CHECK YOUR IDENTITY-BAGGAGE AT THE FIRM DOOR: THE ETHICAL DIFFICULTY OF ZEALOUS ADVOCACY IN BIAS-RIDDEN COURTROOMS

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I. INTRODUCTION[1]

It is almost a maxim among lawyers that, as Henry Brougham, Lord Chancellor, famously put it, "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."[2] It is common to view the various ethical and legal rules governing lawyers as an effort to resolve in the client's favor the agency problems a client-lawyer relationship creates.[3] A client's reliance on his attorney's professional judgment is so great that ultimate trust must characterize their fiduciary relationship.[4] Even lawyers convinced that their responsibilities include a devotion to the public good can claim that the

1. This Note was inspired by the "Karen Horowitz Dilemma" in STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 206-07 (Aspen Publishers 7th ed. 2005) ("I'm a 30-year-old fifth-year litigation associate at a large Midwestern law firm. . . . Two years ago I began working on a very complicated civil case, brought by a certain southern state in state court, arising out of an alleged violation of state banking laws. . . . The case is about to go to trial in a particular county of the state that is not, to put it mildly, known for its enlightened attitudes—religious, gender, or racial. . . . There is some not insubstantial anti-Semitism and antiblack sentiment among the population. . . . [T]he head of our litigation department[] told me that I would not be going down as part of the defense team. The reason: They think a Jewish woman lawyer on the defense team will prejudice the jury against our client. I was told that the client concurred in this judgment. . . . I don't know what I'm going to do about this. I don't know what I can do. But I don't buy the 'our client comes first' explanation.").

2. 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits."); CANONS OF PROF'L ETHICS Canon 15 (1908) (codifying for first time a lawyer's obligation to give "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of [the lawyer's] utmost learning and ability").

3. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, introductory note (2000) ("The subject of this Chapter is, from one point of view, derived from the law of agency. It concerns a voluntary arrangement in which an agent, a lawyer, agrees to work for the benefit of a principal, a client. A lawyer is an agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity. Because those characteristics of the client-lawyer relationship make clients vulnerable to harm, and because of the importance to the legal system of faithful representation, the law stated in this Chapter provides a number of safeguards for clients beyond those generally provided to principals. . . . The lawyer is subject to duties of care, loyalty, confidentiality, and communication, duties enforceable by the client and through disciplinary sanctions."); *see also* L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909 (1980) (characterizing the agency relationship between attorneys and clients).

4. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, introductory note (2000) (noting that clients are vulnerable to harm because lawyers' work is not subject to detailed client supervision due to its complexity); FRANCIS BACON, *Of Counsel, in* THE ESSAYS OF FRANCIS BACON 181 (1846) ("The greatest trust, between [people], is the trust of giving counsel. For in other confidences, men commit the parts of life; their lands, their goods, their children, their credit, some particular affair; but to such as they make their counsellors, they commit the whole: by how much the more, they are obliged to all faith and integrity.").

"public good" is served best by prioritizing the private needs of their clients.

Yet there are scenarios where the attorney's fiduciary duty is pitted against a different lodestar of the legal profession—equal protection.[5] What is the ethical response of lawyers asked to step down from cases because their identity may not play well with a jury?[6] After all, the demographic composition of prospective jury members can influence litigation outcomes,[7] as might the demographic identity of the attorney on the case.[8] A firm might therefore seek to do whatever necessary to minimize the harm that racism, sexism, homophobia, xenophobia, anti-Semitism, and other bigotry can cause to its clients. In short, a firm must facilitate clients' objectives, not impede them. Why should this not encompass making case-staffing decisions with attention to an attorney's identity?[9]

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5. For a fantastic discussion of how zealous advocacy can entail appeals to bias and prejudice, see Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 4-5 (1994) ("Part I examines both the many contexts in which criminal defense lawyers and clinical students encounter bias and prejudice, and the commonly-raised objections to its exploitation. Part II looks at the way the tactical use of bias relates to a lawyer's duty of zealous advocacy. Here, the Note focuses on whether existing ethics rules provide guidance for a lawyer's use of bias and whether proposed rules aimed at eliminating such advocacy would improve or diminish justice.").

6. Juries are often thought to be influenced by factors that are not relevant to a given case at hand. *See, e.g.*, Clarence Darrow, *How to Pick a Jury*, ESQUIRE, May 1936, at 36 ("Every knowing lawyer seeks for a jury of the same sort of men as his client; men who will be able to imagine themselves in the same situation and realize what verdict the client wants."). By extension, a lawyer might seek jurors with the same identity qualities that the lawyer possesses; where jury pools are more homogenous, a firm might seek a lawyer with the sort of qualities of potential jurors.

7. There is a large literature suggesting that the demographic composition of juries may affect the outcome of litigation. *See* Ronald J. Allen, *Unexplored Aspects of the Theory of the Right to Trial by Jury*, 66 WASH. U. L.Q. 33, 36 (1988) (discussing that jurors' previous experiences are critical variables in determining how the words a witness speaks at trial are interpreted and understood); Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 122 ("What is at issue in a discussion of general or interpretive bias among jurors is the differences in their intuition, common sense, and deep-seated hunches and judgments about social life—the type of differences in perspective that often arise from differences in race or gender."); Otis B. Grant, *Rational Choice or Wrongful Discrimination? The Law and Economics of Jury Nullification*, 14 GEO. MASON U. CIV. RTS. L.J. 145, 145-46 (2004) (arguing that jury nullification of blacks in favor of black defendants "is . . . rational and should be welcomed by whites because it is efficient for the criminal justice system as well as morally sound."); Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (examining statistics from criminal trials, mock jury experiments, and other interdisciplinary research on racial prejudice to demonstrate the persistent influence of race in determinations of guilt).

8. David S. Abrams & Albert H. Yoon, *The Luck Of The Draw: Using Random Case Assignment To Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1145 (2007) ("One of the most challenging problems in legal scholarship is the measurement of attorney ability . . . because the nonrandom pairing of attorney and client in most cases makes it difficult, if not impossible, to distinguish between attorney ability and case selection . . . . We find substantial heterogeneity in attorney performance that cannot be explained simply by differences in case characteristics, and this heterogeneity correlates with attorneys' individual observable characteristics. Attorneys with longer tenure in the office achieve better outcomes for the client . . . . *While we find no statistical difference based on law school attended or gender, we find evidence that the public defender's race correlates with sentence length, with Hispanic attorneys obtaining sentences that were up to 26 percent shorter on average than those obtained by black or white attorneys.*") (emphasis added).

9. One reason that identity-based staffing of cases may be even more prevalent in the future is that there have been significant procedural limits on how lawyers can manipulate the composition of a jury. *See* Miller-El v. Dretke, 545 U.S. 231 (2005); Batson v. Kentucky, 476 U.S. 79 (1986); J.E.B.

This Note examines how the Model Rules of Professional Conduct and the Model Code of Professional Responsibility do and should regulate litigation strategy that factors in an attorney's identity.[10] It concludes that the current framework does not provide a meaningful enough deterrent to the professional damage that results from such conduct. The Note explores whether the obligation for zealous advocacy entails an obligation to utilize an attorney's demographic attributes as litigation strategy. It concludes by proposing model rules that might successfully balance the tension between zealous advocacy and professional integrity.

II. A MATTER OF PECUNIARY SELF-INTEREST?

Rather than presuming that there is something unethical about a firm removing an attorney from a case in light of his or her attributes, perhaps instead the attorney has a duty to terminate representation. To refuse to be removed from a case may be seen as putting the attorney's own economic welfare and career ambitions above a client's needs. When cast in such a light, this scenario screams breach of fiduciary duty

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v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994); *see also* Diana L. Garguilo, *The Batson Standard Remains the Applicable Test for Stating a Claim of Jury Discrimination under the Fourteenth Amendment:* Miller-El v. Dretke, 44 DUQ. L. REV. 771, 772 (2006) ("Under *Batson,* a petitioner alleging that a prosecutor used peremptory strikes to exclude jurors on the basis of race must make a prima facie showing that the strike was based entirely on the race of the prospective juror. If the petitioner makes a prima facie showing, the burden then shifts to the prosecutor to present a race-neutral reason for the strike. The trial court is then charged with determining whether the petitioner demonstrated racial discrimination."). The less control that firms have over selecting jurors with demographic characteristics that may render them sympathetic to a client's position, the more inclined they may be to alter case teams to be most likely to play well to any juror from a given jurisdiction. *But see* Phoebe A. Haddon, *Does* Grutter *Offer Courts An Opportunity To Consider Race In Jury Selection And Decisions Related To Promoting Fairness In The Deliberation Process?*, 13 TEMP. POL. & CIV. RTS. L. REV. 547 (proposing that the holding in *Grutter v. Bollinger*, which sustained the limited use of race-consciousness in the educational context, should be extended to allow race to be a factor in determining jury composition).

10. Much attention has been paid to scientific jury selection, where the focus of identity-based legal strategy is the identity of potential jurors. *See, e.g.*, Shari Seidman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178 (1990) (concluding that scientific jury selection can decrease as well as increase the probability of a favorable verdict); Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 OHIO N.U. L. REV. 229, 251-53 (1990) (offering new directions for jury selection consultation); Michael J. Saks, *The Limits of Scientific Jury Selection: Ethical and Empirical*, 17 JURIMETRICS J. 3, 22 (1977) (arguing that scientific jury selection "works" but that it is strength of evidence, and not composition of juries, that most determines case outcomes). In the aftermath of *Batson v. Kentucky*, 476 U.S. 79 (1986), it has been subject to debate the extent to which jury selection is still a legitimate ethical form of advocacy. *See* Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Courts Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501 (1999); Lee Goldman, *Toward a Colorblind Jury Selection Process: Applying the "*Batson *Function" to Peremptory Challenges in Civil Trials*, 31 SANTA CLARA L. REV. 147 (1990); Jeffrey J. Rachlinski, *Scientific Jury Selection and the Equal Protection Rights of Venire Persons*, 24 PAC. L.J. 1497 (1993). This Note does not focus on the ethics of trying to manipulate jury composition to be sympathetic to a client. Rather, it focuses on the practice of staffing cases with attorneys who have identities that might appeal to a jury assembled from a particular geographic region.

by the attorney. Thus viewed, the dilemma is the "classic conflict of interest" that every attorney faces, such as when offered a settlement; the conflict is between a lawyer's "interest in maximizing his fee" and "his clients' interest in maximizing the amount paid to them."[11] It may seem that attorneys that refuse to have their identities employed as a litigation tactic are more concerned with how removal from the case might hurt them than with how their identity might hurt their client's case.

