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PAINTING BY NUMBERS: “AND, UM, LET’S HAVE A BLACK LAWYER SIT AT OUR TABLE”¹

*J. Cunyon Gordon**

INTRODUCTION

No one can deny that law and lawyers occupy a large space in the nation’s psyche. The public perception of lawyers directly affects the public perception of the fairness of the law and the justice it purports to dispense.² Because the public may see lawyers as the “guarantor[s] of our national integrity,”³ disrespect for and mistrust of lawyers translates into questioning the fairness and legitimacy of courts, court decisions and the rule of law.⁴ Law and legal process have changed monumentally in the last twenty-five years. Many accuse the United States Supreme Court of aligning along ideological lines and making decisions based on the prevailing politics; twenty-five years ago, law was not offered up as entertainment the way it is today. Nor did so many lawyers and judges find themselves at the heart of scandals involving compromise of their ethics.⁵ Those tempting subjects notwithstanding, the change in the profession I find most intriguing is that the profession looks different—physically—than it did twenty-five years ago. It is not all white anymore, and it is not so

* The author earned her J.D. at Yale University in 1981, served an honorable stint in the United States Navy as a JAG officer between 1981 and 1987, after which she joined Jenner & Block, now a 300-lawyer firm headquartered in Chicago, Illinois. She was elevated to partnership in 1991, the first black woman in the firm’s seventy-year history to become partner. Since 1998, she has visited as a law professor at the law schools of Boston University, Boston College, Seattle University, and the University of Oregon.

1. *The Verdict* (MGM 1982).

2. Paragraph 12 of the Preamble to the American Bar Association’s Model Rules of Professional Conduct posits that “[l]awyers play a vital role in the preservation of society.” Model Rules of Prof’l Conduct pmbl. (1999). Now is not the time for recriminations.

3. Stephen L. Carter, *Integrity* 107 (1996).

4. The media spectacle that was the trial of *People v. Orenthal James (O.J.) Simpson*, No. BA097211, 1995 WL 704381 (Cal. Super. Ct. Oct. 3, 1995) is only one such example.

5. See, e.g., James Tuohy & Rob Warden, *Greyford: Justice, Chicago Style* (1989) (describing the history and aftermath of a sting operation known as “Operation Greyford,” which exposed widespread corruption of attorneys and judges in the courts of Cook County, Illinois).

overwhelmingly male. Women in large numbers and people of color in lesser force have infiltrated this domain that once was the exclusive province of white male aristocrats.⁶

The result looks something like a boa swallowing a calf; small, tasty bits find themselves palatable and wend their way without effort, while irregular lumps refuse to go down easily, leaving an uncomfortable distended belly full of gas. The overall numerical gains for minorities and women have been nothing short of astounding in law school admissions, government, academics, private practice and even the judiciary. The segment of the profession that seems to have the greatest resistance to the waves of change, however, is the nation's elite law firms. These decades-old, wealthy and powerful institutions lag behind a profession that already lagged behind the rest of society in integrating and fully accepting women and lawyers of color. Black attorneys in particular seem to cause the greatest heartburn to the old boy network.⁷ Many large law firms have attempted to integrate in fits and starts, yet they have failed for the most part. By the late 1980s and early 1990s, when black attorneys were graduating in respectable numbers from the same top schools and competing with whites for these prized positions, I started to notice in horror the revolving doors through which lawyers of color were spinning into and out of law firms. I turned to my usual sounding board, my Dad's now late brother, my Uncle Larry. I often engaged him in "highfalutin" conversations about the seemingly intractable barriers faced by black folk even, I would posit, those solidly in the middle class. Of course Larry would brook only so much "poor-mouthing" on behalf of college-educated black people, who earned annually what their

6. Women were once thought to be too fragile to cope with the rough-and-tumble nature of the courtroom. Their "paramount destiny and mission" were the roles of wife and mother. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring). Blacks had trickled into the legal profession ever since Reconstruction, and had earned law degrees from one of the dozen or so black law schools or one of the law schools in the North that admitted blacks. The profession as a whole was still hostile to blacks and made both education and practice very difficult for them. Many people who celebrate the newly diverse legal profession also wonder what effect these new entrants will have on the profession and the perception of it by the public. See Marilyn J. Berger & Kari A. Robinson, *Woman's Ghetto Within the Legal Profession*, 8 Wis. Women's L.J. 71, 73 (1993) (contending that the legal profession has not moved significantly from the patriarchal notions that guided the Supreme Court more than a century ago); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 Va. J. Soc. Pol'y & L. 75 (1994).

