

Making It to the Brochure but Not to Partnership

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*I will pick a person who can do the job. But I am mindful that diversity is one of the strengths of the country.*¹

I. INTRODUCTION

XYZ Corporation examined the composition of Smith & Jones's workforce and terminated its five-year relationship with the large law firm.² The client cited the firm's lack of diversity as its reason for dismissal. Puzzled, Partner Smith contacted XYZ Corporation. Smith said, "I do not understand your decision; our firm is fully committed to diversity. We attend diversity career fairs, we hire minority associates, and we have a minority associate mentoring program. Did you see the brochure we sent you? The brochure clearly displays how diverse we are as a firm."

XYZ Corporation responded, "With all your diversity programs, why does your firm lack minority partners? What is the point of diversity if it is segregated in the lower ranks of your firm?"

Smith responded, "Listen, we have always provided quality work to your company. Now, I personally believe there should be minority partners; in fact, I support diverse partnership in all firms. The reality is that we can only award partnership to associates who meet our standards. Under our partnership criteria, none of the minority associates happened to qualify."

Fictitious Smith & Jones's lack of diversity in partnership ranks is not unique. "[Forty-one] percent of U.S. law firms report[ed] having no partners of color"³ These and other statistics indicate that,

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1. Jesse J. Holland, *Bush Mentions "Diversity" in Considering Next Supreme Court Nominee*, ASSOCIATED PRESS, Sept. 27, 2005, available at <http://www.law.com/jsp/printerfriendly.jsp?c=LawArticle&t=PrinterFriendlyArticle&cid=1127738114216> (quoting President George W. Bush when asked about his next Supreme Court Justice nominee, prior to his contradictory appointments of John Roberts, Harriet Miers, and Samuel Alito Jr.).

2. XYZ Corporation and Smith & Jones law firm are fictitious entities. "[Large] law firms are large urban law firms that serve national and multinational corporations." Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U.L. REV. 669, 674 (1997).

3. Ursula Furi-Perry, *Slow Gains for Minorities at Firms*, NAT'L JURIST, Feb. 2006, at 40, 40; see also NAT'L ASS'N FOR LAW PLACEMENT, *Women and Attorneys of Color at Law Firm-2004*, <http://www.nalp.org/content/index.php?pid=253> (last visited Apr. 3, 2006).

despite individual capabilities, the prospects for minority associates to attain partnership status in large law firms are bleak.⁴

In 1993, only three percent of law firm partners nationwide were minorities.⁵ In response to these alarming statistics, the American Bar Association (ABA) and corporate counsel at various companies began questioning and tracking diversity in law firms.⁶ Many firms followed their initiative by pledging their commitment to diversity.⁷ In addition, the National Association for Law Placement (NALP) began surveying law firms represented in its directory of legal employers.⁸ Over ten years later, NALP revealed that approximately four percent of the 54,000 partners surveyed were minorities.⁹ The legal community realized that, despite their collective efforts, most large law firms remained ineffective in promoting minority associates to their management ranks.¹⁰

This note explains why many large law firms have been forced to reexamine their dedication to diversity and addresses the barriers that continue to exist for minority attorneys who seek law firm partnership.¹¹ To assist firms in overcoming barriers, this note constructs an ABA-accredited specialty certification program that recognizes large law firms that are making the commitment to attain diversity among their partners.¹² Integrating partnership ranks, however, will only occur if firms restructure themselves to include individual differences, which exist among their associates.

4. See U.S. Equal Employment Opportunity Comm'n, *Executive Summary in DIVERSITY IN LAW FIRMS* (2003), <http://www.eeoc.gov/stats/reports/diversitylaw/lawfirms.pdf> [hereinafter *EEOC REPORT*] (stating that law firm attrition rates were higher for minority associates). Surveying law firms with at least 100 employers, the EEOC discovered that 30.8 percent of minority associates, compared to 70.2 percent of non-minority associates, believed that equal opportunities for partnership existed during the promotional selection process. *Id.* at 27.

5. 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, 627 (1994).

6. J. Cunyon Gordon, *Painting by Numbers: "And, Um, Let's Have a Black Lawyer Sit at Our Table,"* 71 *FORDHAM L. REV.* 1257, 1281-82 (2003). For example, James A. Hatcher, senior vice president for legal and regulatory affairs at Atlanta-based Cox Communications, actively seeks to retain law firms with diverse cultures. Meredith Hobbs, *Wal-Mart May Roll Back Business with Some Firms*, *FULTON COUNTY DAILY REP.*, July 6, 2005, at 1-2. To test Cox's outside counsel's commitment to diversity, he requires partners to explain to him "[w]hy . . . there [are] just white males [at the meeting]." *Id.* at 2 (quoting Hatcher).

7. *E.g.*, KANSAS CITY METRO. BAR ASS'N, *AREA LAW FIRMS WORK TOGETHER TO INCREASE DIVERSITY*, available at <http://www.kcmba.org/PDF%20Files/KCMBa%20Diversity%20List.pdf> (last visited Apr. 3, 2006).

8. See Akshat Tewary, *Legal Ethics as a Means to Address the Problems of Elite Law Firm Non-Diversity*, 12 *ASIAN L.J.* 1, 4 (2005).

9. NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 3. Minority associates represented fifteen percent of the 61,000 associates surveyed. *Id.*

10. See *id.*; see also Hobbs, *supra* note 6, at 1.

11. This note will only address large law firms, although the diversity problem may exist in all law firms.

12. Law firm partners who successfully complete the certification will directly benefit from the profitability potential of their diversity-certified firm. They may also indirectly profit from recruitment savings when they become aware of why their internal policies disfavor diverse candidates.

II. INITIATIVES TOWARD DIVERSITY

In 2005, Wal-Mart shocked the legal community when it terminated its relationship with one of its outside firms for failing to satisfy its “statistical recruitment and retention goals for minority and women attorneys,” even though the quality of the firm’s legal work met the company’s expectations.¹³ Wal-Mart is considering terminating five other law firms if they continue to disregard their responsibility to diversity.¹⁴ Similarly, Sara Lee has implemented a policy mandating that its less diverse firms show improvement within one year or face dismissal.¹⁵

Corporate clients are calling for greater diversity within the law firm workplace, particularly at the partnership level,¹⁶ because diversity in the labor force generates innovative and more successful solutions than the outcomes produced by homogenous collaborations.¹⁷ Clients not only recognize the benefits but also realize the importance of diversity in their legal representation.¹⁸ It is not surprising that corporate clients are using their purchasing power to create adverse consequences to combat those resistant to integrating minority attorneys into their law firm management.

Corporate legal departments have used various methods to compel firms to demonstrate their asserted commitment to diversity.¹⁹ For example, Sara Lee uses a firm’s commitment to diversity as a factor when ranking its outside law firms.²⁰ Sara Lee awards more of its business to the higher-ranked firms and reduces the amount of work referred to the lower-ranked firms.²¹ Wal-Mart’s general counsel, Thomas Mars, demands at a minimum one minority and one woman

13. Edgardo Ramos & Lynn Anne Baronas, *What Works: Ways to Increase Diversity at Law Firms*, NAT’L L.J., Jan. 16, 2006, at 13.

14. Meredith Hobbs, *Wal-Mart Diversity Program Sweeps in 40 New Firm Relationship Partners*, FULTON COUNTY DAILY REP., Oct. 25, 2005, at 2. Wal-Mart demands that law firms promote diversity in the bar associations affiliated with the firms. Heather Smith, *Hue and Cry: Firms Have Begun to Respond to Wal-Mart’s Urgent Call for Diversity Action*, AM. LAW., Sept. 2005, at 18, 18. To bypass any excuses law firms may have, Wal-Mart sends a monthly “Diversity Alert” listing upcoming minority bar events. *Id.* at 18-19.

15. See Ameet Sachdev, *Law Firms Seeking Diversity*, CHI. TRIB., July 9, 2004, at B1.

16. Pressures from minority and female activists have forced corporate, political, and military leaders to accept diversity. RICHARD L. ZWEIGENHAFT & G. WILLIAM DOMHOFF, *DIVERSITY IN THE POWER ELITE: HAVE WOMEN AND MINORITIES REACHED THE TOP?* 7 (1998). Similarly, pressures from corporate counsel have been forcing law firm leaders to accept diversity.

17. Eric Mankin, *Optimizing Diversity*, July 25, 2005, http://www.biz-architect.com/optimizing_diversity.htm.

18. See, e.g., Sachdev, *supra* note 15 (citing statement of Sears general counsel Andrea Zopp).

19. Wal-Mart stated that it would terminate its relationship with law firms that failed to meet its diversity standards. Hobbs, *supra* note 6, at 1. “Corporate law departments in organizations like DuPont and BellSouth are also involved in [diversity] initiatives.” Lisa Walker Johnson, *Responding to the Diversity Challenge*, FINDLAW.COM, http://careers.findlaw.com/diversity/altmanweil/diversity_challenge.html (last visited Apr. 3, 2006).

20. Sachdev, *supra* note 15.

21. *Id.*

“be among the top five relationship attorneys that handle its businesses.”²² Guy Rounsaville Jr., general counsel at Visa, requires outside counsel to submit a monthly diversity report.²³ Catherine A. Lamboley, senior vice president and general counsel at Shell Oil Company, includes diversity as a factor when hiring the company’s law firms; currently “twenty-two percent of its outside counsel are minority- or women-owned firms.”²⁴ In-house corporate counsel, such as Del Monte, Pitney Bowes, and Cox Communications, direct outside counsel to show substantial representation of minority attorneys in the firms’ upper management.²⁵ Other corporate clients request that their outside law firm bills reflect the amount of work performed by minority attorneys.²⁶ Practically speaking, diversity has now become a business necessity, rather than a moral imperative, for most large law firms.²⁷

To answer this challenge, some large law firms have formed alliances with minority-owned firms to receive the benefits of diversity and to retain their clients. For example, when the Chicago-based firm Sonnenschein Nath & Rosenthal lost its A ranking in Sara Lee’s rating system, it formed an alliance with Pugh, Jones, Johnson & Quandt, a minority-owned Chicago firm.²⁸ The firms “pledg[ed] to work together on certain legal matters to give corporate clients a diverse team of lawyers.”²⁹ After the alliance formed, two Fortune 500 companies quickly hired the firms.³⁰ Many in the legal community viewed their

22. Hobbs, *supra* note 6, at 1. Wal-Mart’s goal is to increase diversity among its attorneys, especially in the partnership ranks. Hobbs, *supra* note 14, at 1. Wal-Mart assesses its top 100 outside counsel based on the following factors: (1) a detailed report of the firms’ employment of minority and female attorneys; (2) a list of three to five minority and female candidates to serve in the relationship role; (3) the retention rate for minority and female attorneys as compared to white male attorneys; and (4) the percentage of minority and women associates promoted to partnership. *Id.* Wal-Mart will terminate its relationship with any law firm that fails to “demonstrate a meaningful interest in the importance of diversity.” *Id.*

23. Hobbs, *supra* note 14, at 1.

24. Molly McDonough, *Demanding Diversity: Corporate Pressure Is Changing the Racial Mix at Some Law Firms*, ABA J., Mar. 2005, at 52, 55; see also Terry Carter, *Coming Out of Her Shell*, ABA J., Dec. 2004, at 31, 32 (noting the next step for her company is to analyze the amount of minority and women attorneys reaching law firm partnership).