Were pecuniary self-interest the sole underlying reason that an attorney refused to step down from a case, the ABA Model Rules of Professional Conduct and Model Code of Professional Responsibility would seem to provide clear guidelines for the attorney's conduct. Neither the Code nor the Rules allow lawyers to put their own financial interests above their clients' needs. To do so would be in direct violation of Model Rule 1.7.[12] Similarly, the Model Code does not allow lawyers to obtain a proprietary interest or to become financially interested in the outcome of the litigation, so as to avoid the "possibility of an adverse effect upon the exercise of free judgment."[13] Most strongly, Ethical Consideration 5-1 of the Model Code prevents the attorney from staying on the client's case, if his motivations are purely self-interested: "Neither [a lawyer's] personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute [a lawyer's] loyalty to his client."[14]

From the conflict-of-interest perspective, it may well be that a lawyer who is asked to step down from a case is ethically obligated to do so, where financial self-interest is the sole motivation for staying on. However, it does not necessarily follow that the attorney would have no recourse. One possible way to optimize both the attorney and client's interest would be through a well-structured compensation scheme: the attorney does not stay on the case but is reimbursed for the lost opportunity. If the dilemma were simply about lawyers' interest in being compensated for the work that they would have otherwise had the chance to do, there could be ways to remunerate them. However, as law firms have a winner-take-all employment structure, wherein only a few

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11. *See In re* Hager, 812 A.2d 904, 912 (D.C. 2002); *see also* Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) ("there is . . . a conflict inherent in cases . . . where fees are paid by a quondam adversary from its own funds—the danger being that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees."); ABA Section of Litigation, *Ethical Guidelines for Settlement Negotiations* 4.2.2 (2002) ("When an attorney's fee is a subject of settlement negotiations, a lawyer may not subordinate the client's interest in a favorable settlement to the lawyer's interest in the fee."). *See generally* Richard M. Eittreim, Robert D. Phillips Jr., Jennifer M. Rosa & Eugenia S. Chern, *Ethical Issues in the Settlement of Complex Litigation*, 41 TORT TRIAL & INS. PRAC. L.J. 21 (2005) (describing ethical concerns associated with settlement negotiations).

12. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.").

13. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-7 (1980).

14. *Id.* EC 5-1.

individuals end up in the highly leveraged partnership positions that so many attorneys seek,[15] this valuation would be difficult. Even if the firm makes assurances that the attorney would not be at fault for having to be taken off a case, the attorney's career trajectory could still be thrown off track. The opportunity cost of winning an important case for the firm could possibly have an effect just as negative as that which results from the assignment of fault.[16]

It is clear, however, that far more is at issue for identity-baggaged attorneys than pecuniary self-interest. The attorney most likely wants what is best for the client, but does not see why that requires sacrificing the ideals of equal protection that the legal profession has long fought to achieve. Despite the responsibility the firm has to its clients, the attorney's position is that the firm has a responsibility to not restrict career opportunities based solely on an attorney's immutable traits.[17]

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15. ROBERT H. FRANK & PHILLIP J. COOK, THE WINNER-TAKE-ALL SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US (1996); Robert H. Frank, *Winner Take All Markets and Wage Discrimination*, *in* THE NEW INSTITUTIONALISM IN SOCIOLOGY 208 (Mary C. Brinton & Victor Nee eds., 1998); Sherwin Rosen, *Prizes and Incentives in Elimination Tournaments*, 76 AM. ECON. REV. 701 (1986); Susan A. Stabile, *One for A, Two for B, and Four Hundred for C: The Widening Gap in Pay Between Executives and Rank and File Employees*, 36 U. MICH. J.L. REFORM 115 (2002).

16. How might a firm accurately value the cost of a missed opportunity, where to reach a leveraged position requires staying on a certain course? One approach is to have firms compensate identity-baggaged attorneys using a method akin to calculating damages for plaintiffs in employment discrimination cases. *See* Douglas M. Staudmeister, *Grasping the Intangible: A Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process*, 46 AM. U. L. REV. 189 (1996) (discussing factors EEOC considers when compensating victims of employment discrimination). Instead of having a judge or a jury compensate the attorney ex post for the firm's discriminatory decisions, firms could have a policy of ex ante compensating attorneys that are strategically discharged from cases. In that way, law firms could resolve such situations through a rubric weighing whether removing the attorney is worth more to the firm than the cost of compensating him for the value of lost wages, foregone bonus and promotional opportunities, and other reasonable economic damages. The firm may even compensate removed attorneys for their emotional distress—the psychic damages the attorneys experience for being relegated to a "hated" or "removal-worthy" group classification. Accordingly, this market solution would (at least in theory) leave each party—the client, the firm, and the identity-baggaged attorney—better off than if the attorney were allowed to stay on the case.

17. Title VII of the Civil Rights Act of 1964, Pub L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2000)), the Americans with Disabilities Act, Pub. L. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12101 (2000)), the Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. § 621 to § 634), and other legislation make it illegal to discriminate in any aspect of employment, including hiring and firing. It should be noted, therefore, that courts have given employed attorneys remedies where they can show discriminatory discharge without revealing confidential information. *See, e.g.*, Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 186 (3d Cir. 1997) ("[W]e conclude that Kachmar has stated a prima facie case of retaliatory discharge under Title VII, and is not barred from pursuing her action by the attorney-client privilege and/or the ethical constraints of attorney-client confidentiality."); Plessinger v. Castleman & Haskell, 838 F. Supp. 448, 451 (N.D. Cal. 1993) ("The Court believes that the California Supreme Court would not recognize a client's unlimited right to select among associates employed by a contracted law firm where the selection criteria involves discrimination against a member of a protected class. To hold otherwise would allow law firm clients to demand that law firms not assign cases to women, racial minorities or members of any other protected class, even where the client intends to cause a breach or disruption of the business relationship between the associate and the employing law firm. Important though the attorney-client privilege may be, it should not be available to shield interference with another's civil rights."). Even a retained lawyer has been granted a remedy for discriminatory discharge under 42 U.S.C. § 1981. *See* Mass v. McClenahan, 893 F. Supp. 225, 230 (S.D.N.Y. 1995) (holding that plaintiff's case could withstand a

These restrictions on the attorney's choices are at the crux of the dilemma. This dilemma is not really about what should happen when an attorney's pecuniary interests conflict with his or her client's; instead, it is about what happens when their respective liberty interests are at odds.

Thus, rather than asking whether an identity-baggaged attorney's firm's litigation strategy is legal, this Note investigates whether it is ethical. This Note focuses on the normative question of whether the fiduciary relationship between attorneys and their clients should supersede the objectives of, as an example, the U.S. Equal Employment Opportunity Commission, or the protections of 42 U.S.C. § 1981. Perhaps the lawyer-client relationship may be an arena to which employment law does not apply because of the primacy of the constitutional guarantee to effective assistance of counsel.

III. WHY PROTECT THE ATTORNEY'S INTERESTS?

Why should the identity-baggaged attorney's liberty interests matter? An attorney is a professional, and the discharge of his or her duties invariably requires prioritizing a client's needs over his or her own. Even the founder of the American Civil Liberties Union (ACLU), Roger Baldwin, used race as a determinant in selecting a lawyer to defend him at trial.[18] He believed that the identity of the lawyer representing a client affected the client's chances of winning a case.[19] Describing his litigation strategy in defending his case before the Court of Errors in New Jersey, he explained, "In New Jersey we all decided not to use a Jewish lawyer when we knew prejudice against him existed. . . . [B]ecause of that tactic we won the Patterson, New Jersey, case . . . ."[20] The irony of this is that the ACLU has long positioned itself as a champion for individuals' rights "to equal protection under the law—equal treatment regardless of race, sex, religion or national origin."[21] Was Baldwin's case an arena in which these founding ACLU principles

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motion for summary judgment because of "direct evidence that plaintiff was discharged because he was 'a New York Jew' . . . . [T]he public policy embodied in § 1981 clearly requires that plaintiff be provided with a remedy."). *But see* David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons From the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 878 n.86 (1998) ("It is not clear, however, that a firm that reassigns (as opposed to terminates) a minority lawyer at the client's express direction violates Title VII or other relevant statutes. The traditional view is that clients have an unqualified right to fire their attorneys for any reason, even reasons that violate public policy. *See* Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991). . . . Under the agency model, it is doubtful that a law firm that carries out a client's request to reassign a particular lawyer from working on its matters is guilty of employment discrimination.").

18. PEGGY LAMSON, ROGER BALDWIN, FOUNDER OF THE AMERICAN CIVIL LIBERTIES UNION: A PORTRAIT 160-63 (1976).

19. *Id.*

20. *Id.* at 163.

21. American Civil Liberties Union About Us Page, http://www.aclu.org/about/ (last visited Apr. 12, 2008).

should have applied? No doubt, preventing attorneys from litigating cases because of their identities does violence to equal protection principles. But is that a consideration law firms should be forced, or even allowed, to consider when doing so may be adverse to their clients' best interests? Thus, the question at the heart of this Note is when, if ever, it is ethical for a firm to consider social policy objectives in deciding how to litigate a particular client's case. Does the answer turn on the nature of the "social policy" and the extent to which it is rooted in the U.S. Constitution?

