 (discussing how people's perception of the unfairness of the criminal justice system triggered a major riot).

[16] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

our jurisprudence.[17] More importantly, though, it is also a major part of our society's notions of how we ought to treat differences between people. Not only is our constitution supposed to be colorblind, but so is our entire society.

As the nation attempted, in the 1960s and 70s, to free itself from its past of racial subordination and segregation, race consciousness became, in many respects, equated with racism.[18] According to Professor Gary Peller, "progress [in eliminating racial oppression is identified] with the transcendence of a racial consciousness about the world."[19] According to this view, race is not an attribute that accounts for any difference between people. Thus, to use it as a measure of someone is irrational. Instead, it is necessary to focus on the commonalities that all people share.

Professor Nedelsky observed this commitment in the 1960s and 1970s to "sameness" across racial groups in the television program *Sesame Street*. In one *Sesame Street* segment, children of different ethnic groups played while the background music proclaimed, "Whoever you are, whatever you look like, underneath we are all the same."[20] This was the message of the 1960s, that "[w]e are all really the same; differences do not matter."[21] Similarly, according to the integrationalists, "race makes no real difference between people, except as unfortunate historical vestiges of irrational

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[17] *See, e.g*, City of Richmond v. Croson, 488 U.S. 469 (1989).

[18] *See* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 773-74 ("In short, the symmetry of the integrationist picture is rooted in the idea that racism consists of possessing a race consciousness about the world. . . ."). However, race consciousness was also an important part of the struggle for "equality." *See* discussion, *infra*, at Part IV. Peller uses the term integrationalist for those who advocate increased interaction between different races in order to eliminate discrimination.

[19] *Id.* at 760.

[20] Nedelsky, *supra* note 13, at 1604. Professor Nedelsky is paraphrasing the song, which continues, "We laugh when we are happy. . . . We cry when we are sad, we shiver when we are cold, we sweat when we are hot." *Id.*

[21] *Id. But see* HENRY LOUIS GATES, JR., COLORED PEOPLE (1994) (recounting the memoirs of the chairman of Harvard's Department of African-American studies, which includes discussion on the black power movement in the United States that sought to heighten racial awareness and taught blacks that it *did* matter if you were not white); Frederick D. Robinson, *The Rhetoric of Victimization that is Paralyzing Black America*, CHI. TRIB, Jan. 14, 1991, at 9 (discussing racism and discrimination among African-Americans that has carried over from the black power movement).

discrimination."[22] The integrationalist view posits that the use or consideration of race is the cause of discrimination and of subordination. The goal, then, of the integrationalists, was the elimination of the consideration of race altogether. As Peller points out, some believed that continued exposure to people who were different in identity factors would not only lead to the realization that those differences were irrelevant, but would result in those differences actually disappearing.[23]

Since the 1960s and 70s, the goal of colorblindness has been adopted by conservatives and other groups. Under the new formulation, a commitment to race-neutral measures is used to strike down affirmative action policies designed to assist historically disadvantaged groups. The commitment to "neutral" measures continues, "even if it results in segregated institutions."[24] Facial neutrality is seen as a commitment to meritocracy, where "once the law had performed its 'proper' function of assuring equality of process, differences in outcomes between groups would not reflect past discrimination but rather real differences between groups competing for societal rewards."[25]

The commitment to "sameness," or neutrality in society, tends to lead people away from focusing on the personal identity factors of other individuals. The combination of the neutrality of the Rule of Law and the commitment to a colorblind society creates an environment where race is something to be ignored. This carries over to how we train lawyers and how lawyers are expected to interact with clients.

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[22] Peller, *supra* note 18, at 772.

[23] *See id.* at 771. Peller quotes from T. SHIBUTANI & K. KWAN, ETHNIC STRATIFICATION: A COMPARATIVE APPROACH (1965):

> Human beings throughout the world are fundamentally alike. . . . Hence, whenever distance is reduced, individuals recognize their resemblances. . . . Whenever men interact informally, the common human nature comes through. It would appear, then, that it is only a matter of time before a more enlightened citizenry will realize this. Then, there will be a realignment of group loyalties, and *ethnic identity will become a thing of the past.*

Id. at 771 n.23 (emphasis added).

[24] *Id.* at 777.

[25] Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1344 (1988).

C. The Neutrality Model for Lawyers

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 professional community.[26]

This general notion, combined with the overwhelming commitment in the law to neutrality, can explain the project that Professor Levinson describes. Just as we expect a neutral judge to apply the law regardless of her race or the parties' ethnic groups,[27] Professor Levinson envisions a neutral lawyer applying her talents equally for a client of any racial or ethnic group.

Under Levinson's model, the profession of law is itself a community, not unlike a racial community. In discussing the legal profession as a community, Professor Levinson refers to the work of Steven Cohen when he writes "'professions are potential communities; and, as such, they might serve as surrogates and replacements' for other kinds of communities."[28] Cohen claims that "some professions could conceivably rival ethnic and religious communities in many ways."[29] This community socializes its members into its own values--in law, to value neutrality. The goal of law school then, according to Professor Levinson, is to so ingrain a professional identity that personal identity factors vanish. As Levinson describes it, law school "'bleach[es] out' . . . merely contingent aspects of the self."[30]

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[26] Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578-79 (1993).

[27] *See, e.g.*, Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities*, 1990 DUKE L.J. 848, 884 (1990) ("[W]e are encouraged to believe that our justice system and its courts are a public space where all citizens will have equal voices before the law, even if race, gender, class, sexual orientation, disability, or other factors disadvantage people elsewhere in our society."); Jeffrey R. Pankratz, *Neutral Principles and the Right to Neutral Access to the Courts*, 67 IND. L.J. 1091, 1094 (1992) ("[A] judge must neutrally derive, define and apply legal principles.").

[28] Levinson, *supra* note 26.

[29] *Id.*

[30] *Id.* at 1578.

Once a student has been put through the rigorous training of three years of law school, then, her identity has been reconstructed.[31] Her identity as a professional is such that "apparent aspects of the self [s]uch as one's race, gender, religion, or ethnic background would become irrelevant to defining one's capabilities as a lawyer."[32] In some aspects, this notion of the professional replacing the personal is already familiar to lawyers. For example, many of the rules of ethics that lawyers must follow no doubt conflict with many attorneys' personal conceptions of what is right.[33] However, as Levinson points out, to remain in the profession requires that one allow professional ethics to "supersede personal ethics."[34]

To accept the Neutrality Model, or the Professional Identity Model as Professor Levinson calls it, is to accept that law school can sufficiently retrain individuals to apply their talents regardless of personal identity. Therefore, according to Levinson's model, race not only *should not* be a factor in the attorney client relationship, but it absolutely *is not* a factor if law school has done its job.

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[31] Levinson notes that a professor of his once referred to the law school experience as similar to training in "a Maoist thought reform camp." *Id.* at 1601. According to Levinson, "Just as Mao held out the promise of becoming the new socialist man or woman, so did law school promise the redemptive possibility of becoming transformed into the lawyer." *Id.*

[32] *Id.* at 1579.

[33] One example of a case where the rules of ethics conflicted with an attorney's conception of what is right and wrong occurred in the often cited People v. Belge, 41 N.Y.2d 60 (1976). In *Belge*, an attorney who was appointed by the court to represent a criminal defendant charged with murder learned about a second murder victim during the course of confidential communications with his client. In an attempt to confirm the information about the second homicide received from his client, the attorney went to the site where his client had indicated he buried the body and found the corpse there. After discovering the dead body, the attorney did not inform the authorities or even the victim's family. Here, the lawyer was faced with the dilemma of preserving the confidence learned from his client, as required by the Model Code of Professional Responsibility DR 4-101, or revealing the whereabouts of the body so that the victim's parents would know that their daughter was dead and could give her an appropriate funeral and burial.

[34] Levinson, *supra* note 26, at 1578 (quoting Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1482 n.26 (1966)).

III. THE RACE CONSCIOUSNESS MODEL

A. A Critique on Neutrality In Law & Society

As discussed above, the legitimacy of the Rule of Law is premised on the idea that law is itself neutral. However, there are many who question the notion that law is or even can be truly neutral. In a nation where laws have been historically passed and applied by the dominant white male culture, what appears on its face to be neutral is possibly neutral only from the dominant perspective.[35]

The neutrality discussed above has been criticized by both Feminist and Critical Race theorists. According to many of these critiques, what is considered neutral is actually the product of hundreds of years of dominance by one group (whites) over the rest of society. It has long been recognized that a law that appears to be neutral may, in fact, be intentionally discriminatory.[36] Even if a law is not intentionally discriminatory, it may have results that disadvantage one group in favor of another.[37] The mistake that is made in proclaiming the law neutral is that it overlooks 1) the long

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[35] *See, e.g.*, AUERBACH, *supra* note 3, at 261 (noting that lawyers in modern professional history have repeatedly offered neutral principles to achieve particular results).

[36] *See, e.g*, Yick Wo v. Hopkins, 118 U.S. 356 (1886). *Yick Wo* concerned an ordinance prohibiting the operation of laundries in wooden buildings. The effect of the law was to put all laundries operated by people of Chinese descent out of business. According to the Court,

> "[t]hough the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

Id. at 373-74.

[37] *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976). *Washington v. Davis* concerned an aptitude test given to candidates for the District of Columbia police force. African-American candidates were more than four times as likely to fail the test than white applicants. Despite this discrepancy, the Supreme Court held that mere disparate impact did not invalidate the test. *But see* State v. Russell, 477 N.W.2d 259 (Minn. 1991) (holding a drug statute that adversely impacted on African-Americans to be unconstitutional).

term effects of this domination, 2) the identities of the rule makers and 3) the "norms" that are used by them in formulating the rules.[38]

For example, Professor Kimberle Crenshaw notes that "[the] belief in color-blindness . . . would make no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present."[39] Racism has been, to a large extent, so ingrained in our world, that "it is a part of our common historical experience, and, therefore, a part of our culture."[40] Professor Lawrence's argument, which is similar to Crenshaw's, is that racism cannot be addressed by simply stating, "From now on you will not discriminate." The underlying foundation of society must be examined. More practically, attention must be paid not to process, but to results.[41] Facially neutral classifications cannot be actually neutral when society itself is unfairly constituted.

There is an additional difficulty, though, in eradicating societal unfairness when many believe so strongly that its structure is inherently fair. There are those who argue that it is extremely difficult, if not impossible, for members of dominant groups to objectively recognize their advantages and to identify the disadvantages of subordinated groups around them. This may be a product of self interest, where to recognize the unfairness may be the

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[38] *See, e.g,* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent,* 91 MICH. L. REV. 953, 955. Flagg states:

> The most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any. I call this the transparency phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific. Transparency often is the mechanism through which white decisionmakers who disavow white supremacy impose white norms on blacks. Transparency operates to require black assimilation even when pluralism is the articulated goal; it affords substantial advantages to whites over blacks even when decisionmakers intend to effect substantive racial justice.

Id.

[39] Crenshaw, *supra* note 25, at 1345.

[40] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STANFORD L. REV. 317, 330 (1987)

[41] *See* Crenshaw, *supra* note 25, at 1345.

first step in ending it; or, merely self delusion, since many are sincerely uncomfortable with the notion that they may have achieved their current level of success in a world where the deck is stacked in their favor.[42]

In her article entitled *White Privilege, Male Privilege*, Peggy McIntosh notes that even where men may be willing to admit that women are disadvantaged, they are still unwilling to acknowledge that men are unfairly advantaged.[43] Professor McIntosh sets forth a list of conditions and privileges that she can be assured of as a member of the dominant race.[44] She makes the same observation of whites that she makes of men, claiming that "whites are carefully taught not to recognize white privilege."[45] Perhaps in a more benign reading, it may be that whites, because of their position in society, do not have to examine race at all; it simply does not occur to them.[46]

Under these arguments, current law is not neutral. It only appears neutral to those of the dominant group, whites, and more narrowly, white men. For the rest of society, this claim of neutrality is clearly not correct and fosters a sense of exclusion and unfairness.[47]

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[42] Interestingly, under this view, it may be much more difficult for people who have not achieved the highest level of "success" as our culture defines it (i.e., money, power, fame, etc.) to recognize racism than those at "higher" levels.

[43] Peggy McIntosh, *White Privilege, Male Privilege*, THE LEGAL PROFESSION AND PROFESSIONAL RESPONSIBILITY, Jan. 1991, at 99. Copy on file with the authors.

[44] Professor McIntosh lists 46 "skin-color privileges" that she is assured of simply by being white. Some of the privileges are: being able to afford housing in an area in which she would want to live; having neighbors who will be neutral or pleasant to her; the ability to speak in public without a powerful male group putting her race on trial; doing well in a situation without being called a credit to my race; never being asked to speak for all the people in my own racial group; going to a public accommodation without fearing that people of my own race cannot get in or will be mistreated; and going shopping alone with the assurance that I will not be followed or harassed. *See id.* at 103-07.