25. Hobbs, *supra* note 6, at 1.

26. Sachdev, *supra* note 15. Some firms have assisted corporations in their endeavor. More than sixty law firms in the New York County Lawyers’ Association made a pact to inform corporate clients about the race, ethnicity, and sexual orientation of attorneys who comprise the legal teams working on their clients’ projects. Thomas Adcock, *Keeping Score*, MINORITY L.J., Summer 2005, at 10, 10. The pact specifically states that “[l]aw firms should not object to requests by their corporate clients [to] report the number of hours devoted to the clients’ matters by minority lawyers.” *Id.* (quoting the pact).

27. Ramos & Baronas, *supra* note 13. Law firms that are content with the current stagnancy of their diversity numbers may confront difficulties. For example, one firm slipped from *The American Lawyer*’s annual ranking of the nation’s best law firms, despite having the same minority attorney percentage as in the previous year. *The A-List: The Top 20 Firms*, AM. LAW., Sept. 2005, at 106, 115 (noting that the firm scored well in the other surveyed factors). This drop illustrates that improving diversity is necessary if law firms are to remain highly ranked. See *id.*

28. Sachdev, *supra* note 15.

29. *Id.*

30. McDonough, *supra* note 24.

alliance as an innovative approach in satisfying the diversity challenge.³¹

These types of practices inadequately address the diversity dilemma that currently exists in most firms because alliances create mere facial diversity without compelling inner structural change.³² The idea behind the Sonnenschein-Pugh alliance illustrates this reality. The goal of the two firms was “to offer clients diverse legal teams while both firms maintain[ed] separate identities.”³³ The purpose, however, of pressing firms to increase minority attorneys within their ranks was to force firms to change their homogenous culture to develop into a diverse workplace. To build diverse partnerships, corporate clients provided the books of business as well as the opportunities to receive complex assignments for minority associates. An alliance allows large law firms to retain corporate clients without modifying their non-diverse practices by using separate minority-owned firms as their marketing tools. While corporate clients have accelerated the need for diverse legal teams, alliances dismiss their challenge to integrate the partnership level in non-diverse firms.³⁴

“[It is] no secret that the nation’s top law firms have a less than stellar record when it comes to promoting members of minority groups.”³⁵ Partners in large law firms benefit from their coveted status by holding directorships in bar associations, membership on legislative drafting committees, and board positions for their client

31. See Sachdev, *supra* note 15.

32. For example, Jeneba Ghatt, a fifth-year African American associate at Wilkie Farr & Gallagher, left her Washington telecom firm because of her displeasure with the uncertainty of partnership prospects and the lack of support within her firm. Denali K. Dasgupta, *Last Word: Outside the Box*, MINORITY L.J., Fall 2005, at 42, 42. Ghatt pooled her resources with other minority colleagues and formed a strategic partnership; today, she benefits from a motivating environment and is able to provide minority business clients quality legal representation as well as the perspectives attained by her personal experiences. *Id.* If Ghatt remained at her non-diverse firm, an alliance may not have provided her with the beneficial support that she currently receives from her diverse strategic partnership.

33. McDonough, *supra* note 24.

34. Although many firms desire diversity, those firms do not support preferential treatment or changing their structure to achieve diversity. Deborah L. Rhode, *Frank R. Strong Law Forum Lecture: The Profession and Its Discontents*, 61 OHIO ST. L.J. 1335, 1355 (2000). In a 1999 ABA survey, “[forty-two percent] of white lawyers, compared with [ninety-two percent] of [African American attorneys], favored affirmative action.” *Id.* Furthermore, only eight percent of African American attorneys, compared with forty-one percent of whites, “believed that firms had a genuine commitment to diversity.” *Id.*

35. Vault.com, Train for Law Diversity, http://www.vault.com/nr/main_article_detail.jsp?article_id=19174&ht_type=5 (last visited Apr. 3, 2006); see also Tewary, *supra* note 8, at 3. The record shows that over fifty percent of minority associates, compared to twenty percent of all associates, leave their law firms within three years of employment. Tewary, *supra* note 8, at 5; W.S. Ricks, *I Quit!*, NAT’L JURIST, Nov. 2005, at 19, 19, corrected in Jack Crittenden, *A Huge Error*, NAT’L JURIST, Jan. 2006, at 6, 6 (noting that *The National Jurist* erred in its accounting when it failed to include the associates who were promoted to senior attorney or counsel in its percentage of attrition rates for all associates). “Attrition rates for minority lawyers in law firms . . . are proportionally much higher than attrition rates for non-minority lawyers.” AM. BAR ASS’N, ABA RESOURCE GUIDE: PROGRAMS TO ADVANCE RACIAL AND ETHNIC DIVERSITY IN THE LEGAL PROFESSION 59 (2000), available at <http://www.abanet.org/leadership/divres8.pdf> [hereinafter ABA RESOURCE GUIDE].

corporations.³⁶ Law firm partners, however, have not collectively shared these management positions with diverse associates, which is one of the reasons that the legal field has remained one of the least integrated professions in the United States.³⁷

In 1985, the ABA investigated the mostly non-diverse bar, discovering that the legal profession had failed to integrate minority attorneys in all fields, including the private sector.³⁸ In 1986, the ABA responded by creating the Commission on Opportunities for Minorities in the Profession, renamed the Commission on Racial and Ethnic Diversity in the Profession, to ensure “full and equal participation of minorities in the legal profession.”³⁹ To increase professional opportunities, the ABA offered networking and training programs for minority attorneys.⁴⁰

To diversify the private sector specifically, the ABA realized that money from corporate clients had to be a motivating factor.⁴¹ In 1999, the corporate legal community joined this endeavor.⁴² Charles R. Morgan, executive vice president and general counsel to the BellSouth Corporation, spearheaded the movement and publicly requested that corporations require their hired law firms to promote diversity.⁴³ In response, about 500 chief legal officers signed Morgan’s “Diversity in the Workplace—A Statement of Principle” expressing their commitment to influencing diversity within the law firm workplace.⁴⁴

Even with these combined efforts, the ABA and corporate counsel could not ignore the reality that law firm progress toward diversity had plateaued.⁴⁵ In 2000, ABA President William G. Paul assembled

36. Chambliss, *supra* note 2; *see also* Gordon, *supra* note 6, at 1265-66 (noting that partnership not only provides access to social and political realms but also serves as a gateway to significant leadership positions).

37. The ABA discovered that only natural sciences and dentistry were less diverse than the legal profession. Tewary, *supra* note 8, at 3.

38. Gordon, *supra* note 6, at 1280-81. ABA president Wallace D. Riley established the Task Force on Minorities in the Legal Profession in 1985. *Id.* at 1279.

39. *Id.* at 1281 n.124; ABA Comm’n on Racial and Ethnic Diversity in the Profession, Executive Summary (2000), <http://www.abanet.org/minorities/publications/milessummary.html> (last visited Apr. 3, 2006).

40. *See* Gordon, *supra* note 6, at 1280; *see also* ABA Comm’n on Racial and Ethnic Diversity in the Profession, Programs/Groups, <http://www.abanet.org/minorities/programs.html> (last visited Apr. 3, 2006).

41. Gordon, *supra* note 6, at 1280-81.

42. AM. CORPORATE COUNSEL, CALL TO ACTION: DIVERSITY IN THE LEGAL PROFESSION (Oct. 2004), available at <http://www.acca.com/public/accapolicy/diversity.pdf> [hereinafter CALL TO ACTION].

43. Charles R. Morgan, Executive Vice President and Gen. Counsel, BellSouth Corp., Remarks at President Clinton’s Call to Action to the American Legal Community (July 20, 1999), available at <http://www.acca.com/gcadvocate/calltoaction/morgan.html> (“[Corporate] purchasing power is a powerful tool for promoting diversity.”).

44. CALL TO ACTION, *supra* note 42; *see also* American Corporate Counsel Association, Diversity in the Workplace: A Statement of Principle, <http://www.acca.com/gcadvocate/calltoaction/diversitystmt.html> (last visited Apr. 3, 2006).

45. *See* Ramos & Baronas, *supra* note 13.

the National Summit on the Retention of Minority Lawyers in the Private Sector.⁴⁶ The ABA realized that, along with minority entry-level hiring, the legal profession also had to campaign for “minority retention and promotion.”⁴⁷ Paul noted that the non-diverse bar, consisting of ninety percent white members, did not mirror the diverse nation, with its thirty percent minority composition.⁴⁸

Accordingly, in 2004, Roderick A. Palmore, chief legal counsel at Chicago-based Sara Lee Corporation, issued “Call to Action—Diversity in the Legal Profession” to encourage the law firm culture to embody diversity.⁴⁹ This time, corporate counsel renewed not only their commitment to diversity in their outside law firms but also pledged their intent to terminate any firm that failed to create a diversified workforce.⁵⁰ Motivated to preserve their corporate relationships, firms sought to increase, retain, and promote minority associates.⁵¹

Despite these efforts, it appears that most firms have shirked their responsibility to change their homogenous culture. The statistics demonstrate that 68 percent of male minority associates and 64.4 percent of female minority associates leave their law firm employers within five years of their start dates.⁵² In addition, since Morgan’s initiative, “national minority representation in partnership [has] increased by a mere 0.7 percent.”⁵³ Accordingly, present endeavors are assisting the process toward promoting minority attorneys but at a slow and arduous pace.

III. BARRIERS TO A DIVERSE LAW FIRM PARTNERSHIP

A. *Absence of Title VII Liability in Partnership Admissions Decisions that Disfavor Minority Associates*

The absence of diversity in law firm partnership persists because of the courts’ protection of partnership selection practices that do not exhibit direct evidence of discrimination. “Courts will protect traits . . . [that] cannot be changed,” such as skin color, but “will not protect mutable traits, because individuals can alter them to fade into the

46. Gordon, *supra* note 6, at 1281.

47. *Id.*

48. *Id.* at 1281-82. The minority population is projected to account for fifty percent of the U.S. population in future decades. *Id.* at 1282.

49. Ramos & Baronas, *supra* note 13, at 13, 16 (addressing CALL TO ACTION, *supra* note 42).

50. *Id.* at 16.

51. Wal-Mart’s general counsel has stated that “[i]t is no longer enough . . . to raise the numbers of women and minority lawyers in a firm’s lower ranks if its upper echelons remain an exclusive club for white men.” Hobbs, *supra* note 6, at 1.

52. EEOC REPORT, *supra* note 4, at 4 (comparing to the overall attrition rates of 52.3 percent of male associates and 54.9 percent of female associates).