These questions are particularly interesting in light of all the progress that has been made on the legislative and judicial fronts to protect groups from discrimination. Gone are the days when race could be used as an evidentiary consideration in rape cases.[22] Gone are the days when black[23] or female[24] jurors could be excised from the jury in a systematic way without remedy. Gone are the days when "applicants to

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22. *See* McQuirter v. State, 63 So. 2d 388 (Ala. App. 1953) ("In determining the question of intention the jury may consider social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and defendant was a Negro man."); Kelley v. State, 56 So. 15 (Ala. App. 1911) (discussing how racial differences created an inference of guilt that a "negro" assaulted with intent to ravish a thirteen year-old white girl); Pumphrey v. State, 47 So. 156, 158 (Ala. 1908) ("There is nothing in the evidence to indicate that Mrs. Crimm was not virtuous, or that she had ever had even a conversation with the accused; so that any idea or expectation of permissive intercourse could not have been entertained by the defendant at any time. Again, upon the question of intention, along with the other circumstances in evidence, 'social customs, founded on race differences,' and the fact that Mrs. Crimm was a white person and the defendant a negro, we doubt not, might properly be taken into consideration.") (citation omitted).

23. Batson v. Kentucky, 476 U.S. 79, 97-98 (1986) ("Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.' If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.' The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination.") (citations omitted); Strauder v. West Virginia, 100 U.S. 303, 309 (1879) (invalidating a state statute providing that only white men could serve as jurors because "how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?").

24. Taylor v. Louisiana, 419 U.S. 522, 537 (1975) ("If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed. If at one time it could be held that Sixth Amendment juries must be drawn from a fair cross section of the community but that this requirement permitted the almost total exclusion of women, this is not the case today. Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place."); Ballard v. United States, 329 U.S. 187, 195 (1946) ("The point illustrates that the exclusion of women from jury panels may at times be highly prejudicial to the defendants. But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have in our democratic society.") (citations and footnote omitted).

the bar might be denied admission because of their sexual orientation, or if already admitted, might be disbarred for the same reason."[25] Attorneys have even been denied admission to the bar for holding white supremacist beliefs.[26]

An alternative view is that such progress merely indicates that discriminatory beliefs and practices can no longer operate openly in our courts. After all, despite the progress made in divorcing a person's identity from the culpability of their actions, economists continue to demonstrate that race, gender, and other cognizable traits are significant contributors to criminal justice outcomes.[27] Of particular noteworthiness is a paper by Edward Glaeser and Bruce Sacerdote that finds "victim race and gender matter in the sentencing decision," even when the victim is determined at random such as in vehicular homicides.[28] The implication

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25. GILLERS, *supra* note 2, at 559 (citing State *ex rel.* Fla. Bar v. Kimball, 96 So. 2d 825 (Fla. 1957)); *see also* Joy Margo Packer, *Bar Admissions: The Good Moral Character Requirement and the Homosexual Applicant*, 8 STETSON L. REV. 444, 444 (1979) (commenting on Florida case that held an "applicant's admitted homosexual orientation is not sufficient to prevent his admission to the Bar, absent evidence of homosexual activity").

26. *See, e.g.*, *In re* Hale, 723 N.E.2d 206 (Ill. 1999) (denying Matthew Hale, who publicly called for a racial holy war of whites against people of color, admission to the Illinois bar); *see also* Richard L. Sloane, Note, *Barbarian at the Gates: Revisiting the Case of Matthew F. Hale to Reaffirm that Character and Fitness Evaluations Appropriately Preclude Racists from the Practice of Law*, 15 GEO. J. LEGAL ETHICS 397, 416-24 (2002) (exploring competing conceptions of "good character" and arguing that Matthew Hale would fail under all of them). *But see* Matthew Stevenson, *Hate vs. Hypocrisy: Matt Hale and the New Politics of Bar Admissions*, 63 MONT. L. REV. 419 (2002) (arguing that denying Matthew Hale admission to the bar raised significant First Amendment freedom of speech concerns). *See generally* Carol M. Langford, *Barbarians at the Bar: Regulations of the Legal Profession through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1196 (2008) (discussing how the moral character requirement has actually benefited oppressed groups because, despite the arbitrariness of the moral character requirement, "the ABA has led the way in promoting civil rights to certain groups, like the Lesbian, Gay, Bisexual, Questioning, and Transgendered . . . community, through its admissions procedures long before these rights were achieved publicly"); Carla D. Pratt, *Should Klansmen Be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U.L. REV. 857 (2003) (arguing that granting a law license to a white supremacist would violate the spirit, if not the letter, of the Fourteenth Amendment).

27. For articles pertaining to race, see, for example, Stephen L. Carter, Comment, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 447 (1988) ("All too often, American legal and political culture seems to suggest . . . that there are two varieties of people who are involved in criminal activity, black people and victims. So perhaps when victims happen to be black, the culture rationalizes the seeming contradiction by denying that there has been a crime."); James L. Gibson, *Race as a Determinant of Criminal Sentences: A Methodological Critique and a Case Study*, 12 LAW & SOC'Y REV. 455 (1978); Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179 (1996); Alfred B. Heilbrun, *Race, Criminal Violence, and Length of Parole: A New Look at Parole Outcome*, 18 BRIT. J. CRIMINOLOGY 53 (1978); and Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998). For articles pertaining to gender, see, for example, Robert J. Aalberts, Thomas E. Boyt & Lorne H. Seidman, *Do Race/Ethnicity and Gender Influence Criminal Defendants' Satisfaction with Their Lawyers' Services? An Empirical Study of Nevada Inmates*, 2 NEV. L.J. 72 (2002); Helen Boritch, *Gender and Criminal Court Outcomes: An Historical Analysis*, 30 CRIMINOLOGY 293 (1992); Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80 (1994); Wendy Murphy, *Gender Bias in the Criminal Justice System*, 20 HARV. WOMEN'S L.J. 14 (1997); Dorothy E. Roberts, *The Meaning of Gender Equality in Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 1 (1994); Stanley Yeo, *Resolving Gender Bias in Criminal Defenses*, 19 MONASH U. L. REV. 104 (1993).

28. Edward Glaeser & Bruce Sacerdote, *Sentencing in Homicide Cases and the Role of Vengeance*, 32 J. LEGAL STUD. 363, 364 (2003) (The study found, "[V]ictim race, age, and criminal

of these results is that our criminal justice system does still allow for biases to pervade; the resulting ethical dilemma is what practitioners of law are allowed to *do* with that knowledge. Are attorneys obligated to exploit these deeply entrenched biases to the benefit of their clients, obligated to at least avoid exacerbating these biases where they exist, or obligated to ignore and even challenge these biases by refusing to cater to them?

Thus it is not enough to simply ask whether it is ethical to exploit racial, gender, or religious biases when practicing law. Taken out of the context of the attorney-client relationship, the answer would be a resounding no.[29] But just as any ideal needs to be weighed in the milieu of criminal justice goals, so too is equal protection to be balanced against other priorities. Thus, at the heart of the identity-baggage dilemma is the idea that, for all the value to society that would come from treating all people as equals—from protecting their rights to gainful employment irrespective of the prejudices that are held about aspects of their identity—such progress should not necessarily be made at the expense of any particular client's case.

IV. POTENTIAL WAYS TO EVADE THE DILEMMA

A. Voir Dire

Conceding that the responsibility of the lawyer/firm confronted with jurors' biases is not immediately clear, there may be a way to avoid

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record still determine sentence length even when the victim was killed in a vehicular homicide. Drivers who kill black victims get substantially shorter sentences. Drivers who kill women get substantially longer sentences."); *see also* Nilsen, *supra* note 6, at 7-9 n.22 (examining the ethics of relying on bias and stereotypes in criminal defense).

29. *See, e.g.*, Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571, 575 (1993) ("[A] lawyer is prohibited from making arguments not based on the evidence or not legally relevant to the matters at issue . . . . Arguments catering to racism or other prejudices are not legally relevant and surely assault the dignity of our courts and are degrading toward our system of justice.") (footnotes omitted). *But see* Nilsen, *supra* note 6, at 9, 10 ("It is because bias is so pervasive in the criminal justice system that lawyers rely on it to help win cases. Stereotypes based on gender, disability, and sexual preference are commonly exploited. In a case charging a man with assaulting his estranged wife, for example, the defense may be based in large part on the victim's lack of credibility. May defense counsel impeach the victim through a previous history of hitting the defendant, with testimony of previous beatings or neglect of her children that resulted in social service officials threatening to take the children from the home, with evidence of sexual promiscuity or generally intemperate character, or with a cross-examination implying promiscuity or failure to perform wifely or motherly roles in a traditional manner? Should the attorney seek to have the case heard before a judge or jury likely to be impressed by those facts? If not clearly relevant, should the lawyer try to make this evidence relevant on some theory, or at least plan to place it before the court at sentencing in mitigation where the rules of evidence don't apply? Even if never used in court, it has not escaped defense lawyers that fear of pain-inducing lawyers' tactics leads some victims to abandon prosecution. . . . This is not to say that blatant appeals to prejudice are the rule. Subtle approaches are far more common, drawing upon unconscious or silent prejudices.")

the ethical dilemma entirely. Attorneys could ferret out jurors' biases where they exist, and evade the decision of whether it is ethically mandated or forbidden to cater to them. Such policies do in fact exist—most importantly, in the voir dire process. The Sixth Amendment guarantees that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ."[30] Thus, "[t]he principal purpose of the voir dire examination is to probe each prospective juror's state of mind to enable the trial judge to determine actual bias and to allow counsel to assess suspected bias or prejudice."[31] This process suggests yet another opportunity for compromise: the identity-baggaged attorney can stay on the case but the client will not be adversely affected because the attorney will successfully identify and strike "for cause" any juror that is prejudiced.

The natural criticism of this suggestion can be made on grounds of efficacy. Not only are jurors capable of misleading even the most experienced lawyer,[32] many jurors may not realize their own biases.[33] But the hard question remains: what if biases operate in a client's *best* interests?[34] What if a jury's racism will help an attorney acquit a white defendant for killing a black man, or at least downgrade the offense for which the defendant is convicted? Is the attorney then *obligated* to excuse those jurors "for cause" in the name of larger social policy objectives of tolerance, even if those jurors' biases will benefit the attorney's client?

Johnny Cochran, in his handling of the O.J. Simpson case, did not seem to think so. In fact, Cochran's legal strategy perfectly illustrates the

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30. U.S. CONST. amend. VI.

31. Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981).