[45] *Id.* at 99. The tendency of whites not to think about whiteness or about norms, behaviors, experiences, or perspectives that are white-specific is also known as the "transparency phenomenon." Flagg, *supra* note 38, at 953, 957 (1993).

[46] Nedelsky, *supra* note 13, at 1595 (describing her son's apparent obliviousness to racial differences and wondering whether this is "'because, as a child of the culturally dominant group, he need not learn 'that the white world is dangerous and that if he does not understand its rules it may kill him.'" (quoting ELIZABETH SPELMAN, INESSENTIAL WOMAN (1988))).

[47] *See infra* Part I.

The implications of this perception for the training of lawyers and for the practice of law--especially for whites--is that more attention must be paid to racial differences. As section B, *infra*, discusses, whites may be unaware and unfamiliar with the lives of their clients of color to such an extent that failure to take racial differences into account may mean missing a large part of the client's story and problem.[48]

B. The Persistence of Identity Factors and the Potential for "Bleaching Out"

Some have argued that the civil rights movement of the 1960s reawakened the interest of groups in their different racial and ethnic identities.[49] Led by increasing assertions by African-Americans of racial pride, there was a general rediscovery of ethnicity, and of pride in difference.[50] With the focus on different groups' subjective experience of the world came the idea that there was little or no commonality. The subjective experiences of people of specific backgrounds shape their worldviews in different ways. Professor Nedelsky wrote of this danger in her piece on the illusion of the Rule of Law.[51] According to Nedelsky's theory, a set of circumstances can appear different to members of different identity groups. The resulting lack of commonality means that "[w]hat we think of as common sense may make little sense or even be offensive to someone of a different identification background."[52]

According to the Race Consciousness Model, society trains people in the roles that it expects of them. In many ways, those roles are based on biological factors, such as sex and race. These identities

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[48] *See* Kimberle Crenshaw, *Foreward: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 2 n.4 (1988) (noting that "[w]hites, although aware that racial subordination is a problem, are unlikely to view racism as a constant or central feature of American life").

[49] Clayton P. Alderfer & David A. Thomas, *The Significance of Race and Ethnicity for Understanding Organizational Behavior*, INT'L REV. OF INDUS. & ORGANIZATIONAL PSYCHOL., at 6, 8-9 (1988).

[50] *See id.*

[51] *See* Nedelsky, *supra* note 13.

[52] 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, 1810 (1993). Thus, under this view, even "common" sense is a relative concept.

are socially ingrained at an early age. To a large degree, many believe that our culture teaches African-Americans that the role of blacks in this society is a role of subordination.[53] Those who believe that differences such as race continue to affect the way individuals behave generally acknowledge the profound, but in some ways subtle, effects that racism embedded in our society has. For some, racism is beneath the surface, which makes a full examination of it and its effects very difficult.[54] This is the view expressed by Charles Lawrence in his piece on subconscious racism.[55] According to Lawrence, society's racism is ingrained in all of us to such an extent that we are no longer able to fully evaluate how it informs our opinions and actions.[56] Because we lack the ability to examine these biases and roles, we cannot effectively "reconstitute" ourselves to eliminate them.[57]

As Alderfer and Thomas put it, "Racial and Ethnic groups vary in their experiences, and as a consequence, develop unique ways of understanding their relationships to other groups."[58] This may make lawyering for members of different groups especially difficult. The task is even more difficult for lawyers of the dominant culture who serve clients of color. In these instances, lawyers who have likely not been forced to examine their own ethnicity must attempt to interpret the narrative of others.[59] The assumption that the client narrative can be heard and easily comprehended by both parties is no

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[53] *See* Nedelsky, *supra* note 13 (reviewing ELIZABETH SPELMAN'S book, INESSENTIAL WOMEN (1988)).

[54] *See* Anthony Alfieri, *Stances*, 77 CORNELL L. REV. 1233, 1249 (1992) (discussing the work of Richard Delgado and Jean Stefancic).

[55] Lawrence, *supra* note 40.

[56] *Id.*

[57] *See* Alfieri, *supra* note 54, at 1250.

[58] Alderfer & Thomas, *supra* note 49, at 13.

[59] Alderfer and Thomas discuss several reasons that people deny their own ethnicity. Among these is the fact that people may perceive that they have no ethnicity - they are of the dominant group. This applies to members of the majority who are never forced to live within another culture's identity. Alderfer & Thomas, *supra* note 49, at 9. For a similar analysis, see Nedelsky, *supra* note 13, at 1595. *See also* McIntosh, *supra* note 43. Professor McIntosh lists several things that she considers part of the "invisible package of unearned assets" that white people in the United States have by virtue of their race. According to Professor McIntosh, the package is not generally seen by those who possess it. *Id.* at 102.

longer valid. With different socialization comes different priorities, different ways of thinking, even different languages. Some believe that the group identity will survive professional training. For example, even as Alderfer and Thomas acknowledge that organizational identity will influence a person's behavior and attitude, they also argue that the group identity that an individual brings to the organization will possibly remain the most significant factor.[60]

Long before Professor Levinson set forth his Professor Identity Model,[61] Kimberle Crenshaw wrote a piece that sharply contradicted the notion of neutrality in the law.[62] As discussed above, Professor Crenshaw believes that the neutrality that Levinson describes is not neutral at all, but is the product of the "dominant view in academe that legal analysis can be taught without directly addressing conflicts of individual values, experiences and world views."[63] Professor Crenshaw refers to this notion as "perspectivelessness."[64]

Professor Crenshaw discusses the alienation that law students of color feel in a classroom that treats issues and people as interchangeable without regard to race and gender.[65] By training lawyers without referring to race, white students are not challenged to examine what they consider to be neutral or the "norm," and students of color are presented with the dilemma of choosing between what the professor says, and their own experiences.[66]

Due to the intensely personal nature of the legal profession, group identity differences probably do have an effect on the attorney-client relationship. One of the few pieces that deals with this topic is Professor Russell Pearce's response to Professor Levinson.[67]

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[60] Alderfer & Thomas, *supra* note 49, at 6. Professors Alderfer and Thomas break identity into two categories: organizational groups, and identity groups. Organizational groups are generally based on task or function. Identity groups are based on biological or cultural similarity.

[61] *See supra* Part II.C.

[62] Crenshaw, *supra* note 48.

[63] *Id.* at 2.

[64] *Id.*

[65] *Id.* at 3.

[66] *See id.* at 9.

[67] Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: Midrash on Levinson*, 14 CARDOZO L.REV. 1613, 1631-36 (1993).

According to Professor Pearce, the available research tends to refute Professor Levinson's claims that group identity can effectively be "bleached out" through socialization and training in the methods and values of the profession.[68] Research also seems to indicate that the fact that a group identity does not involve the voluntary adherence to a system of beliefs will make that group identity less relevant.[69]

Individuals who have shared a set of assumptions and traditions from birth should feel an affinity for one another that those from different identity groups may not. If this is so, the relationship of lawyer and client would unquestionably be affected. Those who share a common identity group factor such as race, should feel better able to communicate their needs and their feelings to others of the same race. Their shared identity would facilitate understanding and allow for more productive counseling. What little scholarship there is in this area seems to support this theory. For example, in discussing the mock interviews conducted by law students in his course on "Lawyering Process for Social Change," Professor Ong Hing observes that, "[i]nvariably, it becomes apparent that interviewers of similar identification backgrounds are able to pick up on subtle cues or signals from the interviewees that others might miss."[70]

If this is the case, then Professor Levinson's model would seem to be an inadequate description for lawyering in a multi-cultural environment. A lawyer of color carries with her experiences as a person of color in a society dominated by whites. In contrast, a white attorney who represents a client of color may not be prepared to fully relate to the client if she approaches the client with a set of

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[68] *Id.* at 1632-33. Professor Pearce relies primarily on the work of Professors Alderfer and Thomas.

[69] *See id.* at 1632.

[70] Ong Hing, *supra* note 52, at 1814. In his course Professor Ong Hing first has his students watch a videotaped simulation of an interview between a white attorney and an African-American client. The interview is intentionally awkward, due in part to the class and racial differences between the client and the attorney. After watching the video interview, each student in Ong Hing's class is then required to conduct two videotaped interview exercises in which another student plays a tenant with problems seeking legal assistance. After the interviews are taped, Professor Ong Hing then reviews the tapes with the class, focusing on the personal identity factors involving the lawyers and clients of different genders, races, and ethnicities.

assumptions that do not apply beyond her dominant culture. Accordingly, lawyers and law schools may be more effective if they adopt a model that takes the race of both the attorney and the client into account. Approaching the attorney-client relationship with the knowledge that there may or may not be a shared set of assumptions and constructs may allow the attorney to listen more carefully to the client. This may, in turn, allow the attorney to more fully understand the client and the client's perspective.

As shown below, neither theory described in this section tells the entire story. However, to the extent that the attorneys interviewed in our survey believed that race was a factor in their representation of people of color, it seems as though the Race Consciousness Model is a more accurate account of what goes on in the lawyer-client relationship.

IV. THE DEMOGRAPHICS OF POVERTY AND THE PROVISION OF LEGAL SERVICES

A. Race and Poverty

The connection between race and poverty is undeniable.[71]

Paul E. Lee & Mary M. Lee, in an article in *Clearinghouse Review*, assess the state of legal services today, arguing that despite "hard work by legal services advocates, the plight of poor clients is as bad as or worse now than at any time during the 25 years that legal services programs have been in existence."[72] The plight of poor people generally seems to be worsening; there has been only "slight" progress "toward the reduction of poverty between 1968 and 1993."[73] In 1991, one out of seven Americans (14.2 percent) were poor; this

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[71] 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, 312 (1993).

[72] *Id.* at 312.

[73] John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect--An Introduction*, 71 N.C.L. REV. 1289 (1993) (discussing the Kerner Commission, part of President Johnson's War On Poverty, which explored the explicit links between racial discrimination and urban poverty, and evaluating those findings in light of 1993 statistics).

percentage represents 35.7 million people, and was larger than any year since 1967, with the exception of the deep recession years of 1982 through 1984.[74] People of color continue to be poor at a higher rate than whites; in 1991, the poverty rate was 32.7 percent among African Americans, 28.7 percent among Latinos, and 12 percent among Asian Pacific Americans, as compared to 11.3 percent among whites.[75] Gender as well as race affects poverty. A majority of the poor in the United States are women; in 1991, 20.6 million females were poor, as compared to 15.1 million males.[76]

Many of the anti-poverty programs created in the 1960's explicitly acknowledged that the eradication of racial discrimination was crucial to the elimination of poverty.[77] The strategy of President Johnson's original "War on Poverty," as embodied in the Economic Opportunity Act of 1964,[78] was "primarily a strategy of providing an equal start and an equal opportunity to all Americans, regardless of their race or economic background."[79] Many initiatives of the "War on Poverty," including the Civil Rights Act of 1964[80] and the Voting Rights Act of 1965,[81] "challenged racially discriminatory barriers to opportunity and to participation in the political process, [which are] appropriately viewed in part as anti-poverty initiatives."[82] Access to housing was also targeted in the Fair Housing Act of 1968,[83] which "expressly prohibited racial or religious discrimination by governmental or most private owners of multi-family housing, in the

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[74] *See* Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697 (1993) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COM., SER. P-60, NO. 181, POVERTY IN THE UNITED STATES: 1991 at 1 (1992)).

[75] *See id.* The Bureau of the Census uses the term "Hispanic," which is considered offensive by some groups because it refers to the Spanish conquerors who killed and enslaved many groups of native people. Accordingly, we have replaced it with the more widely accepted "Latino."

[76] *See id.* at 1698.

[77] *See id.*

[78] 42 U.S.C.A. 2701 (1964) (repealed 1981).

[79] Edelman, *supra* note 74, at 1710.

[80] 42 U.S.C.A. 2000e (1964).

[81] 42 U.S.C.A. 1793 (1965).

[82] Edelman, *supra* note 74, at 1710.

[83] 42 U.S.C.A. 3601 (1968).

sale or rental of dwellings, or in their advertisement, their financing, or their commercial brokerage."[84]

Since then, it seems, the trend has been to move away from race conscious antipoverty strategies. The strategy of the Reagan-Bush era embraced what might be called a pathology theory of poverty, characterized by an insistence that the problem is the poor themselves: "[t]alking about the adult, nonelderly, nondisabled, nonemployed poor, this story says that they prefer to be dependent, will not work unless coerced, and have bad morals; government programs to help them just make them worse, cementing them in their dependency with its associated depravity."[85] This story of poverty relies on the assumption that poor people could pull themselves out of poverty, if they would only choose to; if they choose not to, they have only themselves to blame. The pathology story of poverty views poverty as the "aggregation of separate personal cases arising through deficits in individuals' capacity, circumstance, or character."[86]

Whereas the pathology story of poverty "blames" poverty on individual failures or tragedies, it does not consider the effect of race, gender, or other structural or institutional factors. An alternative to the pathology story of poverty is the structural story, which "looks to the state of the economy, the state of opportunity, and the state of education, and it sees racial and ethnic discrimination as a real part of the picture as well."[87] This view locates the root causes of poverty in a larger framework, rather than focusing on individual cases, allowing for a broader understanding of the forces such as race and gender that contribute to persistent poverty. A structural story of poverty is more consistent with a Race Consciousness Model of legal services practice, in which the intersection of race and poverty may be explicitly considered.[88]

Race and poverty also intersect to affect access to legal services; poor people of color are "disproportionately numbered among those without access to effective legal representation."[89] Even

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[84] Boger, *supra* note 73, at 1306.