53. McDonough, *supra* note 24, at 54 (according to the ABA’s Commission on Racial and Ethnic Diversity in the Profession’s latest report).

mainstream, thereby escaping discrimination.”⁵⁴ This lack of protection for mutable traits has allowed many law firms to overcome allegations of discrimination. By using subjective criteria in their partnership admissions decisions, partners have attempted to legitimize decision-making processes that disfavor promoting minority associates to partnership.⁵⁵

When passed over for partnership, minority associates have sought relief under Title VII of the Civil Rights Act of 1964.⁵⁶ Title VII prohibits an employer from

discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *race*, color, religion, sex or national origin; or limit[ing], segregat[ing], or classify[ing] his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *race*, color, religion, sex or national origin.⁵⁷

The Equal Employment Opportunity Commission (EEOC) enforces Title VII to ensure that employers do not engage in any such unlawful practices,⁵⁸ which include discriminatorily based promotional decisions.⁵⁹

Partnership admissions decisions using Title VII protected traits as motivating factors fall within the Act's protection. In *Hishon v. King & Spaulding*,⁶⁰ Elizabeth Hishon, a female associate, sued her law firm for violating Title VII when it failed to reconsider her for partnership.⁶¹ The United States District Court for the Northern District of Georgia dismissed her claim holding that “Title VII was inapplicable to the selection of partners by a partnership.”⁶² Hishon appealed to the U.S. Supreme Court; at issue was whether partnership consideration constituted a “term, condition, or privilege[]” of an associate's employment with a law firm.⁶³

54. Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES, Jan. 15, 2006, § 6 (Magazine), at 32, 35.

55. See EEOC REPORT, *supra* note 4 (“African Americans, Hispanic[] [Americans] and Asian[] [Americans] all have lower odds of being partners than [w]hite males.”).

56. Tewary, *supra* note 8, at 15.

57. 42 U.S.C. § 2000e-2(a) (2000) (emphasis added).

58. *Id.* § 2000e-5(a). A plaintiff may file a claim with the EEOC concerning an employer's discriminatory practice. *Id.* § 2000e-5(b). If the EEOC “determines after . . . investigation that there is a reasonable cause to believe that the charge is true,” then the EEOC may bring a federal civil action against the employer. *Id.*

59. See Brenda D. DiLuigi, Note, *The Notari Alternative: A Better Approach to the Square-Peg-Round-Hole Problem Found in Reverse Discrimination Cases*, 64 BROOK. L. REV. 353, 357 (1998).

60. 467 U.S. 69 (1984).

61. *Id.* at 72.

62. *Id.* at 72-73.

63. *Id.* at 73-74.

Hishon maintained that the law firm marketed the possibility for partnership as a benefit of being an associate at the firm.⁶⁴ She alleged the firm represented that, after approximately five years of employment, partnership promotion “was a matter of course for associates who receive[d] satisfactory evaluations and that associates were promoted to partnership on a fair and equal basis.”⁶⁵ King & Spalding contended that advancement to partnership shifted an employee’s status to employer and was outside the scope of Title VII protection.⁶⁶ In addition, the firm argued that applying Title VII would infringe upon its constitutional right of association.⁶⁷ The Court rejected the firm’s arguments, reasoning that Congress did not expressly provide exemptions for law firms as it did for other entities and that there was no constitutional right to discriminate in selection processes.⁶⁸ Accordingly, the Court ruled that law firm partnership consideration fell within the employment protection of Title VII and that Hishon was entitled to a hearing on the merits.⁶⁹

Courts have granted Title VII protection to partnership admissions decisions, but their sanction of liability for Title VII violations has been problematic. A plaintiff asserts Title VII liability claims by either presenting evidence that the employer intentionally discriminated against the employee or, in the alternative, implemented a facially neutral employment practice that had a significant and unjustified adverse impact on employees of the protected class, such as race.⁷⁰ Courts label these types of Title VII discrimination claims as disparate treatment and disparate impact, respectively.⁷¹ In law firms, disparate treatment occurs when partners deny partnership to a minority associate because of his race.⁷² If the associate cannot prove individual discrimination, he will have to rely on the theory of disparate impact, which may occur if the law firm’s partnership admissions decisions systematically disfavor minority associates.⁷³

When denied partnership, plaintiffs generally argue that the firm’s selection process constituted disparate treatment.⁷⁴ Most plaintiffs, however, must use indirect evidence to prove by inference that

64. *Id.* at 76.

65. *Id.* at 71-72 (internal quotations marks omitted) (quoting Hishon’s complaint).

66. *Id.* at 77.

67. *Id.* at 78.

68. *Id.* at 77-78 & 78 n.11.

69. *Id.* at 78-79 (noting that Hishon’s complaint stated a cognizable claim).

70. *See* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-88 (1988) (plurality opinion).

71. *Id.*; *see also* *Connecticut v. Teal*, 457 U.S. 440, 457 (1982) (Powell, J., dissenting).

72. *See* *Teal*, 457 U.S. at 457. The court focuses on the way in which an employer has treated an individual because of his race. *Id.*

73. *See id.* In disparate impact cases, courts have consistently considered “whether the result of an employer’s *total selection process* had an adverse impact upon the protected group.” *Id.* at 457-58.

74. *E.g.*, *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 512 (3d Cir. 1992).

the law firm employer was discriminatorily motivated in making its decision.⁷⁵ In *McDonnell Douglas Corp. v. Green*,⁷⁶ the U.S. Supreme Court recognized the difficulty of proving direct racial discrimination in disparate treatment cases.⁷⁷ The Court also realized the necessity of protecting plaintiffs from intentional discrimination.⁷⁸ To rectify this dilemma, the Court established a burden-shifting analysis for courts to follow when considering race-based employment discrimination without direct evidence.⁷⁹

Under the *McDonnell Douglas* burden-shifting analysis, the plaintiff bears the initial burden to establish a prima facie case of race-based employment discrimination.⁸⁰ A plaintiff may fulfill his prima facie burden by demonstrating

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, . . . the employer continued to seek applicants from persons of complainant's qualifications.⁸¹

If the plaintiff satisfies this burden, then it "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."⁸² When an employer provides such a reason, the burden of proof returns to the plaintiff.⁸³ The plaintiff is then "afforded a fair opportunity to show that [the employer's] stated reason for [the employee's] rejection [is] in fact pretext," thus proving intentional discrimination.⁸⁴

In almost any firm, partners will be able to articulate a legitimate reason, other than race or Title VII protected traits, to rationalize denying a minority candidate partnership.⁸⁵ A lawful denial of partner-

75. See *Hatcher v. Greater Cleveland Reg'l Transit Auth.*, 746 F. Supp. 679, 684 (N.D. Ohio 1989).

76. 411 U.S. 792 (1973).

77. See *id.* at 800.

78. *Id.* The plain language of the statute demonstrated that Congress intended to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Id.*

79. *Id.* at 801.

80. *Id.* at 802.

81. *Id.* at 802 & n.13.

82. *Id.* at 802.

83. *Id.* at 804.

84. *Id.*

85. See, e.g., *Knadler v. Furth*, No. 04-01220, 2005 U.S. Dist. LEXIS 21278, at *1-3, 9 (N.D. Cal. Sept. 9, 2005) (describing that the firm partner terminated John D. Knadler, an Asian American attorney, for nondiscriminatory reasons, such as excessive socializing, poor work product, and the failure to follow instructions, even though the plaintiff asserted that the partner referred to him discriminatorily as "Cheez Whiz"); *King v. Phelps Dunbar, L.L.P.*, 844 So. 2d 1012, 1019-20 (La. Ct. App. 2003) (explaining that the firm terminated Danatus N. King, an African American attorney, for not progressing at the rate expected with his years of experience, even though King asserted that the firm assigned him fewer projects when he refused to work on a case in which the client requested diverse attorneys be assigned); see also EEOC REPORT, *supra* note 4, at 27 (noting that partners use centralized and informal collective reasoning to make their decisions).

ship, however, may also unknowingly consider motivating factors such as race.⁸⁶ The U.S. Supreme Court addressed this issue in *Price Waterhouse v. Hopkins*,⁸⁷ in which gender was one of the motivating factors in the firm's decision to deny partnership.⁸⁸

Price Waterhouse, a nationwide professional accounting firm, denied senior manager Ann Hopkins partnership because of her abrasive treatment of her staff.⁸⁹ Despite this legitimate reason, Hopkins alleged that sex stereotyping had influenced the partners' decision.⁹⁰ Dr. Susan Fiske, a social psychologist, testified that the accounting firm's partners, including some partners who were not familiar with Hopkins, evaluated her with sex-based terms in their overcritical evaluations.⁹¹

Price Waterhouse, unlike pretext cases, constituted a mixed-motive case.⁹² Analyzing the case, the Court determined that since sex was a motivating factor, a Title VII violation was established.⁹³ A defendant then could overcome the violation if it presented objective evidence that it would have still denied Hopkins partnership solely on its claimed legitimate reason.⁹⁴ In other words, the firm could satisfy its burden of proof only if it demonstrated by a preponderance of evidence that gender did not influence its legitimately based decision.⁹⁵

In awarding more deference to Price Waterhouse's selection process, Justice Sandra Day O'Connor would have required that the plaintiff show that gender was a substantially motivating factor.⁹⁶ O'Connor proposed that the burden to prove causation should remain with the plaintiff to establish by a preponderance of the evidence that illegitimate criterion substantially influenced the employment decision.⁹⁷ Once the plaintiff made that showing, O'Connor agreed with the plurality that the burden of proof would shift to the employer to establish that it would have made the same decision based on Hop-

86. See EEOC REPORT, *supra* note 4, at 27. Promotion to partnership "takes on special meaning for women and minorities since the decision is often viewed as being subjective and thus subject to non-relevant factors such as race/ethnicity or gender." *Id.*

87. 490 U.S. 228 (1989) (plurality opinion).

88. *Id.* at 237-38.

89. *Id.* at 231-32, 234-35.

90. *Id.* at 235. For example, the exhibits demonstrated that the partners criticized Hopkins as "macho" and "overcompensat[ing] for being a woman," and suggested that she should take "a course in charm school." *Id.* (quoting three Price Waterhouse partners).

91. *Id.* at 235-36. One partner stated that Hopkins was "universally disliked"; another partner stated that she was "consistently annoying and irritating." *Id.* at 235 (quoting two partners who rarely worked with Hopkins).

92. *Id.* at 252.

93. *Id.* at 258.

94. *Id.* (noting that merely justifying a decision based on legitimate reasons is insufficient to demonstrate that the firm would have made the same decision had gender not been a factor).

95. *Id.* at 258.

96. *Id.* at 261-62 (O'Connor, J., concurring).

97. *Id.* at 265, 278.

kins' abrasiveness.⁹⁸ O'Connor concurred that "stray remarks" did not rise to the level of a motivating factor.⁹⁹ She made clear, however, that Hopkins had established sufficient evidence to shift the burden of proof to the defendant.