7. The National Association for Law Placement ("NALP") counts lawyers of color at 3.55% of the partners in all firms, and about the same at firms with more than 100 lawyers. Associates of color represent 13.70% of all associates in firms that responded to the survey. See NALP, *Dearth of Women and Attorneys of Color Remains in Law Firms* (Dec. 3, 2001), at <http://www.nalp.org/press/minrwom01.htm>. Women at the same firms occupied 15.80% of the partnerships and 41.94% of the associate positions. *Id.* You can see that both groups follow a pyramid pattern, with dwindling representation in the upper ranks.

parents in some instances made in ten years.⁸ When I started my “woe is us” report whining, “Why aren’t there more black partners at White & Beige, or at Uptown & Midtown, LLP?” his rejoinder was, “Sis, it’s all about money, and ain’t a damn thing funny.”

In my uncle’s typically salty epigram lay more than a nugget of truth. Money lay behind some of the imbalance I bemoaned. The mantra most often recited to explain the lack of black partners in large law firms is “they can’t bring in the business.”⁹ Well, be careful what you ask for. Lately, the big law firms retained by the cream of the corporate crop have begun to encounter a push to racially integrate their ranks, coming not from the minority lawyers within but from without. From their corporate clients comes an extra impetus to integrate, or in the corporations’ words, “to diversify.” For good or ill,¹⁰ companies that are “managing” their own diversity are telling law firms that, as consumers of the firms’ legal services, they will consider a firm’s integration—okay, diversity—a factor in their decisions to retain outside counsel.¹¹ From Uncle Larry’s mouth to their ears: “It’s all about money, and ain’t a damn thing funny.”

8. I dared not try to convince my uncle that facing racial discrimination after you get the MBA from Harvard, or the J.D. from Stanford, can be equally if not more frustrating, leading to a feeling of being surrounded by a wall of gloom. See generally Ellis Cose, *The Rage of a Privileged Class* (1993), in which the author contends that America’s relatively prosperous “black middle class is [nonetheless] in excruciating pain.” *Id.* at 1. They are also “disaffiliated from society,” *Id.* at 11, and aware that “[a] white man with a million dollars is a millionaire, and a black man with a million dollars is a nigger with a million dollars.” *Id.* at 28 (quoting former New York City Mayor David Dinkins).

9. In most law firms, partners are responsible for bringing new clients to the firm. Large corporate clients often spend millions of dollars on outside counsel. The more income a partner derives from her clients, the larger her stake in the firm becomes. The ones who bring in the most revenue are called “rainmakers.” In 2000, the five largest revenue-producing firms in the country had revenues totaling nearly four and a half billion dollars. *The Am Law 100*, *Am. Law. Mag.*, July 2001, at 149 [hereinafter *Am Law 100*].

10. One could probably catalog the reasons a CEO might want to be seen as a diversity champion, ranging from self-interest—the company’s multicultural consumer base—to simple goodwill generated by knowing that a company cares about racial and ethnic diversity. Fortune Magazine annually lists the “50 Best Companies for Minorities” and smart CEOs want to be there. See, e.g., Jonathan Hickman, *America’s 50 Best Companies for Minorities*, *Fortune*, July 8, 2002, at 110. Ivan Seidenberg, CEO of Bell Atlantic, is proud of his company’s being there. See Geoffrey Colvin, *The 50 Best Companies for Asians, Blacks, & Hispanics: Companies that Pursue Diversity Outperform the S&P 500. Coincidence?*, *Fortune*, July 19, 1999, at 52. For the rationales regarding the targeting of ethnic markets offered to the telecommunications industry, see Global Information, Inc., *Executive Summary: Telecom Marketing Opportunities to Ethnic Groups: Segmenting Consumer Markets by Ethnicity, Age, Income and Household Buying Patterns* (Jan. 1999), at http://www.gii.co.jp/english/ir3227_telecom_marketing_ethnic_summary.html.