32. Clearly it is hard to find cases supporting instances where lawyers were misled; successfully misleading jurors will never have their bias revealed. However the instances that exist where prospective jurors do lie or mislead lawyers conducting voir dire suggest that this behavior may be more common than we would like to believe. *See, e.g.*, Williams v. Taylor, 529 U.S. 420, 440-41 (2000) (juror revealed neither former marriage to critical witness for prosecution, nor former representation by prosecutor in divorce proceedings); Fields v. Woodford, 309 F.3d 1095, 1105-06 (9th Cir. 2002) (juror failed to reveal during voir dire that his wife had recently been the victim of a very similar set of crimes to which the defendant was accused); Dyer v. Calderon, 151 F.3d 970, 972 (9th Cir. 1998) (juror failed to reveal that her brother had been killed under similar circumstances as the victim in defendant's case).

33. *See* Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030 (2008) ("[T]he harsh reality for judges conducting voir dire aimed at seating only fair and impartial jurors is that the jurors themselves may not be able to assist because . . . 'we restrict our own speech because we cannot bear admitting our own racism.'") (citation omitted); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1032 (1988) (arguing for recognition that "the operation of unconscious racism in the criminal procedure context would pave the way toward incorporating it into the Court's vision in other equal protection contexts"); Implicit Association Test, https://implicit.harvard.edu/implicit/ (last visited Apr. 14, 2008) (demonstrating the divergence between conscious and unconscious biases, because "[i]t is well known that people don't always 'speak their minds', and it is suspected that people don't always 'know their minds'").

34. For discussions of how even after *Batson* and its progeny, peremptory challenges continue to be abused, see, for example, Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993); and James S. Wrona, Case Note, Hernandez v. New York: *Allowing Bias To Continue in the Jury Selection Process*, 19 OHIO N. U. L. REV. 151 (1992).

struggle within the legal profession in setting the boundaries of ethical lawyering in bias-ridden courtrooms. In his review of a book about the Simpson murder trial, Jeffrey Rosen describes how Cochran deliberately altered the interior decorating of Simpson's home in preparation for the visit by the predominantly black jury:

> All day . . . members of the defense team were hard at work "establishing O.J.'s African-American identity." The lawyers found Simpson's walls lined with pictures of white people: girlfriends, celebrities, corporate sponsors. "The faces were overwhelmingly white. . . . That's not the way to please a jury dominated by African American women." On Cochran's orders, "The white women on the walls have to go, and the black people have to come in." Down went a nude portrait of Paula Barbieri that had been hanging near the fireplace, and up went pictures of Simpson's family—"his black family," in Cochran's words.[35]

Though Cochran's behavior raised ethical questions concerning what constitutes "real evidence,"[36] Cochran's appeals to racial bias are of central importance. Few would dispute that Cochran and his "Dream Team" launched one of the most brilliant and effective defenses known to twenty-first century students of law.[37] Few would not hire any and all members of the "Dream Team" if circumstances required and wealth allowed. But in demonstrating that the "best" defense is not necessarily an ethical one, Cochran's strategy sets in relief the dilemma faced by a firm with an identity-baggaged attorney.[38] Do we fault Cochran's style of advocacy, and if not, why not allow firms to similarly appeal to biases in the name of zealous advocacy? The question remains as to what attorneys must do when their fiduciary responsibility to their clients

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35. Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC, Dec. 9, 1996 (quoting Lawrence Schiller, in a review of LAWRENCE SCHILLER & JAMES WILLWERTH, AMERICAN TRAGEDY: THE UNCENSORED STORY OF THE SIMPSON DEFENSE (1996)).

36. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A) (1980) ("In his representation of a client, a lawyer shall not: . . . (3) Conceal or knowingly fail to disclose that which he is required by law to reveal. (4) Knowingly use perjured testimony or false evidence. (5) Knowingly make a false statement of law or fact. (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false. (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.").

37. *See, e.g.*, W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075 (1996) (defending the behavior of O.J. Simpsons "Dream Team" as ethical zealous advocacy within the bounds of the law). *But see* Richard A. Boswell, *Crossing the Racial Divide: Challenging Stereotypes About Black Jurors*, 6 HASTINGS WOMEN'S L.J. 233, 238 (1995) (arguing that the "widely-held perception that jurors in the O.J. Simpson case were motivated by racial considerations rather than the evidence is a particularly offensive form of 'juror stereotyping'" that would not take place with white jurors). *See generally* Christopher Slobogin, *Race-Based Defenses—The Insights of Traditional Analysis*, 54 ARK. L. REV. 739, 776 (2002) (exploring whether race-based defenses should be allowed in the law).

38. Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 321 (1997) (describing the Brougham-style zeal of O.J. Simpson's defense team and encouraging instead a return to "civility, trust, and fair dealing" in legal advocacy).

seems to require tolerating—or even appealing to—prejudices.

The primary challenge to having attorneys be the decision-making agents with respect to obviating jury bias is the idea that "what a defense attorney 'may' do, he *must* do, if it is necessary to defend his client."[39] Lawyers might thus use the voir dire process not to winnow out biases against their clients, but to ensure that biases are operating in their clients' favor. A cynical viewpoint is that this "bias-shopping" is precisely what the voir dire process is about—selecting potential jurors, who because of their bias or other attributes, will be more sympathetic to a particular client's argument. Where an attorney's particular demographic bundle may increase the likelihood that the bias-shopping is successful, firms are still confronted with the dilemma. In fact, all of the recent cases making it harder for lawyers to use scientific jury selection may make it all the more tempting to manipulate factors within a firm's control—including the identity of the lawyers staffing a case.

B. A Role for Judges?

Circumventing the tension between equal protection and client supremacy ideals may require individual attorneys not to act as the agents for removing jury prejudice (where it exists). Instead of relying on attorneys in voir dire to ferret out prejudices, perhaps judges should have that responsibility. This proposal is already somewhat in practice. For example, judge-conducted voir dire is the norm in federal civil cases,[40] where seventy percent of voir dire is conducted by judges.[41] Additionally, judges must make judicial factual findings when a *Batson* challenge is made.[42] Judges are great candidates for this line of inquiry

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39. ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 145 (1996). One articulated reason to avoid limitations on zealousness is the possibility of encouraging underzealousness that verges on incompetent representation. *See* Strickland v. Washington, 466 U.S. 668 (1984) (establishing a two-part test for a claim of ineffective assistance of counsel, where a criminal defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that there is reasonable probability that, if counsel had performed adequately, the result of the proceeding would have been different). *But see, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002) ("A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.") (citation omitted); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-25 (1980) ("[A] lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him . . . ."); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-106(C)(2) (1980) ("[A] lawyer shall not . . . [a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.").

40. *See* FED. R. CIV. P. 47(a) ("The court may permit the parties or their attorneys to examine prospective jurors or may itself do so."). *But see* Morris Dees, *The Death of Voir Dire*, 20 LITIG. 14 (1993) (criticizing the trend away from lawyer-conducted voir dire).

41. Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 292 (1999).

42. *See* Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM

because they owe no fiduciary duty to any client in the proceedings. Additionally, there are clear guidelines precluding judges from possessing any biases.[43] In some jurisdictions, the rules against judicial bias go so far as to prohibit judges from joining exclusionary organizations.[44] Accordingly, a system of judge-led voir dire might free firms from making strategic staffing decisions based on race, gender, religion, and other cognizable traits. So long as our judiciary is comprised of unbiased individuals, the judges could ensure that the jury is bias-free.[45]

Unfortunately, judges may be no better than lawyers at excising prejudice from their courtroom, though certainly they will not face the same ethical dilemmas regarding obligations to a client. If there is even an iota of a doubt that judges would succeed in identifying the conscious and unconscious biases of a potential juror, law firms would still have to face the identity-baggage dilemma. If there is even a chance that a jury might be biased a certain way, the firm would still need to decide whether it can staff its litigation team so as to maximize the likelihood that the bias operates in its client's favor.[46]

L. REV. 1683, 1701 (2006) ("Trial judges are in the trenches when it comes to Batson challenges. Trial judges, unlike appellate judges who have only the transcript of the proceedings below, have the lawyers and jurors before them. They have facts that might not end up on the record, such as the juror's race, body language, or tone of voice, and they often have to assess the credibility of lawyers when they provide their reasons. With the adoption of the A.B.A. Principles, judges must give even greater thought than before to race and gender during jury selection. Rather than leaving it only to lawyers to raise Batson challenges, the A.B.A. Principles explicitly instruct judges that they can raise Batson challenges sua sponte.") (footnotes omitted); *see also* Hernandez v. New York, 500 U.S. 352, 364-65 (1991) ("In *Batson*, we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal . . . . Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding 'largely will turn on evaluation of credibility.'") (citation omitted).

43. MODEL CODE OF JUDICIAL CONDUCT R. 2.3(A)-(B) (2007) (formerly Canon 3 (B)(5)) ("A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice. . . . A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials or others subject to the judge's direction and control to do so.").

44. MODEL CODE OF JUDICIAL CONDUCT R. 3.6(A) (2007) ("A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation."); *see also* Sean V. Grindlay, *May a Judge Be a Scoutmaster?* Dale, White, *and the New Model Code of Judicial Conduct*, 5 AVE MARIA L. REV. 555 (2007) (arguing against the adoption of Rule 3.6).

45. For a statistical proposal on how judges may discern whether there was discrimination in jury selection, see D.H. Kaye, *Statistical Analysis in Jury Discrimination Cases*, 25 JURIMETRICS J. 274, 277 (1985); and Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 376 (1967) ("Every successful use of technical information by the law has had to travel the path from strangeness to indispensability. The importance of objectivity and consistency should persuade us to follow legal principles in these cases even when their logic lead to ground made less certain by the absence of the assurance—and it is sometimes a false assurance—which intuition brings to judgment.").