O'Connor noted,

At this point Ann Hopkins had taken her proof as far as it could go. She had proved discriminatory input into the decisional process, and had proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision. It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decision-making process that her gender was a major reason for the rejection of her partnership bid.¹⁰⁰

Responding to the plurality opinion and Justice O'Connor's concurrence in *Price Waterhouse*, Congress amended the Act in 1991 to prevent employers from avoiding *all* liability when mixed motives are in play.¹⁰¹ The statute provides the following: "Except as otherwise provided in this [title], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."¹⁰² If the employer demonstrates that it would have made the same decision regardless of discriminatory motivations, then plaintiffs will be limited to declaratory and injunctive relief, attorney fees, and costs associated with the lawsuit.¹⁰³

Since mixed-motive cases require plaintiffs to produce some direct evidence of discrimination, this standard may cause hardship for plaintiffs when litigating law firm partnership admissions decisions. As a result, many plaintiffs choose to assert that a firm's purported reason for denying partnership was a pretext for discrimination to use indirect evidence under the *McDonnell Douglas* burden-shifting analysis.¹⁰⁴ Even with these options, proving Title VII liability against law firms remains nearly impossible because of the subjective criteria in-

98. *Id.* at 278.

99. *Id.* at 277.

100. *Id.* at 272-73.

101. Civil Rights Act of 1964, Pub. L. No. 102-166, 105 Stat. 1071, 1075 (1991) (codified as amended at 42 U.S.C. § 2000e-(2) (2000)); *see also* *Watson v. Se. Pa. Transp. Auth.*, 207 F.3d 207, 216 (3d Cir. 2000) (noting that Congress partially overruled *Price Waterhouse*).

102. 42 U.S.C. § 2000e-2(m).

103. *Id.* § 2000e-5(g)(2)(B)(i); *see also* *Watson*, 207 F.3d at 216. A court shall not award monetary damages. 42 U.S.C. § 2000e-5(g)(2)(B)(ii).

104. *See, e.g.*, *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 512 n.1 & 522 (3d Cir. 1992) (choosing not to allege that the firm's decision involved mixed motives).

herent in partnership admissions decisions. For example, in *Ezold v. Wolf, Block, Schorr & Solis-Cohen*,¹⁰⁵ Nancy Ezold claimed that her firm's purported nondiscriminatory reason for denying her partnership served as a pretext for sex discrimination.¹⁰⁶ Ezold introduced evidence that satisfied her burden under the *McDonnell Douglas* analysis.¹⁰⁷ The burden then shifted to the firm to produce its legitimate motivating factor.¹⁰⁸ Wolf submitted Ezold's negative evaluations to support its articulated reason that Ezold did not have the requisite intellectual capacity to be a partner in the firm.¹⁰⁹

Examining Wolf's partnership standards, the United States District Court for the Eastern District of Pennsylvania noted that the firm had awarded partnership to male associates with comparable negative evaluations.¹¹⁰ Ezold's negative evaluations criticized her ability to manage complex cases.¹¹¹ Questioning these criticisms, one partner wrote in a memorandum to the firm's executive committee that she was "trapped in a Catch 22. The Chairman of the Litigation Department would not assign her to complex cases, yet she received negative evaluations for not working on complex cases."¹¹² As a result, the district court determined that the firm's decision to deny her partnership hinged on her gender and that the firm's purported reason was a pretext for sex discrimination.¹¹³

The United States Court of Appeals for the Third Circuit reviewed the district court's findings, determining that the district court erred in its finding that the firm's reason was a pretext.¹¹⁴ In the district court's analysis, Wolf's articulated reason for denying partnership was not applied to the evidence presented.¹¹⁵ For example, the record demonstrated that the firm considered all the partnership candidates' legal analytical abilities when assessing partnership qualification.¹¹⁶ In addition, the appellate court criticized the district court for select-

105. 983 F.2d 509 (3d Cir. 1992).

106. *Id.* at 522.

107. *Id.* at 523. Both parties agreed that Ezold qualified for partnership consideration. *Id.*

108. *Id.*

109. *Id.* at 524. There were positive evaluations indicating Ezold's success in the courtroom and with clients. *Id.* at 521. A partner, however, told the committee that it should not award Ezold partnership unless the committee lowered the firm's partnership standards. *Id.* After denying Ezold partnership, the chairman of the committee informed Ezold that she could lateral into the domestic relations department since two domestic relations partners were leaving the firm. *Id.* The chairman believed that, after a year, Ezold would qualify for partnership in this department "because the practice area did not require the same complex analysis as the firm's commercial litigation practice." *Id.*

110. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175, 1184 (E.D. Pa. 1990).

111. *Id.* at 1179.

112. *Id.* at 1178-79.

113. *Id.* at 1189. The court stated that the firm applied its standards more rigidly to Ezold as compared to the other male associates. *Id.* at 1189, 1192.

114. *Ezold*, 983 F.2d at 512-13.

115. *Id.* at 524.

116. *Id.* at 526.

ing certain evaluations to support its findings of pretext while disregarding other evaluations that would have justified the firm's articulated nondiscriminatory reason for awarding other male associates, and not Ezold, partnership.¹¹⁷

Even though the district court differed from the firm's reasoning for denying Ezold partnership, the Third Circuit emphasized that the power to decide who qualifies for partnership remained with the firm.¹¹⁸ The court cautioned district courts not to interfere with firms' subjective promotion decisions,¹¹⁹ and stated that "Wolf is also entitled to be wrong in its judgment so long as it does not base its incorrect decision on unlawful sex discrimination or stereotype."¹²⁰ The court acknowledged that it would be difficult for plaintiffs to prove discrimination in decisions involving subjective factors.¹²¹ Nevertheless, the plaintiff had the burden to prove that the purported reason for her denial of partnership status was not credible.¹²²

Ezold argued that gender discrimination played a role in the firm's evaluation of her ability to handle complex cases.¹²³ For example, the firm assigned her small cases, which led to fewer opportunities for complex assignments.¹²⁴ When Ezold mentioned to a litigation partner that her gender might be a reason for her small caseload, he informed her not to make those allegations and to concentrate on her work performance.¹²⁵ The court ruled that Ezold's arguments were not supported by the evidence because gender bias was not apparent in the assignment process and the statement occurred years before partnership consideration.¹²⁶

The partners also informally assigned work to other associates, impairing Ezold's opportunity to secure sophisticated assignments for partnership evaluation.¹²⁷ The court held that this fact also did not support her argument of pretext.¹²⁸ The court stated that

[i]t is a sad fact of life in the working world that employees of ability are sometimes overlooked for promotion. Large law firms are not

117. *Id.* at 528.

118. *Id.* at 527. "[A] company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions." *Id.* (quoting *Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir. 1991)).

119. *Id.*

120. *Id.* at 547 n.38.

121. *Id.* at 531.

122. *Id.* The plaintiff may prove pretext by producing evidence that the firm evaluated the plaintiff more critically as compared to other associates or that the firm did not apply the articulated reason to all candidates in assessing partnership promotions. *Id.*

123. *See id.* at 540.

124. *Id.*

125. *Id.* at 541. Ezold testified that she could not pinpoint any reason other than her gender that explained the firm's delegation of less sophisticated assignments to her. *Id.*

126. *Id.* at 542.

127. *Id.*

128. *Id.* The court noted that "Ezold did not complain when she benefited from the informal assignment process." *Id.* at 542 n.34.

immune from unfairness in this imperfect world. The law limits its protection against that unfairness to cases of invidious illegal discrimination. This record contains no evidence that Wolf's assignment process was tainted by a discriminatory motive.¹²⁹

Because Ezold could not demonstrate that the firm unquestionably denied her partnership because of her gender, the court reversed the district court and remanded the case to the district court to enter judgment in favor of the firm.¹³⁰

The court's deference to subjective decision making, in effect, requires the production of direct evidence necessary to prove pretext, making discrimination claims nearly impossible to prove. "This legal sidestepping by the court highlights one of the basic flaws of Title VII burden shifting."¹³¹ Courts obligate plaintiffs to produce evidence of overt discrimination to prove pretext in law firm promotional practices;¹³² however, the reality of unconscious biases means that discriminatory acts will likely be subtle in nature.¹³³

Because the acts of law firm partners are seldom overtly discriminatory, minority plaintiffs can seldom produce affirmative evidence that the firm's purported reason acted as a pretext for racial discrimination. In *Mungin v. Katten Muchin & Zavis*,¹³⁴ the court confirmed this concept when it ruled that Lawrence Mungin, an African American attorney, had "failed to establish a *prima facie* case or failed to offer *any* evidence showing that Katten's nondiscriminatory reasons were pretextual."¹³⁵ Mungin filed a lawsuit against his law firm for disparate treatment when his firm failed to consider him for partnership.¹³⁶ During his interview for a lateral associate position in the D.C. office, the hiring partner had informed him that Katten Muchin & Zavis, a Chicago-based firm, would consider him for partnership the following year, pursuant to firm policy.¹³⁷ Mungin accepted the position, but after working for two years, the firm failed to consider him for partnership as promised.¹³⁸ Mungin claimed that the firm's

129. *Id.* at 542.

130. *Id.* at 547-48.

131. Tewary, *supra* note 8, at 19.

132. *See id.* "In the context of highly subjective law firm hiring decisions, Title VII's perpetrator perspective precludes its availability as a tool to integrate [large] firms." *Id.* at 20.

133. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 343-44 (1987); *see also* discussion *infra* Part II.B.

134. 116 F.3d 1549 (D.C. Cir. 1997).

135. *Id.* at 1558 & n.4.

136. *Id.* at 1557.