[85] *See* Edelman, *supra* note 74, at 1700.

[86] Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 537 (1993).

[87] Edelman, *supra* note 74, at 1701.

[88] *See infra* Part III.A.

[89] *Symposium on Racial Bias in the Judicial System: Minnesota Supreme Court*

when poor clients of color represent themselves, they are not guaranteed "access" to legal processes. The notion that one has access to justice simply by getting into court is not borne out by the experiences of people of color, particularly poor people of color. People of color are routinely demeaned and discriminated against in the very courtrooms where they have gone to seek justice.[90]

In a study of Baltimore's rent court, Barbara Bezdek found that poor tenants of color are routinely treated less well than the predominantly white landlords and their agents, and rarely prevail on their claims.[91] Because most of these tenants are relatively unskilled in the language of the law, which "bears little or no relation to people's natural narratives,"[92] judges tend not to give credence to tenants' stories, and express impatience when tenants attempt to state their claims. In this setting, tenants are excluded from "meaningful participation in the conversation [making] the legal process a charade."[93] This mistreatment only further entrenches the feeling for poor people of color that the courts are hostile places which are not to be trusted.[94] It also fails to take into account that the law's power and authority exist in connection with other power structures in society.[95]

Task Force on Racial Bias in the Judicial System--Access to Representation and Interaction, and General Civil Process, 16 HAMLINE L. REV. 665 (1993) [hereinafter *Symposium on Racial Bias*).

[90] *See, e.g*, 1991 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES 27 (finding that minority litigants perceive the courtroom environment to be hostile and nearly half of all the minority litigants surveyed reported instances of insensitive or otherwise unfair treatment).

[91] *See generally* Bezdek, *supra* note 86.

[92] *Id.* at 588.

[93] *Id.* at 589.

[94] *See Symposium on Racial Bias*, *supra* note 89, at 666; *see also* Bezdek, *supra* note 86, at 589.

> This is destructive of more than tenants' statutory rights. For most tenants, such a court offers a stern lesson that formal rights are for somebody else and not for them. Judicial manipulation of the hearing's discourse signals official priorities about the rights to be protected and the language to speak. Nothing in it encourages belief in a system of legal rights, nor an expectation that legal rights parallel one's intuitive sense of rightness, nor a perception of oneself as a rights-bearing person.

Id.

[95] *See* Bezdek, *supra* note 86, at 539.

Despite the race conscious history of many past anti-poverty programs in the United States, and statistics which show that people of color continue to be disproportionately affected by poverty, many offices providing legal services to the poor do not address the connection between race and poverty. This is particularly curious, given that neighborhood legal services, now the Legal Services Corporation, grew out of the "War on Poverty."

The Lees argue that legal services attorneys rarely raise issues of racial discrimination in the areas in which they generally practice, such as housing, employment, education and government benefits:

> Civil rights claims are rarely raised in these areas despite the fact that legal services clients are almost always members of groups that have been afforded special protection from unequal treatment--people of color, women, children, seniors and the disabled. As a result, discrimination, inequitable distribution of resources, language access, and institutional racism in benefit and entitlement programs go unchallenged.[96]

The Lees credit this failure of legal services organizations to act on this link between race and poverty to "nonminority members of the legal services community, especially those in legal services leadership, [who] have gained self-esteem by looking down upon their poor clients of color."[97] In the Lees' view, because most managers of legal services offices are white, the policy set by management does not adequately reflect the needs of their clients, who are overwhelmingly people of color.[98]

The Lees argue that it is in the interests of the white management to continue to advocate ineffectually: the white management structure depends on "keeping its overwhelmingly minority clients where they are both socially and economically, whatever the cost."[99] Consequently, "there exists within legal services no real institutional tolerance of strategies that would actually result in increased participation by and empowerment of

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[96] Lee & Lee, *supra* note 71, at 312.
[97] *Id.*
[98] *Id.* at 317.
[99] *Id.* at 312.

poor clients even though a number of legal requirements and moral imperatives for such activity exist."[100] In their view, white managers suffer from unacknowledged "empowerment phobia": they are afraid to share their power with people of color, whether they be attorneys or staff persons, community members, or clients.[101]

The Lees argue that the only way to improve representation of poor clients, particularly poor clients of color, is to increase the number of attorneys of color working to deliver legal services to the poor. The Lees state that "[p]eople of color have a strong desire to have policymaking decisions about essential services provided to them by people who look and talk like them--people they perceive to be capable of identifying with their culture and empathizing with their concerns."[102]

The Lees raise many complex questions: Do clients feel more comfortable with attorneys who "look like them?" Are attorneys of color more effective advocates for poor clients, who are disproportionately of color? Are white attorneys reluctant to share power? Are white attorneys even aware that they have greater power by virtue of being white? These are some of the questions we have attempted to answer through our survey of Legal Aid attorneys.

B. Survey and Methodology

For this paper, we attempted to survey all staff and managing attorneys within the Civil Division of the Legal Aid Society of the City of New York. We collected information using both personal interviews and a written survey.

First, we set out to interview twelve (12) attorneys, administering in person a draft of the survey questions we created. We tried as best we could to match the races and genders of the attorney and interviewer: female attorneys of color were interviewed by a woman of color; male attorneys of color were interviewed by a man of color; white female attorneys were interviewed by a white woman; and white male attorneys were interviewed by a white man.

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100 *Id.* at 313.
101 Lee & Lee, *supra* note 71, at 316.
102 *Id.*

Our original intent was to conduct these interviews as a way to test and refine our survey before mailing it to the rest of the Civil Division. Because of scheduling difficulties, only half of the personal interviews took place before the survey was mailed to the larger group.[103] However, we did receive suggestions for improving the survey from those attorneys we interviewed before the mailing, and our revised survey reflects these changes and clarifications.[104]

The personal interviews were tape recorded[105] and later transcribed on the survey forms for use in our calculations. Though clearly the personal interviews were not conducted anonymously, all material collected through the interviews has been incorporated and cited anonymously.

In all, we sent out ninety-seven (97) written surveys, accompanied by an introductory letter asking attorneys to assist us in our project. The letter made clear that all survey results would be confidential and anonymous. To ensure this, we provided respondents with a stamped, self-addressed envelope.

Our survey consisted of sixty-four (64) questions in six categories: Personal Background; Client Composition; Office Composition; Issues of Race and the Clients; Race of the Courts; and Workplace Questions.[106]

Our goal was to use this information to test the two competing theories set out previously regarding the effects of race on attorney-

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[103] Additionally, due to time constraints and scheduling problems, only two (2) female attorneys of color, and only two (2) white female attorneys were interviewed in person.

[104] For example, attorneys commented on questions they found vague, confusing, or offensive. While the survey questions were revised repeatedly in an attempt to avoid ambiguity, the authors acknowledge that some of the survey questions are subject to different interpretations. For example, Question 41 of the survey asks: Do you take the race of a client into consideration? The word "consideration" can have different meanings to different attorneys and may affect their answers. Likewise, Question 43 asks: Do you believe that race is an issue in your representation of your client? Again, the word "issue" will mean different things to different attorneys and will probably affect their responses. Although various words used in the survey are subject to different interpretations, the authors believe that the subtle differences in the meanings of various words did not significantly impact or skew the results of their survey.

[105] All but one of the attorneys allowed us to tape record the interviews.

[106] *See* attached survey.

client relationships. We set out to attempt to determine whether the Neutrality Model, in which race does not matter and is not considered (at least explicitly), or the Race Consciousness Model, in which race matters a great deal and is actively considered, more readily explains the perceptions of Legal Aid attorneys. The surveys also contained questions designed to test the validity of some of the points made by the Lees in their article.[107] We chose to study the Civil Division because we were interested in investigating attorney perceptions of race in an environment where the clients are poor and generally of color and the majority of the attorneys are white and more economically privileged.

We received a total of sixty-four (64) usable survey responses.[108] Of these sixty-four responses, twenty-four (24) were from attorneys of color and forty (40) were from white attorneys. The responses break down as follows:

Total women of Color:	15
Women of Color (Managers):	0
Women of Color (Staff):	15
Total men of Color:	9
Men of Color (Managers):	2
Men of Color (Staff):	7
TOTAL ATTORNEYS OF COLOR:	24
Total white women:	21
White women (Managers)	4
White women (Staff)	17

[107] *See infra* Part IV.

[108] A handful of attorneys sent back the surveys without answering the question about their own race, making it impossible for us to evaluate the rest of their responses. Additionally, not every responding attorney answered every question. Thus, even among the sixty-four (64) surveys that we considered usable, not every survey was usable for every question.

Total White men:	19
White men (Managers)	4
White men (Staff)	15
TOTAL WHITE ATTORNEYS:	40
[Unusable responses:	5]
TOTAL USEABLE RESPONSES:	64

In examining our results, we chose to look at particular questions, often in clusters, to contrast attorneys' perceptions of themselves with attorneys' perceptions of clients and clients' perceptions. Where there were patterns along gender lines or along management or staff lines, we noted them as well. Because we are not trained statisticians, we have not employed any statistical analysis. Rather, we have analyzed the results anecdotally, and have tried not to draw definitive conclusions. Wherever possible, we have tried to offer as many alternative explanations as we could conceive for the patterns we uncovered.

C. Demographics of The Legal Aid Society's Civil Division

Our Society provides not alms, which these applicants do not ask and would not accept, but justice.[10]

During its one hundred year history, the Civil Division has attempted to provide justice to approximately two million people in need. Founded in 1876 by a group of attorneys and merchants,[110] the Civil Division began as the "German Society,"[111] a corporation created to protect German immigrants. In the late 1800s, New York City was being inundated by German immigrants,[112] many whom

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[110] *See* AUERBACH, *supra* note 3, at 53; TWEED, *supra* note 109.

[111] The actual name of the "German Society" was Der Deutsche- Rechtsschuta-Verein. *See* AUERBACH, *supra* note 3, at 53.

[112] In 1876 90,000 German immigrants, nearly 10% of the city's population,

were being victimized by unscrupulous employers. The "German Society" was created to give legal aid and assistance to that vulnerable group. In 1889, the "German Society" amended its charter and began to provide legal assistance to all groups of people, not just those of German birth.[113] In 1896, the "German Society" officially changed its name to The Legal Aid Society.[114] Since its official name change, The Legal Aid Society has grown tremendously, and is now comprised of six separate divisions: Civil Division, Criminal Division, Criminal Appeals Bureau, Federal Defenders Division, Juvenile Rights Division, and the Volunteer Division. In an effort to keep our findings within manageable levels, our survey and study was limited to the Civil Division.

The Civil Division is the largest provider of civil legal services to the poor in New York City. In 1993, the Civil Division assisted over 33,000 clients[115] in its eight neighborhood offices,[116] six city-wide units, and special projects.[117] The Civil Division employs 124 attorneys, 50 paralegals and 107 support staff. Interestingly, when the Civil Division was founded by a group of German lawyers

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arrived in New York City. *See* TWEED, *supra* note 109, at 5.

[113] *See* AUERBACH, *supra* note 3, at 53; TWEED, *supra* note 109, at 7.

[114] *See* TWEED, *supra* note 109, at 7.

[115] THE LEGAL AID SOCIETY, 1993 ANNUAL REPORT 14 (1993).

[116] The neighborhood office is a key component of the Civil Division's structure. Recognizing years ago that poor people were reluctant to travel outside their own neighborhoods, the Civil Division established offices in depressed neighborhoods throughout the City. *See* TWEED, *supra* note 109, at 20. Today, a staff attorney's vantage point from a neighborhood office supposedly allows the attorney to see clients on a daily basis and develop a sense of the community and its needs. *See* Andrea J. Saltzman, *Private Bar Delivery of Civil Legal Services to the Poor: A Design for a Combined Private Attorney and Staffed Office Delivery System*, 34 HASTINGS L.J. 1165, 1171 (1983). Having developed a sense of the community and its needs, the neighborhood office staff attorney is "more likely to devise efficient and effective ways of dealing with or eliminating . . . problems." *Id.* at 1170.