46. *See In re* Marriage of Iverson, 11 Cal. App. 4th 1495, 1499 (1992) (A judge's decision was reversed for being "replete with gender bias" in finding that a marriage was entirely initiated by the female petitioner because a man would never agree to a marriage if not initiated by the woman: "And why, in heaven's name, do you buy the cow when you get the milk free . . . . Marriage is a

Though excising all prejudice may be too Herculean a feat for judges, they can (and in some jurisdictions, are required to) deter overt appeals to bias. The 2007 Model Code section 3(B)(6), for example, sets out that a judge shall "require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, *lawyers,* or others."[47] The idea behind such a policy is that if attorneys cannot exploit the various prejudices a jury might have, those biases may be prevented from operating. Thus, insulting remarks against counsel's identity would be met with judicial censure.

Unfortunately, having judges regulate bias inside the courtroom effectively motivates firms concerned with identity baggage to engage in backroom dealings. Rather than subject their prejudicially calculated decisions to the disapprobation of the court, the firms can act on them by identity-tailoring the counsel even before stepping into the courtroom. Additionally, if the primary concern for such a firm is not that the opposing attorney will degrade its counsel, but rather that the jury will be prejudiced against counsel without provocation, then judicial sanction will not be a meaningful deterrent. To the extent that judges are empowered to police appeals to bias within their courtrooms, Rule 2.3(D) explains that they are not to exclude reference to the listed factors when relevant to the proceeding.[48] Finally, and perhaps most interestingly, such a setup would require the firm to ask the following question: should the ideal of client supremacy extend to create a fiduciary duty to forum shop for the least bias-policing judges?

This begs the ethical question as to what the meaning of "legitimate advocacy" is in the context of identity-baggaged attorneys.[49] The preceding pages have attempted to provide attorneys with methods to circumvent the need to pit their fiduciary duty to their client against other duties to themselves, their profession, and the Constitution. It does not seem that evading the dilemma is possible. Thus, a more serious discussion is needed regarding the ethical considerations surrounding an identity-baggaged attorney's situation.

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drag on the market. It's a deprivation of his freedom.").

47. MODEL CODE OF JUDICIAL CONDUCT R. 2.3(C) (2007) (formerly Canon 3(B)(6)) (emphasis added).

48. *Id.* R. 2.3(D) (formerly Canon 3(B)(6)) ("The restrictions of paragraph[] . . . (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.").

49. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2002).

V. TOWARDS JUSTIFYING AND REGULATING FIRMS' TREATMENT OF IDENTITY-BAGGAGE IN LITIGATION[50]

The hardest question to tackle is whether it is *unethical* for firms to contemplate their attorneys' identities when making staffing decisions. Why should a firm ignore significant patterns of behavior among members of different groups that might benefit or harm their clients' chances of winning? Support for the position that lawyers have a duty to use this information is found in the standard "statistical discrimination"[51]

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50. This Note's focus is on the ethics of using identity as a weapon in litigation. Yet the same ethical quandary comes up during negotiation, especially in the international context, where assumptions about the role of women and about people of different ethnicities may be even more salient than they are domestically. For example, the Maryland Institute for Continuing Education for Lawyers has the following advice for how to make sure that an international business transaction is successful:

> § 2.7 SPECIAL CONSIDERATIONS FOR WOMEN
>
> Attorneys and business people of both genders, all colors, most creeds, and countless nationalities are commonplace in the United States. It is not so in other countries, particularly in countries that are traditionally male-dominated or in which families are traditional patriarchies. This does not mean that women should automatically refuse to represent a client during international negotiations. If a woman attorney finds during her cultural preparation that a female at the negotiating table could be detrimental to her client's interests, however, that woman should raise the issue with her client and present alternatives for the client to consider. These alternatives can include:
>
> (1) the woman attorney being totally replaced on the negotiating team by a male attorney;
>
> (2) the woman attorney being replaced at the negotiating table by a male attorney while the female attorney remains available for consultation and strategizing either at the hotel where the negotiating team is staying or at another location;
>
> (3) the woman attorney being augmented by a male attorney at the negotiating table; or
>
> (4) making no change in the structure of the negotiating team.
>
> Further, having a woman as an active team member can be beneficial to the client achieving his or her goals. In cultures where women are traditionally segregated from, or hold positions secondary to those of men, a woman sitting at the negotiating table can be a marketing tool that piques the adverse party's interest, and the idea of working with a woman in the future can cause male decision-makers to unconsciously add more points to the team who had a woman member. . . .
>
> [For example, in] Japan there is a special kind of night-spot for Japanese men at which they pay great sums of money for drinks and the chance to speak English with a Western woman. Visiting such a club would be the highlight of a "Boys' Night Out." Bearing this in mind, one can see why a Western woman at the negotiating table adds value to her statements simply by virtue of her gender and nationality.

Celeste Aurelia Campbell, *International Negotiations*, *in* International Commercial Transactions (The Maryland Institute for Continuing Professional Education of Lawyers, Inc. 2005), *available on* Westlaw at ICT MD-CLE 29.

51. This Note, like Altonji & Pierret, uses the term "statistical discrimination" to be "synonymous with the use of the term 'rational expectations,'" and to "mean that in the absence of full

argument. It is an argument put forth by social scientists in attempting to explain why discrimination persists in spite of dramatic civil rights advancements made by historically marginalized groups.[52] The argument may be stated as follows: it is not any particular animus held by employers against the groups' members that results in poor labor outcomes; rather, there are rational, evidence-based reasons that employers are not as likely to hire members of certain groups.[53] For example, suppose it is assumed that women will be more likely than men to have and care for children, resulting in their absence from work for some period of time.[54] Why should profit-minded firms invest valuable resources in employees who statistically have been shown to have certain less-than-desirable patterns of behavior?[55] Thus, there is an argument to be made that because some lawyers will simply be more *able* to connect with juries, firms should be allowed to consider this information when determining litigation strategy.[56]

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information, firms distinguish between individuals with different characteristics based on statistical regularities." Joseph G. Altonji & Charles R. Pierret, *Employer Learning and Statistical Discrimination*, 116 Q. J. ECON. 313, 316 n.3 (2001).

52. *See* David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1619-21 (1991).

53. *See* William T. Bielby & James N. Baron, *Men and Women at Work: Sex Segregation and Statistical Discrimination*, 91 AM. J. SOC. 759, 761-62 (1986). Statistical discrimination has also been used to explain gender-based and race-based wage gaps. *See, e.g.*, Altonji & Pierret, *supra* note 52, at 314 ("Our working hypothesis is that firms, with only limited information about the quality of workers in the early stages of their careers, distinguish among workers on the basis of easily observable variables that are correlated with productivity. These might include years of education or degree, the quality of the school the person attended, race, and gender. (To avoid misunderstanding, we wish to stress that part of the relationship between wages and race and gender may reflect biased inferences on the part of employers or forms of discrimination that have nothing to do with productivity or information.) Firms weigh this information with other information about outside activities, work experience to date, references, the job interview, and perhaps formal testing by the firm."). There is also a literature that suggests women tend to have different litigation and negotiation styles from men, which may be more useful for some types of cases than for others. *See, e.g.*, Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994).

54. *See* Nancy E. Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 FORDHAM L. REV. 699, 701, 702-03 (1986) ("Pregnancy is therefore a predictable, foreseeable condition that will occur among a substantial portion of working women. It is equally predictable that pregnancy will involve some period of disability during which the pregnant (or recently pregnant) employee will be unable to work."). *But see* Bielby & Baron, *supra* note 54, at 759 ("[L]ittle evidence is found that employers' practices reflect efficient and rational responses to sex differences in skills and turnover costs.").

55. Even our own Supreme Court has embraced the real differences doctrine with respect to gender. *See* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . ."); *see also* Rhoda Bunnell, *The Impact of* Geduldig v. Aiello *on the EEOC Guidelines on Sex Discrimination*, 50 IND. L.J. 592 (1975) (arguing that *Geduldig* should be read narrowly to describe what equal protection permits, not requires, so as to avoid putting in peril the EEOC guidelines on sex discrimination); Laura J. Geissler, *Unfinished Business: Intermediate Scrutiny, Real Differences, and Separate-but-Equal in* United States v. Virginia, 20 HAMLINE L. REV. 471, 472 (1997) (arguing, in part, that the Supreme Court should re-examine the real differences theory); Shannon E. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of* Geduldig *and Suggestions for Forcing its Reversal*, 23 N.Y.U. REV. L. & SOC. CHANGE 59, 62 (1997) (proposing ways for advocates to consolidate efforts to bring about reversal of *Geduldig*).

56. For a fantastic discussion of the challenges facing black attorneys at large corporate law firms and the legal hurdles that prevent them from obtaining legal redress of discrimination against them,

If we believe that juries will not be able to divorce the attorney from the position that is being argued, then the historical associations made between groups and positions will render some members more persuasive than others. This phenomenon is particularly relevant for attorneys seeking to push a progressive agenda—what should they do if the net gains from using less than progressive litigation methods can yield great advances in civil liberties nationwide?[57] Every individual carries identity baggage that will render that person more convincing in certain contexts than in others.[58] One setback in resolving the dilemma presented here is our inability to know definitively the extent to which biases against an attorney would factor into jury verdicts.[59] The empirical question is difficult to answer given both the complexity and secrecy of the jury decision-making process.[60] The narrative that a female attorney will not be credible in Southern states, where gender norms may be less accepting of female professionals, is not inconceivable but hard to verify empirically. Empirical verification is especially difficult because, as legal realists posit, even seemingly random factors may influence a jury to

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see David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996). For other articles exploring the challenges to creating diversity in the legal profession, see, for example, David B. Wilkins, Ronit Dinovitzer & Rishi Batra, *Urban Law School Graduates in Large Law Firms*, 36 SW. U. L. REV. 433 (2007); David B. Wilkins, *Partner Shmartner!* EEOC v. Sidley Austin Brown & Wood, 120 HARV. L. REV. 1264 (2007); David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004); David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. STUDY OF LEGAL ETHICS 15 (1999); David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of "Bleached Out" Lawyering*, 5 INT'L J. LEGAL PROF. 141 (1998).

57. See, for example, *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), a school prayer case, where Bernard Wolfman, a member of the ACLU, provided advice but was not otherwise involved in the litigation. He "decided that for him, as a Jew, to represent the Schempps in a challenge to Bible reading and recitation of the Lord's Prayer merely would add unnecessary and probably detrimental baggage to what clearly would be a controversial and, in many quarters, an unpopular cause." Louis H. Pollack, *Lawyer Sawyer*, 148 U. PA. L. REV. 25, 27 (1999).