137. *Id.* at 1551. Mungin had six years of bankruptcy experience at other law firms and possessed a law degree from Harvard before coming to Katten Muchin & Zavis. *Id.*

138. *Id.* at 1551-53 (explaining that Mungin began at the firm in 1992 and left the firm in 1994). The firm also refused Mungin's request for a marketing allowance, stating that marketing allowances were "reserved for partners seeking to recruit clients." *Id.* at 1552. Recruiting clients, however, is an important factor a firm uses when determining which associates are worthy of partnership. *See* Elizabeth K. McManus, *Intimidation and the Culture of Avoidance: Gender Issues and Mentoring in Law Firm Practice*, 33 FORDHAM URB. L.J. 217, 220 n.21 (2005).

refusal to consider him for partnership served as a pretext for race discrimination.¹³⁹

Mungin presented evidence that the firm assigned him unchallenging bankruptcy cases equivalent to first-year associate work; that the firm assigned the more sophisticated bankruptcy work generated by his branch to a white associate located in a different office; and that the firm wrongfully reduced his billing rate from \$185 to \$125 per hour.¹⁴⁰ “The firm presented evidence to establish that Mungin’s lack of sophisticated bankruptcy experience and . . . the disappearance of bankruptcy work for which he was hired precluded him from qualification for partnership.”¹⁴¹ As for the reassignment, the firm argued that the other branch’s associate had a previous working relationship with the client.¹⁴² Additionally, the firm did not consider Mungin for partnership because his billable hours were lower than other white associates’ billable hours.¹⁴³

Finding that the evidence supported Mungin’s claim that the firm intentionally discriminated against him based on race, the jury awarded Mungin \$2.5 million in compensatory and punitive damages.¹⁴⁴ The United States District Court for the District of Columbia upheld the jury’s verdict, holding that the verdict was neither “irrational [nor] unsupported by the record.”¹⁴⁵ On appeal, however, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded the case for judgment in favor of the law firm.¹⁴⁶

139. *Mungin*, 116 F.3d at 1556-57. Mungin realized that even though “[r]ace wasn’t there on the surface . . . race had to be the explanation. By process of elimination: What else was there?” PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* 133 (1999). Mungin once told John Villa, the D.C. branch’s non-lawyer office manager, that “he felt uncomfortable working in an all-white firm.” *Id.* at 106-07. Mungin asked Villa if Villa would feel “comfortable working in an all-[African American] firm.” *Id.* at 107. Villa responded that he would not feel comfortable but that discomfort was not comparable to Mungin’s situation. *Id.*

140. *Mungin*, 116 F.3d at 1551-52, 1556. Mungin had experienced problems in his employment situation but felt isolated. BARRETT, *supra* note 139, at 118. He stated, “There were no [African Americans at my firm]. Who was going to understand?” *Id.* (quoting Mungin).

141. *Mungin*, 116 F.3d at 1557. The firm did not provide Mungin with any performance evaluations throughout the year. *Id.* at 1552. Mungin wanted a performance review, so he scheduled a meeting with both the co-heads of the bankruptcy department in Chicago. *Id.* Once in Chicago, only one of the two department heads met with Mungin. *Id.* Only two of the multiple partners with whom he had worked filled out his evaluation forms. *Id.* Of those two partners, one partner was disfavored at the firm, and the other partner stated that he could not assess Mungin’s quality of work. *Id.* After this meeting, Mungin’s assignments remained the same, corresponding to the capabilities of a lesser-experienced associate. *Id.*

142. *Id.* at 1556.

143. *Id.* at 1557 n.3.

144. *Mungin v. Katten Muchin & Zavis*, 941 F. Supp. 153, 155 (D.D.C. 1996). The jury awarded \$1 million in compensatory damages and \$1.5 million in punitive damages. *Id.*

145. *Id.*

146. *Mungin*, 116 F.3d at 1558 (overturning the jury’s \$2.5 million damage award). Chief Judge Harry T. Edwards disagreed with the majority and held that the evidence was sufficient to establish that Katten Muchin & Zavis “intentionally discriminated against Mungin on the basis of race.” *Id.* at 1558 (Edwards, J., concurring in part and dissenting in part). Judge Edwards, however, agreed with the majority that the evidence was insufficient to support Mungin’s “con-

The court deferred to the law firm's subjective criteria in partnership admissions decisions, reasoning that departments individually made partnership decisions and, in Mungin's case, his direct supervising partner left the firm to establish his own practice.¹⁴⁷ In addition, the court stated that the firm acted lawfully when it used its discretion to reassign the project to another white associate.¹⁴⁸ The court also held that issues surrounding salary considerations would have no effect on partnership nominations and were inconsequential to the firm's decision not to consider Mungin for partnership.¹⁴⁹ Essentially, *Mungin* established that courts would not infer racial animus unless presented with indisputable evidence of discrimination in disparate treatment cases.

It follows that the disparate impact approach is necessary to reach these subconscious stereotypes in a workplace.¹⁵⁰ When an employer's promotion requirements manifest "a discriminatory bar to *opportunities*," those implemented practices fall within disparate impact claims.¹⁵¹ In law firms, a plaintiff could assert that the firm's partnership selection process has adverse effects on minority candidates.¹⁵²

In 1990, Congress codified the burden of proof in disparate impact claims in 42 U.S.C. § 2000e-2.¹⁵³ Section 2000e-2(k)(1)(A)(i) provides that a plaintiff must demonstrate that the employer's practice "causes a disparate impact on the basis of race."¹⁵⁴ The employer must then establish that the "challenged practice [was] job related for the position in question and consistent with business necessity."¹⁵⁵ If the employer satisfies this burden, then the employer may still be liable if the plaintiff proves there was an alternative employment practice that satisfied the employer's legitimate interests, and the employer refused to adopt such practice.¹⁵⁶

structive discharge" claim. *Id.* He wanted to remand the case to the district court for recalculation of the portion of the damage award that was based upon the jury's finding of constructive discharge. *Id.* at 1559.

147. *Id.* at 1557. Mungin attempted to meet more members in the bankruptcy department by traveling to Chicago and Milan, Italy. *Id.* at 1551. Mungin's networking endeavors with the Chicago branch, however, proved to be unsuccessful. *Id.* For example, the department head himself "was too busy to meet with Mungin" when he arrived at his office. *Id.*

148. *Id.* at 1557.

149. *Id.*

150. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988) (plurality opinion).

151. *Connecticut v. Teal*, 457 U.S. 440, 450 (1982).

152. *See id.* at 455-56.

153. 42 U.S.C. § 2000e-2(k) (2000).

154. *Id.* § 2000e-2(k)(1)(A)(i).

155. *Id.*

156. *Id.* § 2000e-2(k)(1)(A)(ii).

In law firms, minority plaintiffs may seek to establish disparate impact in the practice of evaluating partnership candidates.¹⁵⁷ Even though not presently litigated through disparate impact claims, the partnership selection process appears to have an adverse impact on minority associates.¹⁵⁸ Law firms, however, will be able to justify their partnership standards based on business necessity.¹⁵⁹ As a result, it will often be difficult to demonstrate the necessity of an alternative practice that satisfies firms' rigid income requirements.¹⁶⁰

Still, the partnership selection process has created some disadvantages for minority associates. For example, one method of partner work distribution results from "inheritance."¹⁶¹ In the "inheritance market," a senior partner grooms a junior lawyer to whom that partner will eventually bequeath his clients.¹⁶² In 1999, Harvard Law Professor David B. Wilkins interviewed sixty Chicago African American attorneys and was unable to find one example of a senior partner grooming an African American attorney under this practice.¹⁶³

Law firms generally attach a partner's income and power to "his . . . individual contribution to the firm."¹⁶⁴ Attorneys who inherit profitable books of business will likely achieve partnership status.¹⁶⁵ As a result, many minority associates are disadvantaged by the law firm informal "inheritance" practice if not groomed by partners.

Even without an existing book of business, most law firms will subjectively evaluate a candidate's potential to bring in business when determining partnership worthiness.¹⁶⁶ Assessing marketable potential involves predicting the ability to recruit major clients to the law firm.¹⁶⁷ Partnership qualifications based on networking aptitude disfavor minority candidates, as evidenced by the current law firm com-

157. After an exhaustive search, it appears that there are no disparate impact claims regarding litigation between minority associates and law firms surrounding the issue of adverse partnership practices.

158. "[L]ower courts have resisted applying impact analysis to claims of excessive subjectivity." Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 783 (2005).

159. Rachel B. Grand, Note, *"It's Only Disclosure": A Modest Proposal for Partnership Reform*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 389, 400 (2005).

160. Arguably, corporate clients have provided an alternative practice by demanding diversity in the attorneys who work on their cases.

161. David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. FOR STUDY LEGAL ETHICS 15, 38 (1999).

162. *Id.* at 38, 39.

163. *Id.* at 39.

164. *Id.* at 16.

165. *See id.*; *see also* Lynne Eckert Gasey, *Retention and Promotion Issues Face Minorities and Women at Firms*, CHICAGO LAW., May 1998, at 4, 9 ("A book of business . . . is necessary for anyone wanting to move up the ladder.").

166. *See* Grand, *supra* note 159.

167. *See id.*

pensation structure's negative impact on minorities.¹⁶⁸ Despite the identification of this practice as having a disparate impact, courts rarely find law firms liable for Title VII discrimination because of "the generally accepted need for partners [to obtain clients] for their firms."¹⁶⁹

This degree of deference to the law firm means that a plaintiff's only real option is to assert that non-adverse alternative selection practices exist, but the burden remains with the plaintiff to prove that the proposed alternative realistically satisfies the business necessity of firms.¹⁷⁰ Courts may examine the proposed alternatives for cost effectiveness¹⁷¹ but will likely defer to law firms for issues related to minority associates and partnership admissions decisions.¹⁷² In short, the courts have protected law firm partnership selection processes, even though such processes disfavor minority associates.

B. *Misperceptions Exist in Partnership Admissions Decisions*

Another possible reason why law firm partnership has remained non-diverse stems from the influence of misperceptions in partnership admissions decisions.¹⁷³ Georgetown Law Professor Charles R. Lawrence explains in his theory of unconscious racism that misperceptions occur because

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. *In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.*¹⁷⁴

168. *Cf. id.* at 400-01 (contending that women who choose to have children are adversely affected because they may not have as much free time to participate with clients in leisure activities, such as golf, to attract business).

169. Grand, *supra* note 159, at 401; *see also* Daniel Gyebi, *The Civil Rights Act of 1991: Favoring Women and Minorities in Disparate Impact Discrimination Cases Involving High-Level Jobs*, 36 *How. L.J.* 97, 126 (1993) (noting that few courts mandate that employers objectively validate their subjective criteria when concerning upper-level jobs).

170. Gyebi, *supra* note 169, at 129-30.

171. *Id.* at 130.

172. *See* Yoshino, *supra* note 54 (noting that courts will not generally protect mutable traits under Title VII).

173. *See* Tewary, *supra* note 8, at 13 (applying Professor Charles Lawrence's theory of unconscious racism to law firm recruiting practices); *see generally* Lawrence, *supra* note 133, at 317-88 (explaining the theory of unconscious racism).

174. Lawrence, *supra* note 133, at 322 (emphasis added).

Both the Freudian and the cognitive psychology theories, which comprise Professor Lawrence's thesis, demonstrate the unconscious nature of prejudicial discriminatory decisions.¹⁷⁵

Under the Freudian theory, the human mind defends itself by excluding prejudice from its consciousness when there are conflicts between racist ideas and the prevailing societal ethic.¹⁷⁶ This conflict is apparent in the partnership selection process. Throughout the partnership track, minority associates may encounter difficulties in their work performance because of inadequate mentoring and fewer opportunities.¹⁷⁷ Instead of addressing these disadvantages, law firm partners may unknowingly perceive the minority candidates' failed performances as the reason for partnership disqualification.¹⁷⁸

Partners have illustrated their resistance in acknowledging discriminatorily based decisions with female partnership candidates. In *Price Waterhouse*, trial witnesses described Hopkins as "extremely competent, intelligent, strong and forthright."¹⁷⁹ The partners, however, viewed her aggressiveness as abrasive and disqualified her for partnership because of her problematic interpersonal skills.¹⁸⁰ To minimize these negative traits, one partner advised Hopkins to "walk more femininely, . . . dress more femininely, wear make-up, have her hair styled, and wear jewelry."¹⁸¹ The partner believed he was assisting Hopkins in her candidacy for partnership; however, applying the aforementioned Freudian theory, the partner's actions may have resulted from his internal resistance to his own prejudice.