[117] The Civil Division's eight neighborhood offices are: The Bronx Neighborhood Office; The Brooklyn Neighborhood Office; The Harlem Neighborhood Office; The Chelsea/Lower Westside Neighborhood Office; The Rockaway Neighborhood Office; The Queens Neighborhood Office; The Staten Island Neighborhood Office; and The Brooklyn Office for the Aging. The six city-wide units and special projects are: The Civil Appeals and Law Reform Unit; The Homeless Family Rights Project; The Immigration Unit; The Family Law Unit; The Consumer Law Special Project; and The Legislative and Administrative Advocacy Project.

and merchants, their aim was to help other Germans, people who looked like them and had similar ethnic and cultural backgrounds. Today, Civil Division attorneys have few similarities with the clients they serve. Although 90 percent of the Civil Division's clients are people of color,[118] 63 percent of the staff attorneys are white.[119] Among supervising attorneys the figure is even higher -- 77 percent are white.[120] While female staff attorneys outnumber their male counterparts by more than 2 to 1, males account for 62 percent of the supervising attorney positions.[121]

Among the Civil Division's attorneys of color, many different ethnic groups are represented.[122] While most attorneys of color identified themselves as being African-American or Latino/a, other attorneys of color indicated that they were Asian, Euro-Asian, or African. Interestingly, in one survey answer, a white attorney objected to the ethnic category of "white" as "meaningless." The attorney stated, "[i]f you think *color* is the issue (which I do not)

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[118] *See* THE ASSOCIATION OF LEGAL AID ATTORNEYS OF THE CITY OF NEW YORK, SECOND REPORT ON DISCRIMINATION AGAINST LEGAL AID SOCIETY CIVIL DIVISION ATTORNEYS AND JOB APPLICANTS BASED UPON RACE 1 (1992) (hereinafter SECOND REPORT ON DISCRIMINATION) (stating that at least 90% of the Civil Division's clients are people of color).

[119] *See* THE LEGAL AID SOCIETY, EEO REPORT (1995) (hereinafter EEO REPORT). While the percentage of white Legal Aid staff attorneys appears high compared to the percentage of clients of color, the percentage is actually a lot lower than that at most major corporate law firms. A recent American Bar Association survey revealed that 97 percent of all partners in major law firms are white. *See* Menkel-Meadow, *supra* note 4, at 627. Likewise, whites account for over 90 percent of the total bar membership. *See id.*; *Affirmative Action on the Edge*, U.S. NEWS & WORLD REP., Feb. 13, 1995, at 32, 37 (noting that whites account for over 94 percent of all admitted attorneys). Whites also account for approximately 84 percent of the law school enrollment. *See* Adams, *supra* note 5, at 2.

[120] *See* EEO REPORT, *supra* note 119. According to the Lees, it is the high percentage of white management attorneys that is responsible for the failure of legal services organizations to adequately address the needs of their clients, who are overwhelmingly people of color. *See supra* Part IV.A.

[121] *See* EEO REPORT, supra note 119.

[122] Within the survey attorneys were asked circle one of seven ethnic groups that they identified with: White, White Latino/a, African-American, Black Latino/a, Asian, Native American. We also provided an "Other" category which we left blank and allowed attorneys to fill in. A small number of attorneys did use the "Other" category: one attorney filled in the term "African"; another used the term "Euro-Asian"; and a third filled in the blank with "Irish/German-American."

please be uniform in the categories and assign a color to everyone." This attorney went on to state that she is "not colorless" and "not even white." The attorney then commented that if we were going to use the category "African-American, thereby specifying a continent. . . why not European-American?"

In addition to being asked about their ethnic backgrounds, the Civil Division attorneys were also asked about their sexual orientation and age. Fifty percent of the responding attorneys indicated that they fell into the age group of 30-39 years. Nearly one third of the responding attorneys indicated that they were 20-29 years old. While the vast majority of Civil Division attorneys appear to be under the age of forty, there is tremendous age diversity within the Civil Division. Six attorneys indicated that they were between the ages of 40-49; one attorney indicated he was between 50-59 years old; one attorney indicated that she was 60-69 years old; and two attorneys indicated that they were over 69 years old. As with age, there also appears to be sexual orientation diversity within the Civil Division. While the majority of responding attorneys indicated that they were heterosexual, others indicated that they were gay, lesbian or bi-sexual.[123]

Another area attorneys were questioned about was their economic backgrounds. Attorneys were asked to indicate the type of economic background in which they were raised and the economic group to which they now belong. The survey provided seven possible answers: Wealthy; Upper Middle Class; Middle Class; Lower Middle Class; Poor; Below Poverty; and Don't Know. According to the survey answers, there does not appear to be any correlation between race or ethnic background and current economic status among Civil Division attorneys. Overwhelmingly, both white attorneys and attorneys of color identified themselves as currently being middle class. Among the responding white attorneys, 22 of the

[123] Among the responding attorneys, three indicated that they were bi-sexual, two indicated that they were lesbian, and two indicated that they were gay. The information in this section regarding the age, sexual orientation, and economic backgrounds of the attorneys is given to provide a more complete picture of the people we were studying. Although we acknowledge that there are many factors that go into how one person interacts with another, this paper is concerned with race, and as such, we did not analyze the results with regard to other factors such as age or sexual orientation.

40 (55%) identified themselves as middle class. The percentage was even higher among responding attorneys of color-- 17 of 24 (70%) identified with the middle class group.

There does, however, appear to be a noticeable difference in the types of economic backgrounds in which white attorneys and attorneys of color were raised. Among both groups, most of the attorneys indicated that they were raised in some type of "middle class background."[124] However, among white males, two attorneys indicated that they came from wealthy economic backgrounds. This was the *only* group that had responses in the "wealthy" category. While white males were the only group to indicate that some of its members were raised in wealthy environments, one white male did indicate that he was raised in a poor economic environment. Among white females, the responses were similar--only one attorney indicated that she was raised in a "below poverty" economic environment.

Overall, the percentage of white attorneys raised in "poor" or "below poverty" economic environments was small, approximately 5 percent for both men and women.[125] Among attorneys of color, however, the percentage was much higher. Approximately 22 percent of male attorneys of color indicated that they were raised in environments that were "poor" or "below poverty."[126] The percentage was slightly less for women of color-- approximately 20 percent were raised in environments classified as "poor" or "below poverty."[127]

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[124] The term "middle class" here actually encompasses three different economic groups: upper middle class, middle class and lower middle class. The actual breakdown of the responses is as follows: white males (7 middle class, 5 upper middle class, 4 lower middle class, 2 wealthy and 1 poor); white females (10 middle class, 6 upper middle class, 3 lower middle class, and 1 below poverty); females of color (5 lower middle class, 3 poor, 2 upper middle class, 2 middle class, 1 below poverty); males of color (4 middle class, 2 lower middle class, 1 upper middle class, 1 poor, and 1 below poverty).

[125] Among the eighteen responding white males, one indicated that he was raised in a poor economic environment. Likewise, only one of the twenty responding white women indicated that she was raised in an environment below poverty.

[126] Of the nine responding male attorneys of color, one indicated that he was raised in a poor economic environment and one indicated below poverty.

[127] A total of fifteen women responded. Three indicated that they were raised in poor economic environments and one indicated below poverty.

But while many attorneys of color and white attorneys appear to have been raised in much different economic environments, their reasons for entering low-paying legal services positions[128] are basically the same. When asked to indicate what influenced their decision to enter public interest/legal services work, most attorneys indicated a "desire to help others."[129] The difference between the two groups of attorneys was not great-55 percent for white attorneys compared to 47 percent for attorneys of color.

While the statistical difference between the two groups was not great, the answers of the attorneys of color were difficult to interpret. Since a sizable percentage of attorneys of color were raised in poor or below poverty environments, it was anticipated that many of them would indicate other reasons for entering legal services such as "desire to better my community" or "relate to clients due to personal experience." Although some attorneys of color did indicate those answers, so did white attorneys. The most frequently given answer by attorneys of color, "desire to help others," could indicate that the responding attorneys do not think of themselves as a "part" of the group of people they are helping.

An additional noteworthy finding was made when analyzing the reasons why the responding attorneys entered legal services. Two attorneys of color, one male and one female, indicated that they entered public interest/legal services because no other jobs were available. The fact that two attorneys of color, but no white attorneys, gave this answer, even though sixteen more white attorneys answered the survey than attorneys of color, could be indicative of racism in large corporate firms. It is well known that not only are minorities grossly under-represented in the legal profession as a whole, but their numbers are especially lagging in large corporate law firms. In New York State, for example, minorities account for 25 percent of the state's population, but only 4 percent of all registered

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[128] The starting annual salary for a first year attorney at The Legal Aid Society is $31,000, as opposed to $83,000 at any large New York City firm.

[129] "Desire to help others" was one of the eleven choices offered. The others reasons offered were: past work or volunteer experience; desire to better my community; upbringing; saw the need; law school experience; most needy clientele; relate to clients due to personal experience; opportunity for hands on training/court experience; exciting areas of the law; and no other available jobs.

attorneys.[130] Among large corporate law firms, the numbers are even more alarming: a 1989 survey found only 70 minority partners out of a total of 4,086 (1.7 percent).[131]

Not only has the Civil Division substantially increased its workforce and the number of cases it handles since its inception in 1876, it has also diversified its practice. While the Civil Division still assists immigrants against unscrupulous employers, it has expanded its practice and now assists clients in areas such as housing, government benefits, disability, health care, homelessness, elder law, family law, guardianship, bankruptcy, wills, consumer fraud, and education.

D. Individual Question Analysis

1. *Issues of Race and the Clients*

Question 41: Do you take the race of a client into consideration?
Answer Yes or No.

Question 42: Do you believe your clients take the race of their attorney into consideration?
Answer Yes or No.

A majority of all attorneys, both white attorneys[132] and attorneys of color,[133] answered "no" to question 41, indicating that they did not take the race of their clients into consideration. However, only a majority (64%) of white males answered "no" to question 42, [134] indicating that they do not believe that their clients take the race of their attorney into account. In contrast, most women of color, men of color, and white women answered "yes" to question

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[130] *See* NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, EXECUTIVE SUMMARY REPORT 81-82 (1991).

[131] *See id.*

[132] Eighty-four percent (32 of 38 usable responses) of the responding white attorneys answered no.

[133] Seventy-eight percent (18 of 23 usable responses) of the responding attorneys of color answered no.

[134] Eleven of 17 usable responses.

42, indicating that they do believe that their clients take the race of their attorney into account.

Within this pair of questions, only white males appear to be operating under the Neutrality Model. There are several ways to explain the responses of the remaining groups. Answering that they do not take race into consideration could be a result of professional identification, since many comments echo Levinson's theories of neutrality. For example, one woman, who characterized herself as Black Latina, commented, "I try to advocate zealously on behalf of all my clients."[135] A white woman during a face-to-face interview commented that she notices race but does not take it into consideration.[136]

Significantly, no attorneys adhered to an absolute Race Consciousness Model in this set of questions. Perhaps attorneys of color do not take race into account, given that they are in large part serving clients of color. In the same way that whites in the larger culture are not forced to examine their whiteness,[137] it is possible that attorneys of color in an environment where clients are overwhelmingly of color do not feel the need to focus on this issue.

In terms of question 42, groups other than white males may have answered "yes" for different reasons. Some may feel that clients prefer to work with attorneys of the same race. For example, a Latina woman commented, "I believe that clients feel more comfortable with individuals `like them.'"[138] Additionally, a Latino male wrote, "I sense a certain degree of apprehension and confusion when the attorney of record lacks the necessary sensitivity with minority clients. Those clients see the attorney . . . as just one more peg in the white machinery of government."[139] An African-American man stated that clients often make assumptions about the ability of their lawyer to identify with their concerns based on whether or not their attorney is of the same race.[140] This could indicate a half-hearted adherence to the Race Consciousness Model,

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135 Survery #2 (Survey responses are on file with authors.).
136 Survey #26.
137 *See supra* notes 43-46 and accompanying text.
138 Survey #15
139 Survey #11.
140 Survey #44.

or an adherence to the Neutrality Model's concept of a distinct professional identity.

Interestingly, some attorneys of color, in answering question 42, noted that many of their clients of color actually preferred attorneys who embodied the clients' stereotype of what lawyers should be. One African woman stated "clients must take the race of their attorney into consideration since when it comes to lawyers society thinks Jewish is better."[141] An African-American man wrote that "sometimes clients come to the office openly stating that they want a (white) Jewish attorney."[142]

Several responses indicated possible problems with the way both questions were framed. Some attorneys answered the question in terms of whether or not race was a factor in how they formulated courtroom strategy for a particular client. For example, an African-American man wrote, "The client's race affects representation to the extent that the institutions and people we deal with view our clients differently because of their race .... [P]roper representation requires recognition of the challenges our clients are facing, and developing strategies with awareness of those biases."[143] Others may have responded to this question in terms of which clients' cases are taken. For example, a white female commented "office policy is to reach those individuals least represented. We therefore make an extra effort to reach out to the communities of color."[144]

Additionally, one white woman answered question 42 by stating "clients do not get to choose who represents them."[145] Another white woman attorney stated that "our clients are 'assigned' to an attorney and have no input into selecting us. To that extent, our clients cannot take race into account."[146]

> Question 43: Do you believe that race is an issue in your representation of your client?
> Answers on a scale of 1 ("No") to 5 ("Yes").