58. Legal information service providers have tapped into attorneys' desire to know this context precisely. For example, the Total Litigator function in LexisNexis allows attorneys to gather "demographic intelligence" by zip code. The demographic report provides a detailed analysis of the following statistics in a given city: age, race, gender, income, country of origin, and household type and size breakdown. There are additional measures that may indicate the dispositions of the prospective jury members, including land area in square miles, population density centile, housing value, and travel time to work. These tools enable attorneys to make the very decisions discussed in this Note.

59. Chris F. Denove & Edward J. Imwinkelreid, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 AM. J. TRIAL ADVOC. 285, 297 (1995) ("Because any demographic group may be either plaintiff or defense oriented depending on the facts of a given case, attorneys should not rely upon generalized stereotypes during the jury selection process. While it may be cheaper and tempting for the reader to use the data contained in studies such as this to select her own jury, such a practice could be dangerous unless the facts of her case are nearly identical to a fact pattern on this survey. The foremost finding of this survey is that combinations of demographic characteristics can be highly predictive in a particular case but not for all types of cases.").

60. *See* Diamond, *supra* note 11; Fulero & Penrod, *supra* note 11; Johnson, *supra* note 8; Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 129-30 (1993) ("Jury studies belie declarations that the effects of jury discrimination on jury decisions are insignificant or unknowable."); Abbe Smith, *"Nice Work if You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523, 547-49 (1998).

form certain judgments. Documenting the effects of these factors is impeded by an inability to effectively model and control for the array of influences on jury members, both before and after trial.

But from an ethical vantage point, the empirical reality is less relevant. After all, the dilemma exists precisely because attorneys *do not* know how a jury's bias might affect their client. The question is whether or not there is an obligation, or even a right, to use a good faith effort in guessing those biases to prevent them from hurting a client's case.[61] Of course, each time a private firm decides to prevent an attorney with certain attributes from practicing in a certain venue, the norms of what type of person practices in that venue become re-entrenched. Thus, whatever the landscape of juror bias may be, a firm's decisions will either exacerbate or challenge what exists. Should firms consider that their staffing choices might serve the public interest or might impede advances in tolerance?

It may not always be the case that white, straight, Christian, male identities are useful in connecting with juries in ways that are arguably beneficial to the client.[62] Women might better be able to defend an accused rapist to female jurors, who may doubt that a female attorney could represent a person actually guilty of rape. African-Americans might more effectively prosecute other minorities—especially in predominantly black districts where jurors may be unsympathetic to white prosecutors who try to lock up their fellow community members.[63] The permutations seem endless.

But the permutations are not actually endless, and attorneys with

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61. Lonnie T. Brown, Jr., *Racial Discrimination In Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 315-17 (2003) ("The prevailing perception that the intentional, racially discriminatory use of peremptory challenges somehow constitutes 'legitimate advocacy' is simply untenable. . . . If citizens cannot expect to be treated in a non-discriminatory fashion in a courtroom, the very venue in which justice is to be served, how can they have any confidence in the fairness of the process or of our society as a whole?"). *But see* Smith, *supra* note 61, at 531 (arguing that it is "unethical for a defense lawyer to disregard what is known about the influence of race and sex on juror attitudes in order to comply with *Batson v. Kentucky* and its progeny," and that "the new ethics of jury selection ignore the impact of race and gender on jurors' attitudes and thus are directly contrary to the mandate of zealous criminal defense and serve to disadvantage the criminally accused").

62. *See* Abrams & Yoon, *supra* note 9, at 1145 (finding that Hispanic attorneys obtained sentences for their clients that were up to twenty-six percent shorter on average than those obtained by black or white attorneys).

63. *See* LINDA CHEVEZ & GERALD A. REYNOLDS, RACE AND THE CRIMINAL JUSTICE SYSTEM: HOW RACE AFFECTS JURY TRIALS (1996); *see also* J. Cunyon Gordon, *Painting By Numbers: "And, Um, Let's Have a Black Lawyer Sit at Our Table,"* 71 FORDHAM L. REV. 1257, 1260-61 (2003) ("Such responses—tokenism, 'mascoting' and ghettoizing of minority attorneys—substitute one form of discrimination for another, exacerbate the segregation already apparent in the firms, and harm the intended direct beneficiaries. Suppose firm leaders simply 'paint by numbers' and create an authentic-looking multicultural still life that belies the lack of true integration within their walls?"); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1042 (1995) ("For better or worse, many white Americans are likely to interpret [a black lawyer's] willingness to take on this matter as an indication that even the Klan's most bitter enemies believe that its arguments merit careful consideration. Similarly, it is at least conceivable that a substantial number of whites will also take the fact that the Klan was able to secure the services of a black lawyer as some confirmation of the growing sentiment that the Klan is merely a 'fringe' organization whose 'speech' causes no real harm.").

certain attributes might be relegated to only a few types of cases. Because certain classes of individuals are generally more discriminated against than others, allowing strategic attention to be paid to lawyers' identities will likely stratify the legal profession. The public good would not be served if the persuasive power of a woman lawyer in a rape case may limit her legal career prospects to such cases.

But if we are to accept that the "public good" has a role to play in dictating the attorney-client relationship, it is critical to determine the outer bounds of social policy objectives that attorneys may consider. It is very clear that our ethical rules do not allow attorneys to prioritize the public externalities of a litigation decision over the way that decision affects an attorney's client. In turn, the only social policy objectives that attorneys normally are allowed to consider are the ones that their clients are pursuing in their particular cases.[64] However, where a client is opposed to his or her attorney's conception of the "public good," the scope of an attorney's ability to disagree is limited by the duty of loyalty the attorney owes the client.

Furthermore, any ethical rule that prevents lawyers from deferring to client preferences about their attorneys' identities may pose some ethical concerns. If such a rule is to be strictly followed, then practitioners might be forced to deny certain client requests, despite their discomfort with doing so. Take, for instance, a situation where a severely abused woman comes into a law firm and requests that she tell her story to a woman, with whom she would be better able to connect, and whom she is less likely to fear, given her recent victimization by a man. Certainly, it is reasonable and not reprehensible for a client to seek maximum comfort in relating her experience and to pursue a remedy in a context where she feels most open and understood. After all, the underpinnings of most attorney-client rules have to do with giving the clients reason to trust their attorneys and to provide information that would be useful in representing their legal interests. Arguably, a client's desire for a particular kind of attorney is not unlike a woman preferring a female physician or a man preferring a male physician.

But how do you distinguish between such a "preference," and the type of preference that a white businessman might express in requesting to speak to another white attorney who would "just better understand where he is coming from?" Or a preference of a man, accused of

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64. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation,* 85 YALE L.J. 1060, 1084-85 (1976) ("Therefore, my general notion is that a lawyer is morally entitled to act in this formal, representative way even if the result is an injustice, because the legal system which authorizes both the injustice (*e.g.*, the result following the plea of the statute of limitations) and the formal gesture for working it insulates him from personal moral responsibility. I would distinguish between the lawyer's own wrong and the wrong of the system used to advantage by the client. The clearest case is a lawyer who calls to the attention of the court a controlling legal precedent or statute which establishes his client's position even though that position is an unjust one."); *id.* at 1066 ("[I]t is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client's interests—that it is right that a professional put the interests of his client above some idea, however valid, of the collective interest.").

soliciting a prostitute, to speak with another man, for similar reasons? Or even a preference by a xenophobic client who simply does not trust a foreigner and wants a local attorney? Thus, any resolution to the dilemma requires answering whether or not there should be a bright-line rule or a case-by-case analysis of when to allow a client to dictate attorney hiring decisions.

A bright-line rule is needed to make clear that identity staffing based on race, gender, religion, and other cognizable traits is "prejudicial to the administration of justice" as proscribed by Model Rule 8.4.[65] Lawyers are officers of the court,[66] and while the "public good" should not always impede their obligation of zealous advocacy, the anti-discrimination principle residing in the Fourteenth Amendment rises to the level of justifying regulation.

VI. PROPOSAL FOR ETHICAL REGULATION

Surprisingly little has been written on the specific question of a law firm's ethical obligations concerning the use of lawyers' identity attributes as litigation weapons.[67] The need for regulation in this area is created by the basic economic tenets of supply and demand. Were the taste for discrimination entirely at the employer level, economic theory suggests that the discriminating firms would be forced to exit from the market.[68] Regrettably, economic theory has also demonstrated that where

65. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2002).

66. *See, e.g.*, Theard v. U.S., 354 U.S. 278, 281 (1957) ("The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."); Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39 (1989). Further, lawyers are asked to take an oath of allegiance to the U.S. Constitution. *See, e.g.*, Lawyer's Oath, http://www.lascba.org/lawyers_oath.asp (last visited February 17, 2009) ("I solemnly swear (or affirm) I will support the Constitution of the United States and the Constitution of the State of Louisiana.").

67. The closest analog to this ethical question is whether or not law firms can choose to avoid taking clients for discriminatory reasons. Historically, a lawyer's right to decline cases was unfettered. However, that trend has changed in light of various changes to the law, including the model rules adopted in states pertaining to anti-discrimination in legal practice. *See* Robert T. Begg, *Revoking the Lawyer's License to Discriminate in New York: The Demise of A Traditional Professional Perogative*, 7 GEO. J. LEGAL ETHICS 275. *See also* David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1507 (1998) (arguing "that black lawyers must negotiate three 'semi-autonomous' and, ultimately, 'secondary' moral realms: the 'professional,' representing the legitimate moral demands emanating from the norms and practices of the legal profession; the 'obligation thesis,' representing the legitimate moral claims emanating from a black lawyer's membership in the black community; and the 'personal,' representing the unique desires and commitments that black lawyers have in virtue of their basic humanity").