Ingrained in our culture, formed misperceptions also create presumptions about groups of minorities.¹⁸² Cognitive psychology explains that people perceive race by categorizing and stereotyping the minority individual.¹⁸³ Once someone classifies a minority individual based on physical features, stereotypical characteristics will also at-

175. *Id.* at 322-23.

176. *Id.*

177. See Gordon, *supra* note 6, at 1262. Meredith Moore, director of the office of diversity at the Association of the Bar of the City of New York, states that firms need to reevaluate their partnership process to determine "whether [there is] bias in the partner selection process, or a lack of honesty with minority associates about their partnership prospects, or whether minorities are clustered in certain practice areas with fewer opportunities for partnership." Emily Barker, *True Colors: Not All Diversity Is Created Equal*, MINORITY L.J., Summer 2005, at 19, 23.

178. Cf. Kim M. Boyle, *Diversity in the Legal Profession: Best Practices to Achieve Diversity*, 53 LA. BAR J. 122, 123 (2005) (noting that some firms articulate other reasons, such as the lack of qualified diverse candidates to choose from, to support their non-diverse recruiting practices); Tewary, *supra* note 8, at 14 (explaining that subjective criteria, such as a candidate's demeanor, harms minority candidates in recruiting practices because they are often racially stigmatized).

179. *PriceWaterhouse v. Hopkins*, 490 U.S. 228, 234 (1989) (plurality opinion) (quoting a state department official).

180. *Id.* at 234-35.

181. *Id.* at 235 (quoting a Price Waterhouse partner).

182. See Lawrence, *supra* note 133, at 323.

183. ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 45 (1998).

tach.¹⁸⁴ In a law firm, this practice of stereotyping results in gender and racial inequity in the associate pool.

The historical practice of stereotyping women attorneys into certain areas of law illustrates this inequity.¹⁸⁵ For years, law firms steered women associates into certain areas: “library work and research, brief writing, . . . trusts and estates, wills, and domestic relations.”¹⁸⁶ As more women entered law firms, opportunities opened for women to practice in all areas of law, including litigation, an area in which law firms had once considered women unfit.¹⁸⁷ Female attorneys demonstrated that they were capable in any discipline.¹⁸⁸ Cognitive presumptions of incompetence, however, continue in law firms when assessing female candidates for partnership.¹⁸⁹ The statistics show that, while female attorneys account for nearly forty-eight percent of associates, they only comprise seventeen percent of partners.¹⁹⁰ This disparity suggests that stereotyping among associates may persist in most firms.

The partnership admissions process is likewise susceptible to cognitive unconscious biases concerning race. For example, Asian American attorneys are classified as the “model minority,” depicted as “hard working, diligent, smart[,] . . . willing to abide by rules, regulations and structure, and self-effacing,” but passive.¹⁹¹ These stereotypes have led some law firms to believe that Asian American attorneys make excellent associates, but they are not capable leaders at the partnership level.¹⁹² In addition, some partners believe that it is unnecessary to invest as substantial time and resources to mentor Asian American associates compared to other minority associates. It follows that when an Asian American associate struggles in the law

184. *See id.*

185. *See* Nancy L. Farrer, *Commentary: Of Ivory Columns and Glass Ceilings: The Impact of the Supreme Court of the United States on the Practice of Women Attorneys in Law Firms*, 28 ST. MARY'S L.J. 529, 553-54 (1997).

186. *Id.* at 552.

187. *Id.* at 554-55. In the area of litigation, women are changing the inaccurate perceptions that they are not adequately aggressive. Stephanie Francis Ward, *In Like Company: Some Associates Say the Grass Is Greener at Minority-Owned Firms*, ABA J., Mar. 2005, at 32, 32.

188. *See* Farrer, *supra* note 185, at 554-55.

189. *Id.* at 556. “While men are generally considered to be capable until they prove themselves unfit, women often are scrutinized with suspicion until they prove themselves competent in a traditionally ‘male’ profession.” *Id.* at 556-57.

190. NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 3. The numbers demonstrate that female associates remain overrepresented in the lower ranks of the firm but underrepresented in the higher partnership ranks. McManus, *supra* note 138, at 217-18.

191. Lily Liu, *All Asian Asians Are Good at . . .*, DIVERSITY & THE BAR, May 2001, available at <http://www.mcca.com/site/data/inhouse/minorityattorneys/asianamerican.htm>; *see also* Special Committee on Race and Ethnicity, *Report on Race and Ethnicity*, 64 GEO. WASH. L. REV. 189, 228 (1996).

192. Chris Klein, *Asian-Americans Find Place in the Profession*, NAT'L L.J., Feb. 17, 1997, at A16. For example, in a New York study by the Association of the Bar of the City of New York, Asian Americans comprised 11.8 percent of the prepartner pool but only 2.8 percent were actually promoted to partners. Barker, *supra* note 177.

firm workplace, partners may view his mistakes more critically based on their cognitive presumptions. The partners, assuming that the associate should be successful, may assess his failure as evidence that he lacked the intelligence and aggressive attributes necessary to achieve partnership.

African American attorneys face similar harmful cognitive perceptions. They have been unfairly characterized “as mentally, emotionally, and spiritually incapable of self-determination,” and it is assumed that their accomplishments are based on affirmative action policies rather than on ability level.¹⁹³ These typecasts result in the racist belief that the average African American attorney is inferior to the average white attorney because the African American attorney would have been incapable of attaining certain positions in the organization absent affirmative action policies implemented by the firm.¹⁹⁴ Because of these misperceptions, when African American associates achieve success, partners may not fully credit them with their achievements. In addition, the assumption that the associate required assistance in his projects harms him during the evaluation process when partners compare candidates on their ability to direct new associates and to act as lead attorneys on cases.

These are but a few examples of how misperceptions influence a minority associate’s evaluation for partnership. “[M]inority lawyers may not be able to look, act, behave and politic in a way law firm partners are used to seeing lawyers do it, so a lot of times they get deemed as not having the same potential.”¹⁹⁵ Partners’ unconscious presumptions of incompetence in assessing minority candidates may be a significant factor in the absence of diversity in law firm partnership.¹⁹⁶

193. David B. Wilkins, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 610 (1996); accord Special Committee on Race and Ethnicity, *supra* note 191.

194. See Wilkins, *supra* note 193, at 563. Those African American partners who attain partnership status are more likely to have graduated from a top law school than their white counterparts. *Id.*

195. Ward, *supra* note 187 (quoting diversity consultant and attorney Arin Reeves).

196. Analogizing this practice to a sport setting, imagine you were a coach assessing the talents of a white, an African American, and a Chinese American basketball player. Based on preconceived notions, you would likely presume that the African American player was better than the white and Chinese American players, and that the white player was better than the Chinese American basketball player. These presumptions would occur before you tested their talents individually through basketball drills. During the drills, you would unconsciously rely on your initial beliefs that the African American player was superior to the other two athletes when assessing who would qualify for the team. Thus, if the Chinese American basketball player performed the best among the three, you would have a difficult time discounting the other two athletes under your implemented criteria.

C. Diversity Requires a Long-Term Financial Investment

Modifying partnership promotional practices to account for these misperceptions demands a long-term financial investment. Spending the time and money necessary to attain integration, however, may create financial inconvenience for the law firm.¹⁹⁷ “[Large] law firms are averse to investing extra resources to seek, hire, and understand qualified minority lawyers, especially when there are plenty of white lawyers to fill the ranks.”¹⁹⁸ Many firms then view diversity and its associated costs as an aggravation rather than a desirable destination.

Negative perceptions of diversity also envelop the law firm compensation structure.¹⁹⁹ A firm awards partnership to associates who have the potential to bring in client revenue.²⁰⁰ Evaluating candidates on notions of networking success, however, disadvantages many diverse associates.²⁰¹ Because of “the initial monopoly, whites in [large] firms, as a group, have better access to influential contacts, informal relationships, and networking opportunities than minorities, and they are therefore at an advantage in gaining new business.”²⁰² Accordingly, a firm may presume that diverse associates will be unable to bring in as many profitable clients to satisfy a firm’s bottom line. Firms are correct in their assessment that integration will require time and money, but as they continue to focus on the “bottom line,” firms will resist advancing diverse candidates to law firm decision-making positions.²⁰³

D. The Pressure to Fit in

Diverse associates have reacted to non-diverse partnership admissions decisions by changing to fit into the mold of the preferred

197. See Tewary, *supra* note 8, at 20-21. Diversity initiatives, such as specialized training from diversity consultants and active mentoring programs, require a capital investment from the firm. Ramos & Baronas, *supra* note 13, at 16-17.

198. Tewary, *supra* note 8, at 25. Law firms that ignore these diversity measures, however, will inevitably spend more money combating minority attorney turnover. First, law firms risk forfeiting their “best legal talent to competitors by doing nothing about the unacceptably high levels of attrition among all attorneys.” MINORITY CORPORATE COUNSEL ASS’N, CREATING PATHWAYS TO DIVERSITY RESEARCH REPORT 1-2, available at <http://www.mcca.com/site/data/researchprograms/BurgundyPathways/introduction.pdf> (last visited Apr. 3, 2006). Second, firms incurring “high recruitment costs for diverse candidates” will find the expenditures to be futile when it loses those attorneys “within four years [to] a more supportive environment.” *Id.* at 2.

199. Tewary, *supra* note 8, at 22-24 (noting that white attorneys benefit from a continued monopoly in large law firms).

200. Paula A. Patton, *Women Lawyers, Their Status, Influence, and Retention in the Legal Profession*, 11 WM. & MARY J. WOMEN & L. 173, 177 (2005). Compensation structures in firms awarded recruitment of clients and rainmaking. *Id.*; see also McManus, *supra* note 138 (observing that rainmaking is vital for associates to advance to partnership in a law firm).

201. Patton, *supra* note 200, at 179.

202. Tewary, *supra* note 8, at 23-24.

203. See Menkel-Meadow, *supra* note 5, at 631 (“The focus on the dollar or bottom line is often what is meant by the ‘businessization’ of law practice and the ‘ruthlessness’ by which attorneys are hired and fired in law firms.”).

prospective partnership candidate.²⁰⁴ Law firms inaccurately use the term “fit” to explain why a candidate did not qualify under their selection process. “Fit” means “to be suitable or *adapted* to.”²⁰⁵ When describing minority candidates, however, the term “fit” should refer to the ability to assimilate.²⁰⁶ For example, a law firm’s main cultural body is generally “white, Anglo-Saxon and Protestant.”²⁰⁷ Thus, as a partner determines that a minority associate does not fit/assimilate into the firm, there is an implication that the minority associate failed in conforming to mainstream law firm culture.