11. In 1998, Charles R. Morgan, general counsel of BellSouth, formed an eleven-member diversity committee to recommend ways the company could increase its commitment to diversity. They came up with a letter entitled “Diversity in the Workplace: A Statement of Principles,” which Morgan sent to the firms that

This outside agitation for law firm integration has many implications.¹² One question it raises is whether corporate clients have an obligation to police *any* of the behavior of outside counsel.¹³ Obligations aside, some 500 corporations have signed a pledge to make the racial and ethnic makeup of their outside counsel their business.¹⁴ Therefore, in this essay I take these initiatives as *fait accompli*. What intrigues me is whether well-meaning corporations that resort to motivational tactics aimed at law firm self-interest will or can accomplish long-term and long-lasting good, that is, true integration at the upper levels of the target firms. If these pressured firms define the self-interest to which their clients' integration arrow is aimed too narrowly, that is, to mean simply more dollars in the credit column on the balance sheet, they may superficially integrate. Some will undoubtedly adopt crassly instrumentalist responses to the clients' requests. Such responses—tokenism, “mascoting”¹⁵ 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

represent BellSouth in its legal matters. See Minority Corporate Counsel Association, *General Counsel Deliver Diversity Message to Law Firms*, at <http://www.mcca.com/site/data/magazine/coverstory/BellSouth.htm> (last visited Jan. 15, 2003). Morgan also circulated the Statement of Principles to other corporate leaders, and in short order had sixty-five signatories, which are recorded in the text of the pledge at the American Corporate Counsel Association. *Id.* The Statement now has more than 500 signatories. For the text of the Statement, see *infra* note 130. Professor David Wilkins describes its evolution, and makes the case for the ethical responsibility of corporate law firm clients to exercise such authority. David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons From the Diversity Wars*, 11 *Geo. J. Legal Ethics* 855 (1998).

12. Wilkins, *supra* note 11, at 862-64. At that time, Wilkins was offering a theoretical framework to understand the initiatives by bar associations to enlist corporations in the diversity battle. The goal was for the corporations to then encourage their outside law firms to integrate. Wilkins was not, as I am now, addressing what the clients would do after they boarded the integration bandwagon. In fact, Wilkins raises some issues that are addressed here, *infra* Part IV.B, regarding the possible exploitative conduct the firms can engage in to meet the external diversity push. See Wilkins, *supra* note 11, at 862-64.

13. Addressing the issue of corporate clients urging diversity in their outside counsel firms, one commentator asks whether interfering in the diversity of their outside law firms might be just the beginning of a trend toward even more incursion into the life of the firms, and an enhancement of the already extensive power these corporate clients wield. 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, 902 (1998).

14. Peter M. Phillippe, *Small Law Departments Can Achieve Sustainable Diversity*, 119 *ACCA Docket* 41, 59 (2001); see also *ACCA Responds to President Clinton's Call to Action on Racial Equity and Pro Bono Services*, at <http://www.acca.com/gcadvocat/calltoaction/index.html> (last visited Jan. 15, 2003) [hereinafter *Call To Action*].

15. See *infra* Part IV.B for a definition.

by numbers” and create an authentic-looking multicultural still life that belies the lack of true integration within their walls?

This essay is styled as a conversation on an issue that troubles me constantly, and I wish to develop it further.¹⁶ Parts I and II discuss the importance of elite law firms and the reason their integration is important against the backdrop of the old integration paradigm, showing how the firms managed to escape the successful desegregation tactics of the civil rights era. Part III examines the new economics-driven diversity paradigm, in which changes on the demand side drive diversity initiatives in suppliers, and how this paradigm purports to remedy the sorry state of integration in the elite firms. Part IV illustrates some of the practices that could develop as a result of the initiatives, practices that might extract too great a price from the attorneys they are designed to help. The section concludes that too much emphasis on economics subordinates the arguments for the inherent, i.e., moral and ethical, value of integration and may result in mere diversity. Finally, the essay concludes that corporations willing to act as true change agents must embrace the moral and ethical value of integration and make it part of their efforts at law firm transformation.

I. WHY WE SHOULD CARE ABOUT INTEGRATING LARGE LAW FIRMS

At the outset, it may do well to identify some of the reasons we as a profession should even care about whether mega firms¹⁷ should be integrated. One need not look far to hear large law firms decried as sweat shops led by monsters and populated by greedy unethical associates. (Lest my interest in these firms be mistaken for an unpaid infomercial, I do not intend here to encourage anyone of any race to join them; apparently, no matter what is said about them, they are growing like crabgrass and showing no sign of demise). I spent four years as an associate and six as a partner in one of Chicago’s elite law firms, whose associates hailed from the “elite” and “prestige” law

16. I welcomed the opportunity to participate in this symposium because I have not seen this particular aspect of the fight for true integration in the profession addressed in this way. I am well aware of the scholarship about diversity and ethics in the profession, particularly that of Professor David Wilkins of Harvard, Professor Marc Galanter and Professor Carrie Menkel-Meadow. As a new academic, I have not absorbed all of it, and hope I do not do injustice to any of their fine and important work. I do not intentionally misrepresent any of their work, and hope that any inadvertent shadings are not material.