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141 Survey #4.

142 Survey #14. This lawyer also noted that there are other clients who specifically request "a black attorney."

143 Survey #14.

144 Survey #54.

145 Survey #52.

146 Survey #53.

> For purposes of tabulation, answers of "1" or "2" were counted as "No" responses; "3" was considered neutral or no response; and answers of "4" or "5" were counted as "Yes" responses.

The results for this question for white males were demographically similar to the results for questions 41 and 42. A majority of white males (57%)[147] responded that race is not an issue, consistent with the Neutrality Model. The responses of white women differed from their male counterparts. Only 43%[148] indicated that race was not an issue in the representation of clients. It should be noted that six of the twenty-one responding white women indicated that race was □somewhat□ of an issue in the representation of clients. To maintain consistency in our polling methods, the authors considered all "3" responses as neutral and did not use them in the calculations. However, this term may have misled some of the responding attorneys and unfairly skewed the results of this question.

The responses of women of color were divided equally on this question: 5 women responded that race was not an issue and 5 women indicated that race was an issue. The remaining 5 women chose the neutral response, which was not counted in our survey. Based on the even split among women of color, it is difficult to categorize their responses as adhering to either model.

The responses of men of color were surprising. It was expected that men of color would align with the Race Consciousness Model. That was not the case however. Forty-four percent of men of color stated that race was an issue in the representation of clients.[149] However, one-third of the men of color stated that race was not an issue.[150] While the responses of the men of color lean more towards the Race Consciousness Model, the results are difficult to categorize and do not clearly align with either model.

One interesting comment came from a male attorney who characterized himself as Black Latino. He commented that "[r]ace is

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147 Eleven of 19 responses.
148 Nine of 21 usable responses.
149 Four of 9 responses.
150 Three of 9 responses.

always an issue, if not to me, [then] to the courts, this office, the outside world."[151]

> Question 44: Do you believe your race has an effect on how you represent your clients?
> Answers on a scale of 1 ("Negative") to 5("Positive"), with 3 being "None" or no effect.

Under a Race Consciousness approach, the answer to this question would depend on the race of the attorney. A white attorney would be expected to respond that her race might have a negative effect on her representation of people of color. She might believe that the racial differences between her and her clients would impede communication, making representation more problematic. An attorney of color, on the other hand, might feel that his race is a positive factor in representation, insofar as it may contribute to greater mutual understanding. Obviously, attorneys who follow the Neutrality Model should respond that their race has no effect on representation.

While the responses of white women to the questions discussed above were similar to their attorney of color counterparts, in this question, the majority (64%)[152] of white women and white men answered that their race had no effect on how they represent their clients. This may be attributable to the notion that, even where white women can acknowledge the existence of issues in regards to race, they may not be comfortable acknowledging that these issues actually affect the quality of their work.

In contrast, the majority (59%)[153] of all people of color believed that their race had a positive effect, indicating that they felt that the race-based commonality they have with their clients facilitates representation of those clients. This is in line with the Race Consciousness Model, where shared racial identity factors help to foster more meaningful communication.

> Question #47: I prefer clients of the same race as me.

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[151] Survey #9.
[152] Twenty-two of 34 usable responses.
[153] Thirteen of 22 usable responses.

Answers on a scale of 1(disagree) to 5(agree).

Question #48: I believe that clients prefer attorneys of the same race as they are.
Answers on a scale of 1(disagree) to 5(agree).

For purposes of tabulation for both of the above questions, answers of "1" or "2" were counted as "No" responses; answers of "3" were counted as neutral or no response; and answers of "4" or "5" were counted as "Yes" responses.

Question 47, because it asks for an attorney's racial preference, could be construed as asking the attorney to state that he or she is racist. As noted above, though, Race Consciousness should not be equated with actually preferring people of the same race. Because of this difficulty, we did not expect more than a handful of positive responses to question 47. Instead, the question was intended as a foil, to provide the respondents with an opportunity to state up front that they were not racists, ideally allowing them to respond more honestly to question 48.

As expected, an overwhelming majority (50 of 62 usable responses--81%) of all responding attorneys disagreed with the statement in question 47. Among the white attorneys, 92 percent (37 of 40 responses) disagreed with the statement in question 47. The percentage was lower for attorneys of color--59 percent (13 of 22 usable responses) of the responding attorneys disagreed with the statement in question 47.

A majority of white attorneys (71%--23 of 32 usable responses) stated that they disagreed with the statement in question 48, indicating that they believed that clients did not prefer attorneys of the same race. The answers of the white attorneys fall squarely within the Neutrality Model and indicate that, as a group, white attorneys believe that race does not play a part in the attorney-client relationship. The few comments from the white attorneys seem to indicate a belief in the Neutrality Model's idea of a professional identity. For example, one white male attorney wrote, "Clients just

want an attorney."[154] Another commented that "Clients just want competent attorneys who are sympathetic to their problems."[155]

Particularly interesting, given the similarity of questions 47 and 48 to questions 41 and 42, were the answers of white women. As noted in the discussion on questions 41 and 42, white women followed the answer pattern of attorneys of color.[156] Here, however, white women answered in line with their male counterparts. The issue may again be one of degree. In the earlier questions, attorneys were asked only whether race was an issue, which many white women may have felt comfortable acknowledging. Here, they are asked to assess whether or not the issue rises to a level such that it is actually an impairment of the attorney-client relationship. Perhaps, not surprisingly, fewer are willing to admit that race would play such a large role.

The responses of the attorneys of color to question 48 are more difficult to interpret. Unlike their white counterparts, only 31 percent (7 of 22 usable responses) of attorneys of color disagreed with the statement in question 48. Yet, only 41 percent (9 of 22 usable responses) of attorneys of color agreed with the statement. Further examination of the responses of attorneys of color reveals a split among the sexes.

A majority of men of color (55% - 5 of 9 responses) agreed with the statement in question 48, indicating adherence to the Race Consciousness Model. Women of color, however, were split amongst their ranks. Thirty-eight percent (5 of 13 useable responses) of the women *disagreed* with the statement in question 48, while a somewhat smaller percentage of the women *agreed* with the statement (31%-4 of 13 usable responses). The split among women of color to question 48 may indicate the group's limited belief in both the Race Consciousness Model and the Neutrality Model.

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[154] Survey response #38.

[155] Survey response #30.

[156] One possible explanation for why the answers of white women have followed the patterns of attorneys of color is that women, who themselves are frequently the victims of discrimination and harassment, may be more aware because of personal experiences of personal identity factors and how those differences translate into differential treatment.

Question #49: Clients are more open with attorneys of the same race as them.
Answers on a scale of 1(disagree) to 5(agree).

For tabulation purposes, answers of "1" and "2" were considered as disagreeing with the question; "3" was considered as neutral or no response; and answers of "4" and "5" were considered as agreeing with the question.

Communication is probably the most important part of the attorney-client relationship.[157] In order for an attorney to effectively advocate for her client, she must first establish a relationship with that client, and she must obtain the necessary information. Communication is also the area where race may play the most important role in the attorney-client relationship. As client and attorney comfort levels go up, one would presume that communication becomes more productive and representation becomes more effective.

A majority of people of color (57%-12 of 21 useable responses) agreed with the statement, indicating an adherence to the Race Consciousness Model. There was little difference between men and women of color in response to this question, as a majority of both groups agreed with the statement in question 49. Men of color may have exhibited a stronger adherence to the Race Consciousness Model, since not a single male disagreed with the statement in question 49, while two women of color disagreed with the statement.

Not even a majority of white attorneys (41%-12 or 29 useable responses) disagreed with the statement in question 49, indicating that even those who earlier did not acknowledge race as an issue now seem to believe that people of color are more open with attorneys of color. These responses are the most difficult to explain. The white

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[157] Communication is so vital to the attorney-client relationship that it forms the basis of the legal profession's oldest and most important common law privilege, the attorney-client privilege. As the Supreme Court noted in Upjohn v. United States, 449 U.S. 383, 389 (1981), "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation...." It was further noted that communication forms the basis of the privilege because it "encourage[s] clients to make full disclosures to their attorneys." *Id.*

attorneys' responses to this statement may illustrate a general lack of concentration on the dynamics of attorney-client communication. For a white attorney to implicitly acknowledge that a client of color is more open with an attorney of color, but not to acknowledge that race is an issue, seems contradictory. Possibly the white attorneys are in positions with little client contact, so that even though people of color are less open with them, this is irrelevant to their effectiveness as a lawyer or to how they approach representation. For example, some may regard eviction prevention law as merely filling out forms and arguing before courts, and may therefore place little emphasis on dealing with the client herself. Alternatively, white attorneys may believe that although people of color are less open with them, they are open enough to ensure effective representation.

This question presents one of the more racially explicit queries in the survey, and as such we might expect people to answer with some hesitancy. This may explain why it is difficult to discern any pattern in the responses of white attorneys. As stated earlier, even attorneys willing to state that race is an issue might be less likely to admit that it has a concrete effect on the quality of representation they provide to their clients.

> Question #50: I believe that attorneys of color are more effective representatives of people of color.
> Answers on a scale of 1(disagree) to 5(agree).
>
> For tabulation purposes, answers of "1" and "2" were considered as disagreeing with the question; "3" was considered as neutral or no response; and answers of "4" and "5" were considered as agreeing with the question.

This question is clearly the most explicit in addressing the issue of the impact of race on the attorney-client relationship. With this statement, the issue of race is no longer an abstract construct that an attorney can acknowledge without implicating his or her own effectiveness or competence. For white Legal Aid attorneys to agree with this statement is to acknowledge that they are potentially handicapped in their effectiveness as representatives of people of

color. For attorneys of color to agree with this statement is for them to state they are better at what they do because of their race.

The answers to this question were clearly divided along racial lines. White attorneys overwhelmingly disagreed: Seventy-three percent (27 out of 37 useable responses) answered either "1" or "2." The answers among white men and white women were similar: 75 percent (12 of 18 useable responses) of white women disagreed with this question, while 79 percent (15 of 19 useable responses) of white men disagreed.

Whether this is the result of adherence to the Neutrality Model or adherence to their own self-interest is hard to determine. It would be difficult to imagine that most white attorneys would be willing to agree with the idea that they, by virtue of their race, are simply less effective advocates of people of color. It would be tantamount to a call to replace them with attorneys of color.

One white male attorney responded, "[a]bsolutely not-a quality lawyer can effectively advocate for their client regardless of color."[158] Similarly, another white male attorney wrote, "in most individual instances the individual skill of an attorney obviously determines the effectiveness of the representation."[159] A white female attorney echoed these remarks, commenting that "[w]hat makes a good attorney is commitment, openness, and a willingness to listen. That's not tied to race."[160] Another white female attorney stated that the effectiveness of the representation is not related to the race of the attorney. The attorney noted that a person of color may feel more comfortable with an attorney of color, but that doesn't translate into more effective representation.[161]

The answers of attorneys of color to this question were much different than their white counterparts. Only 42% (10 of 24 responses) of attorneys of color disagreed with this question. This lower percentage, compared to their white counterparts, results from a marked difference in opinion among men of color and women of color. Forty-seven percent of women of color disagreed with this question. Yet, only 20% of women of color agreed with this

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158 Survey response #56.
159 Survey response # 37.
160 Survey response #55.
161 Survey response #26.

question. Conversely, only 33% percent (3 of 9 responses) of men of color expressed disagreement to this question, while 55% (5 of 9 responses) of the men agreed that attorneys of color are more effective representatives of people of color.

Here, it appears that the answers of the white attorneys, both men and women, can be explained by the Neutrality Model, while the answers of the men of color clearly adhere to the Race Consciousness Model. The answers of the women of color, however, are more difficult to interpret. Although it could be argued that answers of women of color to this question align closer to the Neutrality Model than the Race Consciousness Model, since 47 percent of the women indicated their disagreement, it is difficult to draw any conclusions since five of the women answered "3," which is considered a neutral response for control purposes.

> Question #39: In general, I have good relationships with my clients.
> Answers on a scale of 1(disagree) to 5(agree).
>
> Question #40: In general, my colleagues have good relationships with their clients.
> Answers on a scale of 1(disagree) to 5(agree).
> For tabulation purposes, answers of "1" and "2" were considered as disagreeing with the question; "3" was considered as neutral or no response; and answers of "4" and "5" were considered as agreeing with the question.

These questions are related to questions 43 and 50. In question 43, we asked whether attorneys believed that race was an issue in their representation of clients. In response to this question, the two groups of attorneys divided along racial lines. In adhering to the Neutrality Model, the majority (55%) of white attorneys said "no" to question 43, indicating that race was not an issue. Attorneys of color, consistent with the Race Consciousness Model, took the opposite view. Sixty-six percent of attorneys of color indicated that race *was* an issue in their representation of a client.