Yale Law School Professor Kenji Yoshino uses the term “cover” to describe the “pressure to conform” and the “need to assimilate” for minorities.²⁰⁸ Yoshino states that this “subtler form of discrimination . . . does not aim at groups as a whole [but at a] subset of the group that refuses to cover, that is, to assimilate to dominant norms.”²⁰⁹ In the law firm context, covering requires minority associates to assume an additional challenge beyond the general duties of an associate.²¹⁰ To continue on the partnership track, minority associates must tailor their identities to succeed in “fitting” into the non-diverse legal mainstream.²¹¹

The same trend has occurred in corporate America; the comfort factor mandated diverse candidates to assimilate to reach the upper

204. For example, Catherine A. Lamboley stated that at Shell Oil Company, she “had become so assimilated to [the male dominated] culture that [she] had [not] realized how [much she] had changed to fit in.” Carter, *supra* note 24, at 31. Fortunately, when she spoke out, Shell’s management listened to her frustrations. *Id.* Years later, as Shell’s general counsel, she serves as an advocate for diversity by tracking hired law firms on the demographics and percentage of work attributed to women and minorities, alerting these firms through “report cards” on their progress. *Id.* Catherine Lamboley’s experience exemplifies the proposition advocated by Professor Ronald C. Griffin: “To educate people for a diverse and nonracist world, people of color have joined forces with folk who fight those favoring assimilation and monoculturalism as solutions to our problems.” Ronald C. Griffin, *Jubilee*, 43 WASHBURN L.J. 353, 355 (2004).

205. WEBSTER’S NEW WORLD COLLEGE DICTIONARY 535 (4th ed. 2000) (emphasis added).

206. “Assimilation” is inferred from the “adapted to” part of the “fit” definition. “[A]ssimilation” means “the cultural absorption of a minority group into the main cultural body.” *Id.* at 85.

207. See Yoshino, *supra* note 54, at 32 (quoting JOHN T. MOLLOY, *NEW DRESS FOR SUCCESS* 234 (1988)).

208. *Id.* at 32, 34-35.

209. *Id.* at 34.

210. See *id.*

211. See *id.* Covering is required to reach the “model of success,” which is generally “white, Anglo-Saxon and Protestant.” *Id.* (quoting MOLLOY, *supra* note 207). Molloy states that minorities must surpass what is required to counteract these immutable differences. *Id.* For example, Molloy proposes that African Americans have to “not only . . . dress more conservatively but also more expensively than their white counterparts if they want[] to have an equal impact.” MOLLOY, *supra* note 207, at 233. In addition, a minority attorney will also need to learn a law firm’s culture. For example, an unnamed lawyer stated, “As I started working, I began acclimating myself, and once I spent more time with older, middle-aged white men, I began understanding their jokes, but it was such a culture shock. The difference might have been a generational thing, but nevertheless it was really difficult.” Ward, *supra* note 187 (quoting a minority attorney, who preferred to remain anonymous, when she went to work for a large law firm after completing a federal clerkship).

management ranks.²¹² “The most frequently identified problem was the ‘comfort factor’—that the men atop their corporations wanted others around them with whom they were comfortable, and that generally meant other men similar to themselves.”²¹³ This phenomenon remains pervasive even though studies have demonstrated that the comfort factor may limit successful problem solving by groups.²¹⁴ Eric Mankin, a business innovation expert, discovered that people with diverse backgrounds and perspectives predictably created superior solutions to complex problems as compared to groups whose members were identical.²¹⁵ These diverse teams also generated conflict that most people would find uncomfortable and time consuming.²¹⁶ As a result, “[m]ost people prefer[red] to work with those who [were] similar to themselves.”²¹⁷ Mankin suggests that this preference occurs because work life then tends to be easier and more predictable.²¹⁸

When applied to the law firm partnership selection process, the preference to work with similar people may explain the reason behind the absence of minority partners. Law firm partners tend to gravitate toward associates with the same background. “Skin color, gender, religion, sexual orientation, national origin, and other characteristics may vary, but the funnel to partnership often drives a certain uniformity of thinking.”²¹⁹ As a result, partners will channel the best assignments to “similar” associates who are generally non-diverse.²²⁰ In response to this practice, some minority attorneys depart from the firm before partnership consideration occurs because this practice leaves many minority associates to feel like “window dressing” in the

212. Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1665 (2004) (discussing the comfort factor as applying to race and noting that minorities have the burden to ensure non-minority colleagues feel comfortable with their diversity); see also ZWEIGENHAFT & DOMHOFF, *supra* note 16, 177 (“[There is a] marked preference for women and minorities who think and act like the straight Christian males running those organizations.”).

213. ZWEIGENHAFT & DOMHOFF, *supra* note 16, at 53.

214. Mankin, *supra* note 17.

215. *Id.* “For those charged with improving the quality of innovative efforts, one of the challenges is to encourage the tendencies for diversity in environments that tend towards homogeneity.” *Id.* Eric Mankin is the executive director of Babson College’s Research Center on Innovation and Corporate Entrepreneurship, and President of Innovation & Business Architectures, Inc. Eric Mankin, http://www.biz-architect.com/eric_mankin_background.htm (last visited Apr. 3, 2006). Mankin received his undergraduate degree from Yale, his M.B.A. from Harvard Business School, and his Ph.D. in business economics from Harvard’s Graduate School of Arts and Sciences. *Id.*

216. Mankin, *supra* note 17. Mankin uses a broad definition of diversity: the diversity of experience. *Id.* Mankin explains that the ability to bring forth a variety of perspectives and backgrounds to the group defines the diversity of experience. *Id.*

217. *Id.* Mankin states that people generally choose similarity over diversity when given the option. *Id.*

218. *Id.*

219. Posting of Ron Friedmann to Diversity and Law Firm Decision Making, <http://www.prismlegal.com/wordpress/index.php?p=334&c=1> (Aug. 15, 2005, 09:05 EST).

220. William Henderson, *Second Look at the Second City: Chicago Lawyers Changed a Lot in 20 Years*, LEGAL AFFAIRS, Nov./Dec. 2005, at 61, 62.

large law firm.²²¹ The remaining minority candidates suppress some or all of their identities to homogenize into the culture of the firm until the assimilation practice becomes too emotionally draining.²²²

IV. OVERCOMING THE BARRIERS

As law firms begin the transition to diversity, barriers to partnership remain for minority attorneys. For firms to be successful, they must overcome these barriers by internally restructuring their non-diverse practices. To assist them during the process, this note offers an external plan that will allow law firms to keep their corporate clients while serving the current needs of minority associates. The solution will not be short-term; retaining diverse candidates for partnership depends on a long-term commitment from partners to comprehend the underlying problems in their structure and to institute solutions within their firm.

To change the law firm partnership selection process, partners have the professional obligation to commit themselves to promoting minority associates.²²³ The preamble to the Model Rules of Professional Conduct states that an attorney is a “public citizen [who has a] special responsibility for the quality of justice.”²²⁴ Arguably, the struggle against non-diversity in law firm leadership positions falls within this responsibility.²²⁵ To support this proposition, the rules mandate that firms must provide competent representation to their clients.²²⁶ It “stands to reason that having a variety of perspectives on a legal team can open the door to innovative thinking, strategy and solutions, and differentiated thought that they might not get from a group of white, male lawyers who share the same suburban upbringing

221. *Id.* The decision to leave a large law firm is “almost by necessity, rather than choice.” Dasgupta, *supra* note 32 (quoting Jeneba Ghatt, a minority attorney). Many minority associates leave law firms prior to partnership consideration for more diverse structures. See, e.g., EEOC REPORT, *supra* note 4, at 2 (employing 43.8 percent African American and 37.5 percent Hispanic American attorneys, the Chicago public sector has a higher employment percentage for minorities than large law firms); Smith, *supra* note 14 (increasing its in-house counsel from nine to twenty-five percent in the last three years, Wal-Mart has employed a greater percentage of minority attorneys than large law firms). As a result, law firms may ultimately suffer because the presence of attorneys with diverse backgrounds increases the amount of quality ideas used to solve legal issues. See Menkel-Meadow, *supra* note 5, at 642-43.

222. See Pepi Sappal, *Cultural Traits Can Be a Hindrance or a Help*, WSJ.COM, July 27, 2005, <http://www.careerjournal.com/myc/diversity/20050727-sappal.html>.

223. See Tewary, *supra* note 8, at 30-31. “[F]irm practices that structurally disadvantage minorities act to tarnish the reputation and credibility of lawyers as fair-minded and respectable officers of the legal system.” *Id.* at 31.

224. MODEL RULES OF PROF'L CONDUCT PmbL (2004); see also Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947, 955 (2002) (noting that attorneys are public servants and guardians “of all the legal rights and obligations of all the citizens”).

225. See EEOC REPORT, *supra* note 4, at 2. Lawyers must develop the law “practice as a noble profession rather than as a trade or occupation.” *Id.* (quoting Alex M. Johnson Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1022 (1997)).

226. MODEL RULES OF PROF'L CONDUCT R. 1.1 & 5.1(a).

and socioeconomic background.”²²⁷ As firms attempt to satisfy the complex requirements of their clients, “[i]ncreasing diversity in [law firms] is not only the right thing to do, it is the smart thing to do—[attorneys] must personify the laws and rights that [attorneys] champion.”²²⁸

Still, when managing diversity, many partners resist altering a firm’s structure simply to accommodate minority associate promotions. Peter J. Hersha, vice president of Nationwide Mutual Insurance Company’s trial division, stated that, “[m]anaging diversity was not a new subject to [him because he] had attended more than one of [his] company’s diversity awareness training programs and more than one CLE diversity presentation,” in addition to drafting the company diversity plan.²²⁹ In spite of his experience with diversity awareness, Hersha was inspired by a speaker from an ABA diversity program to attend his first National Bar Association convention where he discovered that diversity issues are more complex and require collective efforts of all legal professionals.²³⁰ Professor Wilkins echoes the need for collaboration, “Firms are selling the idea that people can succeed on their own, and that’s a big lie. . . . [It is] a myth that ultimately harms diversity.”²³¹

To alter firm structure to become more diverse, the bar association should encourage the removal of the barriers to partnership.²³² “It is the bar association, not the individual lawyer, that can maintain . . . high standards of ethical conduct.”²³³ Examining previous ABA efforts, this note proposes that the ABA embrace one more crusade: the creation of a specialty certification program in diversity.

227. McDonough, *supra* note 24, at 52, 54.

228. KANSAS CITY METRO. BAR ASS’N, *supra* note 7 (quoting KCMBA past president Sylvester “Sly” James Jr.). Supporting this statement, Kay Hodge, the chair of the ABA Commission on Racial and Ethnic Diversity in the Profession, states that “[attorneys] hold the keys to the justice system, [and] it is unlikely that [clients are] going to see that [the present non-diverse legal] profession as just.” Ursula Furi-Perry, *Minority Enrollment Falls*, NAT’L JURIST, NOV. 2005, at 14, 14 (quoting Kay Hodge).