68. *See* Peter A. Riach & Judith Rich, *An Investigation of Gender Discrimination in Labor Hiring*, 21 E. ECON. J. 343, 351 (1995) ("The proposition that discrimination can be analyzed as a 'taste' possessed by various individuals, which they indulge at some economic cost, was proposed by Becker [1957]. Employers are analyzed as being prepared to pay a wage premium to the preferred group of workers, in order to avoid labor market contact with the group to whom they are averse. Alternatively, customers pay a higher price to indulge their taste of containing product market contact to the preferred group. In this approach employers are no longer strict profit maximizers, as

the discrimination is client-based, the firm that caters to those clients will be the richer for it.[69] Because the prejudices in the proposed dilemma are external to the firm—the dilemma assumes that the bias resides either with the client or with the prospective jury, and not with the firm's members—there is a market "failure" in an ethical sense, requiring intervention.

Fortunately, where states have allowed,[70] the market for legal services is regulated by the rules of ethical conduct as spelled out in the Model Code and Model Rules. Thus, to the extent that these rules are being followed, firms should be able to coordinate their efforts and avoid the prisoner's dilemma that results when use of attorney identity as a litigation strategy is allowed, but precluded by ethical considerations.[71] Ethics guidelines will be able to ensure that no firm loses business by acceding to the discriminatory preferences of a client or by refusing to exploit the biases of a prospective jury. Thus, the regulation of lawyers stands to play a particularly relevant role in making anti-discrimination practices workable for all firms.

For most of the history of the Model Rules, there was no rule proscribing discrimination on the basis of "race, creed, color, gender, religion, age, national origin, disability, sexual orientation or marital status."[72] The original Model Rule 8.4 contained a provision stating, "It is professional misconduct for a lawyer to: . . . engage in conduct that is

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avoidance of the psychic cost of contact with the 'wrong' race, gender, etc. takes precedence over increasing profits. If employer tastes are heterogeneous there is an obvious competitive advantage to those without discriminatory tastes, and therefore the process of economic Darwinian evolution should ensure the long-run elimination of labor market discrimination.").

69. *See id.* at 352 ("Where consumers display discriminatory tastes, there will be a transmission to the labor market, with employers merely acting as agents. Such an expression of discriminatory tastes would manifest itself in a failure of employers to hire members of the 'wrong' race, gender, etc. in those jobs in which worker-customer contact occurred."); *see also* Lawrence M. Kahn, *Customer Discrimination and Affirmative Action*, 29 ECON. INQUIRY 555 (1991) (showing that under constant returns to scale and free entry, customer discrimination, unlike employer or employee discrimination, can cause long-run wage differentials). For a creative proposal to increase diversity in law firms by imposing duties on clients, see David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855 (1998). *But see* Carrie Menkel-Meadow, *Toward a Theory of Reciprocal Responsibility Between Clients and Lawyers: A Comment on David Wilkins'* Do Clients Have Ethical Obligations To Lawyers? Some Lessons From the Diversity Wars, 11 GEO. J. LEGAL ETHICS 901 (1998).

70. As of 2009, all states except California had adopted the Model Rules of Professional Conduct. *See* American Bar Association, Model Rules of Professional Conduct Dates of Adoption, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Apr. 15, 2009).

71. The prisoner's dilemma is like that of a restaurateur who will not hire black waitresses claiming clients will boycott the restaurant. The accuracy of the claim depends on what other restaurants do. If, for example, other restaurants do use race, gender, and other such criteria to determine which employees to hire, then a restaurant that avoids catering to the predicted consumer demand will lose business and have to exit the market. However, if all restaurants are equal opportunity employers, then consumers with discriminatory preferences will be out of luck. Of course, the temptation for any restaurant to profit by catering to the biased tastes is very strong. Thus, the law governing employment discrimination helps align the incentives of employers in a way that coordinates refusal to cater to a customer's discriminatory preferences.

72. *See* Susan D. Gilbert & Michael P. Allen, *Overcoming Discrimination in the Legal Profession: Should the* Model Rules *Be Changed?*, 6 GEO. J. LEGAL ETHICS 933, 934 (1993) (calling for a Model Rule proscribing such discrimination).

prejudicial to the administration of justice," but there was no elaboration as to what constituted such prejudicial conduct.[73] By 1998, many states had supplemented the language in Rule 8.4 to more specifically prohibit discrimination of legal employment or practice.[74] Then, in August 1998, the ABA House of Delegates added a new Comment to Rule 8.4 explaining that, "A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice."[75] Certainly, any identity-based litigation strategy would be the sort of "conduct" that manifested bias and prejudice. Thus, this rule would cover the conduct discussed in this Note, were there not the caveat that "[l]egitimate advocacy respecting the foregoing factors does not violate paragraph (d)."[76] While a rule rendering it unethical to discriminate already exists, it does not go far enough to reach the conduct discussed in this Note. Unless a rule more clearly indicates that identity-based litigation is outside the bounds of "legitimate advocacy," it is not apparent that law firms will be held to the standard of conduct that is ideal.[77]

The ideal standard of conduct is not readily apparent. It is important that the rule is not so broad as to prioritize equal protection to the detriment of zealous advocacy. For example, one bright-line limitation

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73. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (1983).

74. *See* Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 781 n.4 (1996) (citing ethical rules from 16 states, each of which contained such a provision by 1998); *id.* at 836-39 (summarizing differences between these and other related rules); Brenda Jones Quick, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response to Discrimination on the Rise*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5 (1993) (suggesting revision to proposed New Jersey, California, and Michigan rules' construction so as to avoid constitutional problems).

75. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 2 (1998) (cmt. 3 in the 2002 version).

76. *Id.*

77. *See Id.* R. 8.4 cmt. 3. Andrew Taslitz and Sharon Styles-Anderson proposed a modification to Rule 8.4 to read as follows: "It is professional misconduct for a lawyer to: (1) commit, in the course of representing a client, any verbal or physical discriminatory act, on account of race, ethnicity, or gender, if intended to intimidate litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, or to gain a tactical advantage; or (2) engage, in the course of representing a client, in any continuing course of verbal or physical discriminatory conduct, on account of race, ethnicity or gender, in dealings with litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, if such conduct constitutes harassment." Taslitz & Styles-Anderson, *supra* note 75, at 785. This proposed modification to Model Rule 8.4 would certainly come closer to combating the identity-based litigation strategy, specifically because of the language "to gain a tactical advantage." *Id.* Yet the authors explain the scope of their proposal as one that "largely bars racial, ethnic or gender discrimination to harass or intentionally intimidate others." *Id.* at 799. Taslitz and Styles-Anderson primarily focus on ways in which individuals with racial, ethnic, or gender identity baggage may be targeted by lawyers that use harassment as a method of advocacy. For example, the authors cite examples where female lawyers were victims of overtly insulting behavior, demeaning sexual innuendo, verbal condescension, non-verbal condescension or rejection, or unequal treatment, among other tactics used by lawyers seeking to discredit the female attorneys in the eyes of the court. *Id.* at 788-89. Though it is a form of identity-based litigation strategy, such behavior is not the focus of this Note. Thus, a more narrowly tailored rule to the particular problems raised by firms making staff decisions would be appropriate.

on any proposed rule may be that the attorney-client relationship is not a place for attorney affirmative action to take place. Even accepting the proposition that an attorney's attributes should not be a *bar* to representation, a firm's concern for social equality should not make those attributes a *boon*. Much as a firm might be concerned that the remnant of occupational segregation persists, a client should not have to be represented by an attorney whose identity might be a liability just to further the integration of the bar nationally. Were the firms to adopt this anti-classification (in lieu of an anti-subordination) principle in their employment decisions, they would strike a fair balance between equal opportunity objectives and the needs of any particular client. Thereby, a firm would not be complicit in perpetuating the invidious hatreds that have plagued the history of the U.S. since its founding, but would not be actively endangering the needs of a particular client.

What might such a rule look like? Should it be phrased in the form of a duty, perhaps as an addendum to Model Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers, that such parties must not allow stereotypical attitudes about cultural perceptions of the worth or abilities of other attorneys to influence their case staffing decisions?[78] Or should it be an exception to the rules on fiduciary duties, allowing attorneys to defend against malpractice or ineffective assistance of counsel suits? Such an approach could be carried out through an addendum to Model Rule 1.2 Scope of Representation that might prescribe, "A lawyer shall abide by a client's decisions concerning the objectives of representation, but is not obligated to consider or appeal to the perceived biases of prospective decision makers, even if doing so may be in the best interests of his or her client."[79] Or should it be an elaboration to Model Rule 8.4, specifically articulating that identity-based staffing is a form of discrimination prohibited by the rule?[80] Admittedly, both the strong form and weak form of the rule are wrought with difficulties. Imposing a strong duty on firms may result in the punishment of well-meaning attorneys who are sincerely torn about how to comply with the rule. Which aspects of an attorney's background *would* they be allowed to consider in staffing decisions? Similarly, making the rule optional will not overcome the prisoner's dilemma described above; profit-maximizing firms will likely want to cater to their clients' preferences if ethical rules permit.[81]

Additionally, *any* version of a possible Model Rule might fall victim to the same non-compliance that other employment discrimination

78. MODEL RULES OF PROF'L CONDUCT R. 5.1 (2002).

79. *Id.* R. 1.2.

80. *Id.* R. 8.4.

81. The fact that rules conflict among jurisdictions might seem particularly problematic for this proposed rule. The variation might motivate firms to operate in jurisdictions that do not have the proposed rule. Of course, if the firm will go to all the trouble of forum shopping, it might just have sought to get a change of venue once it became apparent that prejudice might exist against the identity-baggaged attorney.

legislation has. Other attributes may come to stand as proxies for the immutable characteristics that the Model Rule proposals are seeking to protect. The identity-baggaged attorneys of the world may simply be told, "We are not looking for a New Yorker," when such a statement really means, "We are not looking for Jews." It is not enough that judges have long rejected attorneys' in-court appeals to regional biases of juries. Such behavior is "so plainly repugnant that the Supreme Court long ago stated their condemnation 'required no comment.'"[82] If firms so chose, they could make it very hard to prove that any such discrimination against their employees was taking place.