In question 50, we asked the surveyed lawyers whether they believed that attorneys of color were more effective representatives of

people of color. As with question 43, the answers to question 50 often differed according to the race of the responding attorney. Whites overwhelmingly (73 %) stated that attorneys of color were *not* more effective representatives of people of color. A much smaller percentage (42%) of people of color disagreed in question 50. Interestingly, only 33 percent of attorneys of color indicated that they *were* more effective representatives of people of color. The answers of attorneys of color differed sharply according to the sex of the responding attorney. While only 20 percent of women of color agreed with the statement in question 50, a majority (55%) of the men of color agreed that attorneys of color were more effective representatives of people of color.

Remembering that 90 percent of the Civil Division's clients are people of color,[162] the answers to questions 39 and 40 should differ depending on the race of the attorney, according to the Race Consciousness Model. Since the majority of white attorneys indicated earlier that race is not an issue in the representation of clients and that attorneys of color are not more effective representatives of people of color, white attorneys would be expected to agree with both questions 39 and 40.

Under the Neutrality Model, since race is irrelevant, white attorneys adhering to this model would assume that their relationships with their clients are as good as their attorney of color counterparts. Indeed, that was the case. Ninety-two percent of white attorneys stated that they had good relationships with their clients of color. A somewhat smaller percentage, eighty-seven percent, agreed that their colleagues also have good relationships with their clients. Because question 40 did not ask whether their colleagues *of color* have good relationships with their clients, it is difficult to draw a conclusion from the answers of the white attorneys to this question. We can conclude, however, based on the large majority of white attorneys (92%) that agreed with question 39, that white attorneys believe that their relationships with their clients, who are mostly people of color, are as good as those of any other attorneys in the Civil Division, regardless of the attorney's race.

Although the majority of white attorneys clearly aligned with the Neutrality Model in responding to questions 39 and 40, the

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[162] *See supra* note 118 and accompanying text.

answers of the attorneys of color differed from their white counterparts. Since race is an issue in client representation under the Race Consciousness Model, one would think that a greater percentage of attorneys of color, as opposed to white attorneys, would agree that they have good relationships with their clients, who are primarily people of color. Such was not the case. Surprisingly, a smaller majority (83%) of attorneys of color indicated that they have good relationships with their clients. Of course, the answers of both white attorneys and attorneys of color to question 39 could be motivated by personal interest and have nothing to do with race. It would seem that most attorneys, regardless of race, believe that they possess the requisite skills and professionalism to maintain good relationships with their clients.

In response to question 40, the answers of attorneys of color differed more significantly than their white counterparts. Although a majority of attorneys of color (62%-15 of 24 responses) indicated that their colleagues have good relationships with their clients, this percentage was significantly lower than their white counterparts. Under the Race Consciousness Model, attorneys of color would be aware of their client's race and would supposedly be able to put the client more at ease, understand the client better, and interpret unspoken cues. Of course, while the Race Consciousness Model is used to explain the attorney's behavior, the client cannot be ignored. Clients may indeed feel more at ease and thus be more open with attorneys that look like them and may have similar backgrounds. If so, this would also foster a "better" relationship among the client and attorney. But, while the responses of attorneys of color to question 40 may have shifted more towards the Race Consciousness Model, as a whole their responses are best explained by the Neutrality Model.

There is a possible explanation for the answers of attorneys of color to question 40. Attorneys of color may be exhibiting their "professional identities" in responding to questions 39 and 40.[163] Such a conclusion would comport with Levinson's assumption that the rigorous training of law school "bleach[es] out [the] aspects of self"[164] such that "race, gender, religion, or ethnic background

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[163] *See supra* Part II.C.

[164] Levinson, *supra* note 26, at 1578. *See also supra* Part II.C.

become irrelevant to defining one's capabilities as a lawyer."[165] But while the "professional identity" explanation is plausible, it does not adequately account for or explain the earlier responses of male attorneys of color to question 50 that corresponded with the Race Consciousness Model.

B. Community Involvement

> Question #30: What sort of impact do you believe your office has on the community?
> Answer on a scale of 1 (negative) to 5 (positive) with 3 being no effect.

This question was designed to gauge whether attorneys of color and white attorneys had the same evaluation of the significance of their work in the community. If the Race Consciousness Model, with its emphasis on the increased ability of attorneys of color to communicate with people of color, and thus with the community, held true, then we would expect there to be a discrepancy between the answers of attorneys of color and white attorneys. One could expect, for example, attorneys who are less knowledgeable about the lives and struggles of their clients to overestimate the impact that their office has on the community it serves.

Another important aspect of this question is that it directly tests the criticisms leveled by the Lees in their article.[166] According to the Lees, the policies pursued by legal services offices are largely the product of white attorneys and managers who have little connection or concern for the real problems faced by the communities of color they serve. If this were the case, we would expect attorneys of color, perhaps, to perceive that their office has only a minimal effect on the community. White attorneys, who arguably operate from the same perspective as the policy makers, would believe that the organization's impact is greater.

The responses that we received, though, did not vary significantly according to race.[167] Across the board, attorneys

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[165] Levinson, *supra* note 26, at 1579. *See also supra* Part II.C.
[166] *See supra* Part IV.A.
[167] Additionally, the results did not vary across management/staff lines, or gender

answered that their offices had a significant positive impact on the community.

> Question #36: How responsive is your office to the desires of the community?
> Answers on a scale of 1 (not responsive) to 5 (very responsive)

As with the previous question, question 36 was designed to determine whether attorneys of color and white attorneys sensed a different level of community involvement. Additionally, as with question 30, this question tests the Lees' hypothesis that offices advocating on behalf of poor clients of color set their agendas without regard to the actual needs and desires of the communities themselves.

Although the responses were not as positive as the responses to question 30, a clear majority of all races and genders believed that their offices are fairly responsive to the desires of the community. Only seventeen of fifty-eight attorneys responding to this question answered that their offices were *not* responsive to the community. Six of twenty attorneys of color answered negatively, and eleven of thirty-eight white attorneys answered negatively.

Again, the responses to both questions 30 and 36 seem to argue against the theories advanced by the Lees.

C. Race and The Courts

> Question #51: Do you believe your client's race has an effect on the treatment your client receives in court?
> Answers on a scale of 1 (negative effect) to 5 (positive effect) with 3 being no effect.

For tabulation purposes, answers of "1" and "2" were counted as a negative effect; "3" was counted no effect; and answers of "4" and "5" were counted as a positive effect.

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lines.

According to the Rule of Law,[168] a client's race should have no effect on the treatment that she receives from the court. Given the overwhelming statistics on the demographics of poverty,[169] it would be hard to imagine even the strictest adherent to the Neutrality Model answering that race had no effect on the treatment that people of color receive in court. Not surprisingly, the responses were heavily skewed in the negative. For whites, seventy-one percent (25 of 35 useable responses) answered that they believed that their client's race had a negative effect on their treatment by the courts. One white attorney, who responded that her clients' race had a negative effect, noted that her clients "are seen as interchangeable. Outright racism is rare, but the undercurrent pervades the system."[170] Another white attorney commented that "[m]ost judges, who are white, are condescending to clients of color."[171] Finally, a white attorney put his observations in more strident terms, stating "[s]ome of the judges are racist--I know this because of comments they have made to me."[172] A white woman attorney also stated that racist and sexist comments are made about her clients by opposing counsel, the parties, and judges.[173]

As with the questions regarding community impact and input, the difference between the responses of attorneys of color and white attorneys to question 51 was minor. The majority of attorneys of color (58% -14 of 24 useable responses) responded that the race of their clients had a negative effect on their treatment. As one Latino attorney put it, "[m]ost of the time I'm led to believe that my client has the burden of proof. The assumption is that, if the client is Latino/a, she must be on welfare and must be guilty, even in cases where the petitioner is a well-known slum lord."[174]

It should be noted that the same white attorneys, who in earlier questions generally denied that race had an impact on how they dealt with clients, were willing to state that race is a factor in how other whites (judges) treat those same clients. This may reflect

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168 *See supra* Part II.A.
169 *See supra* Part IV.A.
170 Survey #55.
171 Survey #20.
172 Survey #61.
173 Survey #53.
174 Survey #11.

their recognition that there continues to be racism in society in general, but discomfort with the notion that they may be a part of this structure of subordination. It is also entirely possible that the answer patterns of the white attorneys reflects that they are, in fact, more aware and culturally sensitive to their clients of color than the judges before whom they appear.

> Question #53: Do believe that your race has an effect on the treatment that you receive from the court?
> Answers on a scale of 1 (negative effect) to 5 (positive effect) with 3 being no effect.
>
> For tabulation purposes, answers of "1" and "2" were counted as a negative effect; "3" was counted no effect; and answers of "4" and "5" were counted as a positive effect.

Given the responses to question 52, we should expect the attorneys to indicate that their race does have an effect on how they are treated by the courts. A large majority of white attorneys (71%) were willing to admit that their race resulted in better treatment by judges and court personnel. Here was one of the rare occasions in our survey that white attorneys as a group aligned with the Race Consciousness Model. When it comes to acknowledging that race plays a role in the treatment an attorney receives from the court, white attorneys are very cognizant of the favorable treatment they receive. Additionally, where whites were earlier reluctant to state that race had an impact in the client's representation, here, by a large majority, they were willing to see racism as practiced by others.

The answers of the attorneys of color were more difficult to interpret. Forty-seven percent (11 of 23 useable responses) of attorneys of color indicated that their race had a negative effect on the treatment they received from the court. While this percentage was more than 900 percent higher than the responses of white attorneys (only 5 percent of white attorneys answered that their race had a negative effect), the number was still surprising. It was assumed that since attorneys of color indicated that the race of their clients had a negative effect on the treatment that they received, the attorneys

would indicate that their race also had a negative effect on how they were treated.

Even more surprising was that nearly one-third (30%) of attorneys of color indicated that their race had a positive effect on the treatment they received. One possible explanation for this response is that this group of attorneys presumed that their favorable treatment was based on status and not race alone. Perhaps these attorneys were treated better than their clients because they were professionals admitted to the Bar?

A majority of men of color (62%) indicated that their race had a negative effect on how they were treated. Among the women of color, however, only 40 percent indicated that their race has a negative effect on how they were treated. The answers of the men of color clearly align with the Race Consciousness Model, but the responses of women of color are more difficult to interpret.

D. Race and The Workplace

Question #61: Attorneys of color and white attorneys have the same opportunities for advancement.
Answers on a scale of 1 (disagree) to 5 (agree).

Question #62: Performances of attorneys of color and white attorneys are judged by the same standards.
Answers on a scale of 1 (disagree) to 5 (agree).

For tabulation purposes, answers of "1" and "2" were considered as disagreeing with the question; "3" was considered as neutral or no response; and answers of "4" and "5" were considered as agreeing with the question.

The answers to these questions do not necessarily implicate either model discussed previously, in that the questions do not deal with relationships with clients. However, the questions do have implications for the Lees' arguments. If the Lees are correct, then we would expect most attorneys to disagree with these statements, presuming they were aware of the inequities. Perhaps, though, the Lees would also argue that white attorneys would not be aware of the more limited opportunities for advancement for attorneys of color,

and would therefore agree with both statements, while attorneys of color would disagree with both.

In fact, this is the pattern that emerged. Sixty-four percent of attorneys of color (14 of 23 useable responses) disagreed with the statement that attorneys of color and white attorneys have the same opportunities for advancement. In contrast, 60 percent of the white attorneys (20 of 33 useable responses) responded that the opportunities are the same regardless of race.

Answers were similar for question 62. Sixty-three percent of the white attorneys (21 of 33 useable responses) answered that attorneys of color and white attorneys are judged by the same standards. Attorneys of color expressed the opposite view, as fifty-six percent of attorneys of color (13 of 23 useable responses) disagreed with the statement.

This, then, seems to be the area in which the answers of the attorneys were most closely correlated with their racial identity factors. Part of the reluctance of white attorneys to answer that there is a different standard for attorneys of different races may be an unwillingness to state that they may have an unfair advantage over their colleagues of color within their organizations. The implication is that they may have achieved their positions unfairly, simply by virtue of being white.[175]

But there is also a second plausible explanation for the answers of white attorneys to these questions. Because whites in our society are taught at an early age not to recognize the privileges that are inherent in being part of the ruling hegemony,[176] whites may actually be unable to recognize that they have better opportunities and are judged by a more lenient standard than their colleagues of color.

This question implicates race in a very personal way; white attorneys disagreeing with this question may very well have to confront the notion that they do indeed benefit from racism and that predominately white organizations do not function as meritocracies. Unlike the earlier questions dealing with race and the courts, here the benefits of bias against people of color would inure directly to the

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[175] *See supra* notes 43-46 and accompanying text.