229. Peter J. Hersha, *Diversity, or How an ABA Program Led Me to My First National Bar Association Convention*, ABA THE BRIEF: TORT TRIAL & INSURANCE PRACTICE SECTION, Fall 2005, at 70, 70.

230. *Id.* at 70-71. At the convention, Hersha avoided his usual CLE courses, and instead, took diversity-related courses, such as “the assault on diversity.” *Id.* at 71. His spontaneous article submission to *The Brief* describing his newfound awareness led to its fall’s diversity-related publication. *Id.*

231. Vivia Chen, *Gibson’s Failing Grade*, MINORITY L.J., Summer 2005, at 50, 56 (quoting Professor Wilkins).

232. Attorneys as a whole must remove “structural, social, and cultural barriers if women and minorities are to get ahead in the legal profession.” Pamela W. Carter, *Committee on Diversity in the Profession: Moving Ahead . . . but Slowly*, ABA THE BRIEF: TORT TRIAL & INSURANCE PRACTICE SECTION, Fall 2005, at 6, 7.

233. Morgan, *supra* note 224, at 957 (quoting ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 11 (1953)). The ABA has previously provided a resource guide listing programs that seek to advance racial and ethnic diversity in the legal profession. ABA RESOURCE GUIDE, *supra* note 35, at 9.

The ABA should extend diversity certification status to law firms. Currently, the ABA accredits specialty certification to legal programs and organizations that conform to its standards.²³⁴ “Certification as a specialist means that a certifying body has recognized that a lawyer has an enhanced degree of skill and experience in a specified area of practice.”²³⁵ A certifying organization may include the ABA and other bar associations.²³⁶ Pursuant to this proposal, the ABA-accredited certifying organization would grant diversity certification status to a firm if the firm has fulfilled the certification program’s requirements.²³⁷ If a law firm qualifies under the program, then the diversity certified firm could market this status to corporate clients.

The purpose of diversity certification for law firms is (1) to ensure that minority associates have adequate support during their track toward partnership; and (2) to improve the “bottom line” for firms that invest the resources to incorporate diversity within their culture. ABA certification should not only implement standards to enable reasonable participation by law firm members but also exhibit to corporate clients that the diversity certified firm is on the path toward integrating diversity into its structure.

To accommodate these interests, this note suggests the following standards. First, for the ABA to grant certification to the “applicant” firm, more than half of the law firm partners must individually execute these standards.²³⁸ At the time of application, each law firm must provide evidence of substantial involvement in the specialty area of diversity.²³⁹ At a minimum, each qualifying partner must account for thirty hours in the following: ten hours participation in the mentoring center; twelve hours participation in the education center; five hours attending minority bar association conferences or events; and three hours assisting minority law students through mentoring or participating in minority law student organization events.²⁴⁰ In addition, the ABA should develop requirements for continuation and renewal of diversity certification.²⁴¹ Once an applicant firm fulfills these requirements, the certifying organization may grant the law firm diversity cer-

234. AM. BAR ASS’N, ABA STANDARDS FOR SPECIALTY CERTIFICATION PROGRAMS FOR LAWYERS § 1.01, available at <http://www.abanet.org/legalservices/specialization/standard.html> (last visited Apr. 3, 2006) [hereinafter ABA STANDARDS]; see AM. BAR ASS’N, SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR Ch.1, available at <http://www.abanet.org/legaled/standards/chapter1.html> (last visited Apr. 3, 2006).

235. ABA Standing Comm. on Specialization, Accreditation of Lawyer Certification Programs, <http://www.abanet.org/legalservices/specialization/accred.html> (last visited Apr. 3, 2006) [hereinafter ABA Accreditation Information].

236. ABA STANDARDS, *supra* note 234, § 2.01(C).

237. *Id.* § 4.04(A); ABA Accreditation Information, *supra* note 235.

238. See ABA STANDARDS, *supra* note 234, § 4.06.

239. See, e.g., *id.* § 4.06(A).

240. See, e.g., *id.* § 4.06(D).

241. See, e.g., *id.* § 4.08.

tification, authorizing the firm to publicize its status to corporate clients.²⁴²

The mentoring center will provide minority associates with professional advice to assist them in their endeavors toward partnership. This advisory role is essential because it equips minority associates with appropriate solutions to resolve problems without the repercussions of negative partnership evaluations. When faced with professional issues at firms, minority associates seldom have a pool of diverse supervising partners to assist them in their quest for partnership.²⁴³ Many minority associates avoid approaching their formally assigned mentors because they fear that the partners may fail to provide adequate support or brand the respective associate as a “jaded minority.”²⁴⁴

In this setting, a minority associate submits questions or frustrations to the mentoring center.²⁴⁵ Partners from firms that have applied for diversity certification will reply with advice on how to resolve the situation. The minority associate will then be able to use these strategies to resolve his dispute with his firm. The mentoring center will assist the minority associates and partners in understanding each other, as well as ensure that minority candidates are evaluated on actual ability rather than on unconscious or preconceived notions regarding capability. These endeavors should then result in a greater number of minority associates remaining and eventually being considered for partnership at their respective firms.

Mentoring to minorities will not automatically alter biased partnership practices, but the program will provide an education center to foster awareness for partners to understand their unconscious biases. Cultural differences arise when partners unconsciously mandate assimilation to qualify for law firm partnership. In domestic settings, cross cultures exist in the relationship between the non-diverse law firm partner and the diverse associate.²⁴⁶ For example, Elgin Clemons, a successful African American attorney, stated that he received his “most interesting work assignments over drinks with partners.”²⁴⁷

242. ABA Accreditation Information, *supra* note 235. Advertising of the certification status must conform to state disciplinary rules. *Id.*

243. See Gasey, *supra* note 165, at 69. Feelings of isolation increase when there are “fewer mentors and role models” for minority associates. *Id.*

244. The absence of real mentoring is one of the main criticisms minority attorneys have regarding large law firms. Boyle, *supra* note 178.

245. To avoid identification of the minority associate, the certifying organization can assign non-descript e-mail addresses and numbers to the minority associate or organize a hotline through a third party.

246. See Ilhyung Lee, *In re Culture: The Cross-Cultural Negotiations Course in the Law School Curriculum*, 20 OHIO ST. J. ON DISP. RESOL. 375, 375 (2005) (noting that culture encompasses race, ethnicity, and gender); see also Johnson, *supra* note 19.

247. BARRETT, *supra* note 139, at 108 (describing Clemons’s experience at Shearman & Sterling, a New York large law firm).

He noted that the firm partners, however, did not invite other African American associates if they perceived them to be “less at ease socially.”²⁴⁸ Minority associates who did not assimilate appropriately to the firm’s standards did not have access to such assignments.²⁴⁹ This informal grooming process is understood by recognizing that people prefer to work with those who are similar.²⁵⁰ The problem arises, however, when the law firm does not connect this disparity and relies upon the lack of sophisticated assignments as a reason to deny partnership to the non-assimilated minority associate.

The education center’s mission will be to teach law firm partners to understand the value of diversity and to recognize their preference for uniformity in their practices. In addition to the traditional lectures on diversity, the program will implement cross-cultural exercises in its training classes to educate law firm partners about the unconscious development of non-diverse practices. Awareness of the tendency toward non-diverse practices should inspire large law firms to overcome their current barriers to partnership.

Diversity certification benefits both the non-diverse law firm and its minority associates while also satisfying the challenge imposed by corporate clients. If the certifying organization properly administers the certification program, then a law firm will view diversity as a reward rather than a penalty. In addition, the certification program’s long-lasting effects on the legal profession should guide the profession to become one of the most integrated in the nation.

V. CONCLUSION

Imagine as a partner in a large law firm, one of your summer associates told you that he was attracted to the firm because everyone was just like him.²⁵¹ How would you react?²⁵²

248. *Id.* Clemons and other African American associates at Shearman & Sterling supported this belief. *Id.*

249. *Id.*

250. *Cf.* McManus, *supra* note 138, at 220 (detecting that men have greater access to informal interactions with partners and clients). Statistics show that people are unaware of these trends toward similarity. In a New York Bar Association’s survey, 96 percent of male, compared to 69 percent of female attorneys, believed that informal mentoring opportunities through social or sporting activities were equal for both women and men. *Id.*

251. Less than two percent of the 3,691 white summer associates surveyed mentioned “diversity in the firm’s partnership as one of their top three criteria for evaluating job offers.” Tally Goldstein, *Shades of Difference*, *MINORITY L.J.*, Fall 2005, at 13, 22 (surveying minority and white mid-level associates and summer interns).

252. *See generally* THANE JOSEF MESSINGER, *THE YOUNG LAWYER’S JUNGLE BOOK: A SURVIVAL GUIDE* 137 (2d ed. 2000) (noting that the law firm members prefer similarity).

Societies operate—or not—based on the solidarity each member feels for himself within society. . . . Sins of the sword are perpetuated not out of the *existence* of cliques, but instead by their too-often rigidly exclusive, non-accommodating . . . nature. Law and its servants are in a peculiar position in this still-raging debate. [Attorneys] are the gatekeepers of freedom . . . and adherents to our own cliquish ways.

Id.

The truth is that partnership ranks in large law firms often lack minority representation. Although diversity initiatives are admittedly costly and involve training and direct participation from partners, modern reality dictates economic and moral incentives for law firms to improve diversity in their upper-management ranks.²⁵³ External solutions, such as the proposed ABA certification program, may assist in promoting diversity within law firms, but partners themselves must realize that their internal policies are not “geared to retain associates of color.”²⁵⁴

To integrate race and culture inside partnership ranks, firms must recreate their environment to be favorable toward individual differences.²⁵⁵ Law firms must have a “workplace [that] reflects the rich diversity of all our people.”²⁵⁶ It is critically important that law firm partners ensure that minority attorneys serve a greater purpose within their structure than as faces of diversity in a brochure.

253. Large law firms will change because the need for diversity is now economically driven. Adcock, *supra* note 26. There is commercial value for law firms to show that they possess minority partners. For example, the *Minority Law Journal* publishes an annual *National Directory of Minority Attorneys*. Firms voluntarily submit information to the directory. Andre Sutton & Sid Mehta, *National Directory of Minority Attorneys: Introduction*, *MINORITY L.J.*, 2006, at 4. In light of the realities discussed in this note, those depending on this directory should further research to determine whether the representations from the firms are accurate.

254. Goldstein, *supra* note 251, at 22 (quoting a surveyed minority mid-level associate). “[T]he ABA cannot create a diverse profession by itself, but it can be a catalyst.” Robert J. Grey Jr., *President’s Message: Raising the Tempo: Diversity Is Central to Our Progress as a Nation and a Profession*, *ABA J.*, Oct. 2004, at 10, 10.

255. “Even though [minority attorneys are] accustomed to being one of few, [it is] still difficult being the only one.” Goldstein, *supra* note 251, at 18 (quoting a surveyed minority summer associate).

256. Morgan, *supra* note 43.