Nevertheless, despite the challenges of administering any version of such a rule, there are model examples of how such a rule might operate. The selective staffing in the proposed dilemma can be treated as similar to the situation in which "a litigant selects a lawyer to represent him knowing that the lawyer is a relative of the trial judge and intending the presence of the lawyer to force the trial judge to recuse himself . . . ."[83] In *McCuin v. Texas Power & Light Co.*, the Fifth Circuit acknowledged that while "a litigant's motives for selecting a lawyer are not ordinarily subject to judicial scrutiny," this is not without exception.[84] The principle guiding when the client's right to counsel of choice should be subject to review is if "tolerat[ing] such gamesmanship would tarnish the concept of impartial justice. To permit a litigant to blackball a judge merely by invoking a talismanic 'right to counsel of my choice' would contribute to skepticism about and mistrust of our judicial system."[85] The analogy between *McCuin* and the dilemma presented here is even more compelling because in both scenarios, the staffing decision is based solely on an attorney's immutable characteristic—people cannot change who they are related to. What could contribute more to skepticism about the administration of justice than permitting behavior that suggests the racial, gender, or religious identity of an attorney could yield different legal outcomes for clients? Accordingly, the type of strategic gamesmanship discussed in this Note could also be deemed to "tarnish the concept of impartial justice" and warrant limitations placed on rights to counsel of choice.

Such a rule would be in keeping with the recent trend to relax the Brougham-like duties of loyalty that attorneys are supposed to have for their client's best interest. For example, D-R 7-101(A)(1) in Canon 7 of the Code states, "A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law . . . ." But in the same Canon, the lawyer's duty of

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82. Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534, 539 (2d Cir. 1992) (citing N.Y. Cent. R.R. Co. v. Johnson, 279 U.S. 310, 319 (1929)).

83. GILLERS, *supra* note 2, at 521.

84. 714 F.2d 1255, 1265 (5th Cir. 1983).

85. *Id. See also* Grievance Adm'r v. Fried, 570 N.W.2d 262 (Mich. 1997) (holding that counsel participating in a case for the sole purpose of obtaining judicial recusal is grounds for discipline).

zealous representation "does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."[86] Additionally, "The Model Code . . . no longer provides the basis for professional discipline in most states, and its replacement, the Model Rules of Professional Conduct, is considerably more tepid on the Brougham issue."[87] Specifically, the Model Rules weaken the zealous advocacy duty by stating, "A lawyer is not bound . . . to press for every advantage that might be realized for a client. . . . [A] lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued."[88] This statement is a far cry from Brougham's portrayal of an attorney who, in performing his duty, "must not regard the alarm, the torments, the destruction which he may bring upon others."[89]

But just because there is room in the rules for a workable prohibition on identity-based legal strategy, it does not necessarily follow that the legal profession should endorse such a rule. No doubt the identity-baggaged attorney provides one of the strongest cases of two fundamental values—almost postulates—in the criminal justice system pitted against each other. Even advocates who would stretch the rules regarding perjury[90] or real evidence[91] to avoid hurting their clients' cases would be uncomfortable privileging their clients when it means systematically excluding their fellow colleagues from the legitimate practice of law. Just as we would not want attorneys to discriminate against their clients, neither do we want the reverse scenario. For example, a respected attorney, Judith Nathanson, was fined by the Massachusetts Commission Against Discrimination for limiting her practice to the representation of women in matrimonial matters.[92] In

86. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-10 (1980).

87. Alschuler, *supra* note 39, at 294.

88. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002).

89. 2 THE TRIAL OF QUEEN CAROLINE, *supra* note 3, at 8.

90. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002) ("A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.").

91. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A) (1980) ("In his representation of a client, a lawyer shall not: . . . (3) Conceal or knowingly fail to disclose that which he is required by law to reveal. (4) Knowingly use perjured testimony or false evidence. (5) Knowingly make a false statement of law or fact. (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false. (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.").

92. Stropnicky v. Nathanson, No. 91-BPA-0061, 1999 WL 33453078 *3-4 (July 26, 1999) ("The evidence was that Respondent rejected Complainant solely on the basis of sex . . . . [Respondent] is a lawyer who offered her services to the public. The distinction between Respondent's provision of a service to the public and her desire as a private person to express herself politically must be drawn and maintained lest a consuming exception be created in the anti-discrimination law. Lawyers play a unique role in our society, and have been permitted a liberal measure of self-regulation. Yet, there is no reason to exempt lawyers generally, or Respondent in particular, from the laws that govern the

defense, Nathanson referred to her fiduciary duty of zealous advocacy, which she argued she could provide far better for women than for men. She was fined based on the theory that the law firm, even when private, is a place for public accommodation. The ruling suggests that the law firm has a duty to honor the equal protection principles established by Supreme Court rulings throughout the Twentieth Century.

The conversation with the client who does not get the lawyer of his or her choice will not be an easy one.[93] Yet employers of this country have long had to have this type of conversation with individuals who have sought to avoid the services of certain "types" of people. The firm can make convincing arguments about why the identity-baggaged attorneys in the firm will make effective advocates and how juries might entirely ignore their identity. Additionally, having an ethical rule to reference when explaining its professional obligation will bolster the firms' credibility to disgruntled clients. Ultimately, however, if all lawyers subscribe to the ethical rule, clients will have no place to register their discriminatory preferences. There is even the hope that widespread subscription to the ethical rule will reduce juror bias: eliminating the systematic exclusion of certain types of attorneys from practicing in certain jurisdictions may have the effect of eradicating stereotypes.[94]

VII. THE DILEMMA IN THE PUBLIC SECTOR

Context might affect the reach of any proposed rule. Thus far, this Note has only discussed a private firm's duties toward a client. An evaluation of the conflict between equal protection principles and fiduciary duty principles, however, would be incomplete without transporting the dilemma to the public sphere. Would the ethics of the question be any different if it were not a private firm, but rather a district attorney or a public defender who wanted to use discriminatory tactics in litigation? One answer is that because of the state actor requirement of the Fourteenth Amendment's Equal Protection Clause, such

rest of society, including the anti-discrimination statutes.").

93. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1980) ("In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. . . . In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."); *see also* Nilsen, *supra* note 6, at 22-23 ("Another commentator has proposed that lawyers engage in dialogues with clients over morally troubling issues. . . . The primary concerns of most criminal clients are to win at trial and to stay out of jail. It is the lawyer's job to try her best to achieve those goals. A bias laden tactic that troubled the lawyer would not necessarily trouble the client. Could the lawyer forego the arguably winning but objectionable tactic and simply not mention it to the client? Probably not.") (footnotes omitted).

94. *See* Thomas F. Pettigrew & Linda R. Tropp, *Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings*, *in* REDUCING PREJUDICE AND DISCRIMINATION 93, 110 (Stuart Oskamp ed., 2000) ("These meta-analytic data support the contention that optimal intergroup contact should be a critical component of any successful effort to reduce prejudice.").

discrimination would not only be unethical, but unconstitutional.[95] There is something very troubling about allowing the federal and state governments to be complicit in perpetuating prejudices that have divided our nation—even more troubling than when private firms behave in this way. However, the counterargument can also be made that the strength of the fiduciary duty a public defender or district attorney owes a client is even stronger than that of a private firm acting on behalf of a client who can choose from an array of attorneys. Is it fair to assume that what is ethical in one sphere would be ethical in the other? Is it possible for anti-discrimination concerns to be stronger in the public sphere than the private sphere, not only for legal reasons but also for ethical and historical ones?

Ultimately, this Note argues that in neither sphere should an attorney be fired based solely on race, gender, religion, sexuality, or historically discriminated-against identity attributes. The ethical rule should be the same in both spheres—a bright-line ethical rule precluding any use of an attorney's identity as a reason to fire or not hire him or her for a particular case. How workable would any such proposed rule be? To the extent that we have a history of allowing clients to set goals and attorneys to set strategies in litigating cases, it is a workable rule to suggest that attorneys will not comply with clients' biased preferences.

VIII. CONCLUSION

Admittedly, there is no dispositive reason why equal protection should trump fiduciary duty. Brougham would argue that it should not, as he sees "the duty of a patriot" as separate from "that of an advocate."[96] The latter "must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."[97] But there is a strong argument for why it is critical for law firms to honor the anti-discrimination commitment of the U.S. Constitution. The American bar, with all that it represents, is the one group that should value above all else the inherent worth of an individual. That is the goal that lawyers have championed through landmark civil rights litigation for over a century.

The question of why lawyers should be held to a different standard than other professionals, such as doctors, architects, or professors, is difficult but not without answer. It is true that clients can choose who styles their hair, who designs their houses, and who operates on their hearts. We have an economy based on freedom of choice. But the legal profession itself sets law apart from other professions in the preamble to

95. *See* The Civil Rights Cases, 109 U.S. 3 (1883).
96. 2 TRIAL OF QUEEN CAROLINE, *supra* note 3, at 8.
97. *Id.*

the Model Rules, explaining that:

> Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.[98]

Thus legal professionals, as agents of the courts, have "special responsibilities" to assure that their practices "are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."[99] In fact, the Model Rules of Professional Conduct explicitly seek to define the relationship between the lawyer and the legal system, and enable lawyers to "play a vital role in the preservation of society."[100] Doctors undoubtedly play a role in preserving society *members*, but lawyers are uniquely charged with preserving society as a system. It is not that lawyers must balance their duty to their clients against the public good, but as preservers of the Constitution, it is only ethical that their behavior does not undermine the bedrock of the founding document of their profession.

When Oliver Wendell Holmes declared that "the life of the law has not been logic: it has been experience," he captured best the reason underlying my support for an anti-bias provision in the ethical codes governing lawyers.[101] When Holmes explained, "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics," he called upon us to recognize the United States' unique history in determining our future.[102] When a lawyer takes an oath to honor the Constitution of the United States, there is a greater commitment being made than a blind obedience to the will of a client. An ethical rule prohibiting firms from making staffing decisions based on attorneys' identity baggage is a welcome step in recognizing that commitment.

98. MODEL RULES OF PROF'L CONDUCT, Preamble ¶ 10 (2002).
99. *Id.* ¶ 12.
100. *Id.* ¶ 13.
101. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).
102. *Id.*