[176] *See supra* notes 43-46 and accompanying text.

white attorneys, rather than indirectly to their clients of color. Additionally, the previous questions dealt with racism from without, whereas this question deals with racism from within the attorneys' own organization.

Attorneys of color, on the other hand, to a large extent feel that they are not treated fairly by their organization, and that racism permeates their experience of being attorneys, even when not dealing directly with clients or the judicial system. This seems to support the claims made in the Lees' article, that the management of legal services organizations often replicates the discrimination present in society. This also supports the perception by many people of color that predominately white organizations like the Civil Division are neopigmentocracies, and not meritocracies as the predominately white management contends.[177] A neopigmentocracy is an organization characterized by rules that require the enfranchisement of all persons regardless of race, accompanied "by a psychological mindset on the part of the dominant race that reinforces a sense of entitlement characteristic of a racially caste society."[178] Within a neopigmentocracy, people of color are permitted to attain "acceptable positions" but as a group are excluded from management positions.[179] As people of color attempt to move beyond "acceptable positions" in a neopigmentocracy, "racist forces are mobilized to stunt . . . careers."[180]

Thus, as far as people of color are concerned, two salient features identify neopigmentocracies: 1) the absence of people of color in management positions; and 2) a high turnover rate among people of color because of the absence of equal opportunities. According to the Equal Employment Opportunity (EEO) report

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[177] *See* CLAYTON P. ALDERFER & DAVID A. THOMAS, THE INFLUENCE OF RACE ON CAREER DYNAMICS: THEORY AND RESEARCH ON MINORITY CAREER EXPERIENCES, HANDBOOK IN CAREER THEORY 133, 148 (1989).

[178] *Id.* at 148-49.

[179] *Id.* at 149. This concept is also commonly referred to as the "glass ceiling." *See, e.g.*, Mary Daly, *Rebuilding the City of Richmond: Congress's Power to Authorize the States to Implement Race-Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903 (1992) (discussing Congress' adoption of the Glass Ceiling Act of 1991 to combat gender discrimination in the workplace); Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181 (1994) (noting that glass ceilings have been documented in virtually every business and professional sector).

[180] Alderfer & Thomas, *supra* note 177.

issued by The Legal Aid Society in 1995, both of these features are present in the Civil Division.[181] Not only do attorneys of color account for only 23 percent of management positions,[182] but 51 percent of all the staff attorneys who left the Civil Division between July 1993 and November 1995 were people of color.[183]

E. The Neutrality and Race Consciousness Models and Group Dynamics Within the Civil Division

An analysis of the survey answers reveals that Civil Division attorneys of The Legal Aid Society do not fit neatly into either the Neutrality or Race Consciousness Model based solely on race or ethnic background. While white attorneys and attorneys of color clearly align with a particular model on some answers, the answers to other questions are at best amorphous and difficult to interpret. For example, when asked if race was an issue in the representation of clients, white attorneys as a group aligned with the Neutrality Model and answered "no." Attorneys of color, on the other hand, answered "yes", that race was an issue, consistent with the Race Consciousness Model. But when asked if they take the race of the client into consideration during their representation, attorneys of color answered "no", seemingly departing from the Race Consciousness Model. It is difficult to reconcile these two answers from attorneys of color. If race is an issue in the representation of clients, it would make sense to take the race of the client into consideration when representing that client. While attorneys of color gave seemingly conflicting answers to these two questions, the answers of the white attorneys were consistent. Since white attorneys did not think that race was an issue in the representation of clients, they indicated that they did not take the clients' race into consideration.

The discrepancies in answers continue when we examine other responses. In response to question 50, "I believe that attorneys

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[181] *See* EEO REPORT, *supra* note 119.

[182] *See id.*

[183] *See* The Legal Aid Society, Civil Division Affirmative Action Committee, Nov. 28, 1995. In one Civil Division neighborhood office, 85 percent of the staff attorneys of color left the organization within a twenty-month period. *See id.* During the same period, 23 percent of the white staff attorneys left. *See id.*

of color are more effective representatives of people of color", the overwhelming majority of white attorneys disagreed with the statement. Again, the answers of the white attorneys were consistent with the Neutrality Model. As expected, a majority of attorneys of color agreed with the statement, consistent with the Race Consciousness Model.

However, when asked if "Clients are more open with attorneys of the same race as them", both groups of attorneys appear to have changed their positions. In response to this question, a majority of white attorneys did not *disagree.* Likewise, the attorneys of color did not voice strong *agreement.* It seems logical that if white attorneys do not think that attorneys of color are more effective representatives of people of color, then they would also think that clients of color are *not* more open with attorneys of the same race as them. In drawing this conclusion, it must be remembered that the majority of Legal Aid clients are people of color[184] and attorney/client communications are crucial to the success of any representation. Thus, if white attorneys do not think that attorneys of color are more effective representatives of people of color, they should probably also believe that attorneys of color do not have an advantage in communicating with clients of color. On the other hand, one of the reasons attorneys of color probably believe that they are more effective representatives of people of color is because of enhanced attorney/client communications due, in part, to the client being more open with attorneys that look like them or have similar ethnic backgrounds. Yet strangely, attorneys of color did not seem to think that clients are more open with attorneys of the same race as them. Another area of the survey where one group, white attorneys, appeared to vacillate between the Neutrality and Race Consciousness Models was on the topic of "Race and the Courts." As previously noted, as a group white attorneys indicated that race is not an issue in the representation of clients. White attorneys also indicated that *their* race did not affect how they represented their clients. Both of these answers are consistent with the Neutrality Model. But when asked how a client's and an attorney's race affected the treatment they received from the courts, white attorneys appear to abandon the

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[184] *See supra* note 118 and accompanying text.

Neutrality Model and align themselves with the Race Consciousness Model instead.

When white attorneys were asked if a client's race has a positive or negative effect on the treatment a client receives from the court, they indicated that it had a negative effect. But when asked if an attorney's race has a positive or negative effect on the treatment they receive from the courts, white attorneys indicated that it had a positive effect. Here, white attorneys apparently no longer think that race is irrelevant and, thus, clearly depart from the Neutrality Model. Instead, when it comes to the courts, white attorneys appear to be very cognizant of the issue of race.

Once again, it is difficult to interpret these seemingly contradictory answers. Certainly, if a client's race affects how the courts will treat that client, then race must be an issue in the representation of the client. Likewise, if a white attorney receives more favorable treatment from the courts because of her race, then the race of an attorney must have an effect on how that attorney represents the client.

A possible explanation for the conflicting survey answers among the two groups of attorneys may lie in an examination of group dynamics. According to Alderfer and Thomas, two types of groups exist within organizations: identity groups and organization groups.[185] Identity group members share common biological characteristics or historical experiences and thus tend to develop similar worldviews.[186] Identity groups are often based on race, ethnicity, gender, age, or family. Organization groups, on the other hand, are based on task, function, and hierarchy.[187] Members of organization groups perform similar "tasks, participate in comparable work experiences and, as a result, tend to develop common organizational views."[188] Because people often join and leave organizations, organization membership is fluid and changes over time. Conversely, since most people are born into identity groups, membership tends to remain constant or change slowly as the result of natural development.

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[185] *See* Alderfer & Thomas, *supra* note 177, at 145.
[186] *See id.*
[187] *See id.*
[188] *See id.*

Within Legal Aid all attorneys, regardless of race, belong to both an identity group and an organization group. Depending on factors such as race, ethnicity, gender, and age, an attorney can belong to one or multiple identity groups. For example, a sixty-year-old African-American woman attorney may belong to the identity groups of women, African-Americans, and the elderly. A thirty-five year old white male, on the other hand, may only identify with the ruling white male hegemony within our society.[189] Regardless of the identity group(s) an attorney belongs to, all the attorneys in the Civil Division will be part of the organization group that consists of attorneys employed by The Legal Aid Society.

Membership in identity and organization groups affects the way in which an attorney views the world, including race. Clearly, a Black Latina attorney who was raised in poverty and experienced discrimination firsthand will view racism differently that a white male raised in affluent suburbs who has been taught to disregard the "invisible package of unearned assets"[190] that accrue merely as the result of his gender and skin color. Having experienced racism and painfully aware of its effects, the Black Latina's views of race will be shaped by her experiences and the experiences of others in her identity group. Accordingly, this woman will probably not think that "[o]ur Constitution is color-blind"[191] and most of her views could probably be explained by the Race Consciousness Model. The white male attorney, on the other hand, may very well be oblivious to the issue of race. Having never been discriminated against and taught from an early age to disregard the privileges of his own race and gender,[192] this attorney probably does believe that the law is neutral and, thus, most of his views will probably align with the Neutrality Model.

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189 Of course, like the African-American attorney, the white male can also be associated with other identity groups by age, gender, etc. However, because of "white privilege" and "male privilege", a white male may not realize that he is part of multiple identity groups. *See* McIntosh, *supra* note 43. White males are taught not to recognize the advantages that accrue as the result of their race and gender. *See id.*

190 *See id.*

191 *See supra* Part II.B.

192 *See supra* note 43-46 and accompanying text.

But while identity group membership may determine which of the two models explain some of an attorney's views, organization group membership also influences an attorney's perceptions. It is well documented that group members often adjust their views to fit within the group norm. In one study examining the dynamics of group pressure, participants were asked how much a stationary point of light moved.[193] Although the light was stationary, the participants gradually adjusted their estimates to fit within the prevailing group norm, which always indicated movement.[194] As members of Legal Aid, the responding attorneys may have adjusted their answers to fit within the prevailing norm of the organization. If so, this could explain why no one model can adequately explain all the answers of either of the groups of attorneys. In responding to some answers, attorneys may be exhibiting their group identities when aligning with either the Neutrality or Race Consciousness Models. On other answers, however, when it appears that the same group of attorneys departs from a previously stated position, the group may be succumbing to group pressure and exhibiting its organizational identity.

For example, when asked if race was an issue in the representation of clients, attorneys of color answered "yes." This answer, as noted above, aligns with the Race Consciousness Model. But when asked if they take the race of the client into consideration during their representation, this same group of attorneys answered "no", this time aligning themselves more with the Neutrality Model. These seemingly contradictory answers may be explained by examining group memberships.

As members of identity groups based on race and ethnicity, attorneys of color are probably very aware that race is always an issue in society at large and, thus, must be an issue in legal representation. However, as members of Legal Aid, attorneys of color are part of an organization that expects its employees to be color-blind and to serve all of its clients equally. The expectation within Legal Aid that all clients, regardless of race, should receive comparable services is probably based on a number of factors. First, Legal Aid attorneys are

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193 *See* Alderfer & Thomas, *supra* note 49, at 3.

194 *See id.*

merely a subset of all attorneys. As attorneys, Legal Aid employees have been indoctrinated on the "Rule of Law" and taught to disregard race. Thus, as an organization all of Legal Aid's attorneys may merely be adjusting their answers to fit within the group norm that they learned and adopted in law school. Second, as noted above, 77 percent of the supervising attorneys within the Civil Division are white males. As a group, white males continually aligned with the Neutrality Model during our survey and thought that race was not an issue. Accordingly, if attorneys of color want to advance within the Legal Aid, they may align their views with that of the ruling hegemony to win the approval of their supervisors. By indicating that they do not take the race of the client into consideration during representation, attorneys of color may simply be conforming to organizational expectations.

Among white attorneys, group dynamics may also explain seemingly contradictory answers. When asked if race is an issue in the representation of clients, white attorneys overwhelmingly answered "no", adhering to the Neutrality Model where race is never an issue. But when asked to indicate if their race had a positive or negative effect on the treatment they received from the court, white attorneys indicated that their race had a positive effect. In response to this question, white attorneys appear to have abandoned the Neutrality Model and become acutely aware of race. Unlike the responses of attorneys of color, the conflicting answers here are probably *not* the result of any antagonism between identity and organization group membership. Rather, the conflicting answers may be explained by membership in only an identity group.

As part of the identity group of the "white majority", whites steadfastly adhere to the Neutrality Model and do not recognize race as an issue. This may be because whites are oblivious to race as the result of "white privilege",[195] or it may be that whites are reluctant to admit that attorneys of color may be more effective representatives of people of color if race is an issue in legal representation. On the other hand, when benefits inure to whites merely as the result of their skin color, whites suddenly become aware of race, aligning themselves with the Race Consciousness Model. While the sudden recognition of race seemingly contradicts other answers of white

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[195] *See supra* notes 43-46 and accompanying text.

attorneys, the answers can still be explained by identity group membership. This time, however, white attorneys are identifying with the group simply because of the advantages of being white and not because of "white privilege" or their reluctance to admit that attorneys of color may, in certain cases, be more effective representatives of people of color.

It should be noted, however, that the argument that attorneys of color are more effective representatives of people of color has a flip side that may be especially troubling to attorneys of color. If attorneys of color are more effective representatives of people of color merely based on their skin color, whites could argue that they are more effective representatives of white clients. This argument could possibly support excluding attorneys of color from major corporate firms where the majority of clients are white, since the firms would naturally want to hire the most effective attorneys.

Identity group membership also helps to explain the seemingly anomalous answers of an Asian male who responded to the survey. Unlike his attorney of color colleagues, this attorney's responses echoed those of his white male counterparts. In response to a number of key questions on race, this Asian male indicated that 1) he did *not* take the race of a client into consideration during representation; 2) clients do *not* take the race of their attorney into consideration; 3) race has *no* effect on how he represents clients; and 4) attorneys of color are *not* more effective representatives of people of color. But while these responses do not follow the general pattern of answers by other Legal Aid attorneys of color, they probably can be explained by identity group membership.

An examination of some of the other survey responses of this Asian male attorney indicates that, despite being a person of color, he readily relates to the identity group of white males. His affinity towards this group can probably be traced to extensive socialization. In his survey answers, this attorney indicated that he was raised in a predominately white, middle class, suburban environment. This attorney also indicated that in his three years at Legal Aid, he worked in an office where the majority of attorneys, including the managing attorneys, were white males. Having been raised and later employed in an environment where his white friends and colleagues have been taught to disregard the privileges that inure to them based solely on

race, this attorney may either truly believe that race does not matter in society or legal representation; or, he may, like some of his white friends and colleagues, be totally oblivious to issues of race because he was raised in an environment where race played little, if any, role.

Group dynamics also help to explain the tensions and conflicts that exist between white attorneys and attorneys of color. Within any organization there is interface between identity and organization groups. This interface can lead to tension and conflicts.[196] How an organization manages these tensions and conflicts depends, in part, on a concept called intergroup embeddedness. Within any organization there are two types of embeddedness: congruent and incongruent.[197] Congruent embeddedness occurs where the power relations in an organization mirror those in society as a whole.[198] For example, with regard to race, congruent embeddedness is present in an organization in which whites occupy high status positions and people of color are found in low power, low status positions. This organizational race pattern mirrors the power relations in society at large. On the other hand, if people of color occupied the high status positions in an organization and whites occupied the lower echelons, incongruent embeddedness would be present. Alderfer and Thomas have noted that in organizations where congruent embeddedness exists, evaluations of racial minorities by the controlling whites are likely to be inaccurate and may reflect the anxieties of the dominant group in race relations.[199] This could possibly explain the answers of both groups of attorneys to question 62, where attorneys were asked if they agreed or disagreed with the statement that attorneys of color and white attorneys are judged by the same standards. Sixty-five percent of white attorneys agreed with this statement, while 64 percent of attorneys of color disagreed. In an organization such as Legal Aid where congruent embeddedness exists, it is possible to have conflicting answers to this question. Because attorneys of color only occupy a minority of management positions, they may be justified in

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196 *See* Alderfer & Thomas, *supra* note 177, at 145.
197 *See id.* at 146.
198 *See id.*
199 *Id.*

believing that they are judged by a higher standard than whites. On the other hand, the answers of the majority of white attorneys may reflect their inaccurate evaluations of attorneys of color.

Examining group dynamics within the Civil Division not only helps to explain the seemingly contradictory answers of attorneys of color and white attorneys, it also lends support to the conclusion that neither the Neutrality Model nor the Race Consciousness Model dominates within the Civil Division. While race and ethnicity played a large part in determining which model attorneys aligned with, the two models could not adequately explain all the answers of a particular group of attorneys. Rather, the conclusion to be drawn is that Civil Division attorneys are operating under a hybrid of the two models. While adherence to the hybrid model may lead to conflicting answers between the two groups of attorneys, those conflicts can often be explained by examining group memberships.

F. Examining the Lees' Theory About Racial Bias in the Provision of Legal Services to the Poor

One of the purposes of the survey was to test some of the arguments posited by the Lees in their article *Reflections from the Bottom of the Well: Racial Bias in the Provision of Legal Services to the Poor*.[200] In their article, the Lees contend that the plight of poor legal services clients is as bad or worse now than at any time during the 25 year history of legal services programs.[201] The Lees attribute the plight of the poor to the failure of legal services offices to address the connection between race and poverty. According to the Lees, the policies set by the predominately white legal services management fail to reflect the needs of the clients who are overwhelmingly people of color.[202] The result is that many of the problems encountered by poor people of color--discrimination, institutional racism, inequitable distribution of resources--go unchallenged.[203] The Lees further posit that the predominately white management of legal services offices

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200 Lee & Lee, *supra* note 71.

201 *See supra* note 71 and accompanying text.

202 *See supra* note 98 and accompanying text.

203 *See supra* note 96 and accompanying text.

gain self-esteem by looking down upon their clients of color,[204] suffer from an unacknowledged "empowerment phobia,"[205] and are thus reluctant to share their power either attorneys or clients of color.[206]

An examination of Legal Aid's Civil Division and its policies lends credence to some of the Lees' arguments. To begin with, the vast majority (77 percent) of the Civil Division's managing attorneys are white.[207] The policies set by this predominately white management focus on providing individual representation and not on litigating for systemic reform. Between 1994-96, the Civil Division exhibited a marked shift toward individual client representation in Housing Court and away from systemic reform.

The Civil Division has also shown a reluctance to share power with attorneys of color. Only two of the 11 Civil Division offices that serve clients have management attorneys of color.[208] Only one Civil Division office has an attorney-in-charge or an assistant attorney-in-charge who is a person of color.[209] Additionally, only two of the 11 management positions that were filled between October 1993 and December 1995 were filled with attorneys of color.[210]

However, standing alone, the composition of the Civil Division's management and their current service policies do not adequately support the Lees' premise that legal services' white management suffers from "empowerment phobia"[211] and gains self-esteem by looking down upon their poor clients of color.[212] The Lees fail to cite to any empirical data or studies to support their premise and our survey was not intended to probe the psychological mindset of the Civil Division's management. An analysis of our survey data does, however, provide alternate explanations for the composition of the Civil Division management and the policies set by that management.

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204 *See supra* note 97 and accompanying text.
205 *See supra* note 102 and accompanying text.
206 *See supra* note 102 and accompanying text.
207 *See supra* note 120 and accompanying text.
208 *See* ALAA Civil Division Affirmative Action Committee, Civil Division Attorney Hiring, Promotion, and Retention Statistics, Dec. 14, 1995 Draft.
209 *See id.*
210 *See id.*
211 *See supra* note 102 and accompanying text.
212 *See supra* note 97 and accompanying text.

The predominately white Civil Division management is probably best explained in terms of subtle racism rather than any "empowerment phobia." During our survey, white attorneys and attorneys of colored disagreed on whether attorneys of color and white attorneys have the same opportunities for advancement and on the standards by which attorney performances are judged.[213] Sixty-seven percent of attorneys of color indicated that attorneys of color and white attorneys do not have the same opportunities for advancement, while 72 percent of white attorneys responded that the opportunities were the same.[214] Similarly, 64 percent of attorneys of color indicated that attorneys of color were held to a higher standard than white attorneys; 65 percent of the white attorneys responded that attorneys of color and white attorneys were judged by the same standards.[215]

The alarming differences in the responses of the two groups of attorneys can be sufficiently explained. As previously noted, whites are taught at an early age not to recognize the privileges that are inherent in being part of the ruling hegemony.[216] Thus, whites may actually be unaware that they are afforded better opportunities in life and are judged by a more lenient standard than people of color. People of color, on the other hand, tend to be more conscious of race and probably perceive a predominately white organization like the Civil Division as a neopigmentocracy and not a meritocracy.[217] Two salient features identify a neopigmentocracy: 1) the absence of people of color in management positions; and 2) a high turnover rate among people of color because of the absence of equal opportunities.[218]

While both of these features are clearly present in the Civil Division,[219] racism provides a more plausible explanation for their presence than does any "empowerment phobia" theory. Within a neopigmentocracy, people of color are permitted to attain "acceptable

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213 *See supra* notes 151-54 and accompanying text.
214 *See supra* Part IV.D.
215 *See supra* note 151 and accompanying text.
216 *See supra* notes 43-46, 153 and accompanying text.
217 *See supra* note 154 and accompanying text.
218 *See supra* Part IV.D.
219 *See supra* notes 120, 160 and accompanying text.

positions"[220] but are stunted by "racist forces" as they attempt to attain management positions.[221] Racism, then, could account for the small number of management attorneys of color because attorneys of color are prohibited from rising above "acceptable positions." Racism could also account for the high turnover rate, as attorneys of color leave the Civil Division because of the absence of opportunities.

The Lees also posit that the predominately white management of legal services offices set service policies that fail to address the problems of poor people of color because management gains self-esteem by looking down upon their poor clients of color and thus has no motive to empower their clients. There exists, however, at least two other alternate explanations for the polices set by the predominately white Civil Division management. One explanation, and the one frequently espoused by the Legal Aid management, is that the recent focus on individual representation, as opposed to systemic reform litigation, generates millions of dollars in fees that enable Legal Aid to employ more attorneys who, in turn, service more clients.

A second plausible explanation is that the predominately white management, who operate principally within the Neutrality Model, do not recognize race as a factor when devising service policies for their offices. Obviously, the failure to recognize race as a factor results in the absence of any systemic strategies aimed at addressing discrimination, institutional racism, the inequitable distribution of resources and other problems that disproportionately impact upon poor people of color.

While it appears that the Lees are correct in their assessment that racial bias occurs in the provision of legal services to the poor, it cannot be stated with certainty that the racial bias is the result the white management's "empowerment phobia" and the need to gain self-esteem by looking down upon poor clients of color. Institutional racism, which the Lees may argue is grounded in empowerment of the majority and a search for self-esteem, may also account for the predominately white management of the Civil Division and the high turn-over rate among attorneys of color. Additionally, fiscal

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220 *See supra* note 156 and accompanying text.

221 *See supra* note 157 and accompanying text.

motivations and the Neutrality Model provide alternate explanations for the Civil Division's service policies that failure to systemically address many of the problems of poor clients of color. It appears that further research is needed before the arguments posited by the Lees can be proved or discarded.

V. CONCLUSION

The results of the survey reveal that the perceptions of attorneys of color and white attorneys on the impact that race has on the law and lawyering cannot be adequately explained by either the Neutrality Model or the Race Consciousness Model. Clearly, attorneys do not align with either model based solely on their race. Rather, there are some general differences in how people perceive race and the effects that race has on legal representation and the treatment clients and attorneys receive at the hands of the courts and by their own organization.

As a group, attorneys of color were much more likely to perceive both the advantages and the disadvantages that came with being of color. Advantages in dealing with their clients, including better communication; but disadvantages in the treatment received by the courts and in the workplace. Although white attorneys were less likely to perceive the effects of race in their dealings with clients, many did note that it was an issue. A large percentage of the white attorneys believed that race has an impact on their client's treatment by the judicial system.

But while neither the Neutrality Model nor the Race Consciousness Model could adequately explain all the answers from both groups of attorneys, the survey did reveal that *all* the participating attorneys recognized race as a significant factor in some aspect of their professional lives, whether it was the attorney-client relationship, dealing with the courts or treatment in the workplace. Thus, it appears that as society and the legal profession become more diverse, race is beginning to have an impact on the law and lawyering, at least within the realm of The Legal Aid Society. Additionally, the failure of either model to adequately explain all the answers of a given group of attorneys also lends credence to the proposition that Legal Aid attorneys are operating under a hybrid of

the two models and are exhibiting their identity group and organization memberships.

The question, then, is where to go from here. Clearly there is the need for further study of this issue. In particular, if we are to improve the position of attorneys of color, as well as clients of color, the study must be expanded outside the realm of "poverty law," where most clients are people of color, and where attorneys of color have arguably more opportunity than in other areas of the law.

Several options or approaches must be examined. For example, perhaps the Professional Identity Model is not being ingrained enough in students in our law schools. If people of color, and some whites, place an emphasis on the importance of race, perhaps neutrality is not being sufficiently taught.

More likely, though, if whites are less sensitive to racial differences, law schools should focus more on these differences, and more on communication skills. In a society that is severely stratified along racial lines, whites and people of color probably share fewer common experiences than law schools may be assuming. Because law is taught from a neutral perspective, we may be inhibiting white students, who most likely have not been forced to examine racial issues, from developing the sensitivity that may be necessary to effectively advocate for people of color. At the same time, we may be alienating students of color by refusing to acknowledge differences in people and their treatment by society in general, and by the law. Perhaps, then, the time has finally arrived for our law schools to acknowledge that the pursuit of colorblindness is an inadequate social policy by which to achieve justice within our legal system.

What we should strive for, then, is a legal education system that teaches students that both whites and people of color should be conscious and sensitive to the issue of race. Students must also be taught that race consciousness and sensitivity can be learned, regardless of race, class, ethnicity or other personal identity factors. Finally, students and seasoned attorneys alike, must be shown the need to examine how their actions as lawyers relate to issues of race.