17. Mega firms are the huge law firms that have resulted from growth of merely large firms or from the mergers of smaller and mid-sized firms. They represent primarily corporate or business interests. Last year the number of lawyers at the top 100 firms in the nation grew to an average of 621 lawyers. The nation’s 100 highest-grossing law firms took in a combined total of more than \$35 billion last year. See *Am Law 100*, *supra* note 9, at 149-50.

schools,¹⁸ and whose partners' careers included service at the highest levels of the judiciary, the government and industry.¹⁹ I saw firsthand the influence the firm and its individual members wielded locally, nationally and globally, and the impact it had on politics, business, civil rights and the public. I also observed the number of black attorneys peak at nine in the 1980's, only to plummet back to one in 2000.²⁰ That firm's 2001 summer intern class, made up of members of the law school classes of 2003 and 2004, contained 101 students, only one of them black.²¹ That ratio bodes ill for the diversity of the partnership classes of 2011 and 2012. Veterans of these firms know that large law firms tend to eat their young of all hues and both sexes, and suffer high attrition.²² However, because black associates are more visible due to their rarity in these environments, and black partners even odder, their exodus is often remarked upon. The description of my former firm sounds extraordinary, but alas, it is but an archetype of like institutions both nation and worldwide. What is it about firms anyway?

The public is both fascinated and repulsed by the myth of law firms. The schizophrenia leads people to glorify them and their inhabitants

18. By one account, although there is room for debate, Chicago, Columbia, Harvard, Michigan, Stanford, and Yale are in the category of "elite" and Northwestern, Illinois, Georgetown, Wisconsin, Virginia, Pennsylvania, and New York University are in the category of "prestige" law schools. See John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* 10-11 (2d ed. 1994).

19. The firm's founder, Albert E. Jenner, Jr. may have been the archetype of the lawyer as public citizen. His incredible career included service as Chief Special Counsel to the House Judiciary Committee during the Nixon impeachment, membership on the National Commission on the Causes and Prevention of Violence and Senior Counsel to the [Chief Justice Earl] Warren Commission that investigated the assassination of President Kennedy. He was a founding member of the Lawyers Committee for Civil Rights Under Law and a strong advocate for pro bono work. He was among the few lawyers who dared face down the House Un-American Activities Committee during the McCarthy era, challenging HUAC's constitutionality. See Peter Hay, *Albert E. Jenner, Jr.: In Memoriam*, 4 U. Ill. L. Rev. 817, 817-18 (1988).

20. As of 2001, the firm had one Hispanic income partner, and ten minority associates: one black, three Hispanic and six Asian American. *Chicago Lawyer Diversity Survey*, Chi. Law., July 2001, at 14-15. Remember when I said in the Introduction that of all the racial minorities, blacks seem to be faring the worst in these elite firms?

21. The firm, Jenner & Block, had the largest 2001 summer class reported, reporting ninety white members, sixty-one men, twenty-nine women; no black men, one black woman; ten Asian Americans, six men and four women; and four Hispanics, two men and two women. Mark Schauerte, *Summer Associate Diversity Tops Other Groups at Firms*, Chi. Law., July 2002, at 7.

22. A 2000 study by NALP found that nearly 40% of associates leave by the end of their third year, and nearly 60% are gone by the end of their fifth year. NALP also found lower third-year attrition in law offices that offered alternative work schedules than in offices that did not. NALP Foundation for Law Career Research & Education, *Associate Attrition Rates Changed Minimally Since 1999—Departure Destinations And Law Firm Use of Retention Incentives Documented in Benchmark Study*, available at <http://www.nalp.org/press/bidwars.htm> (Sept. 20, 2000).

as attractive, sexy, important, powerful, and rich²³ and alternately vilify them as ruthless, unethical, and untrustworthy, the butt of many vicious (and often hilarious) jokes.²⁴ Whether held lofty or low, how the public views lawyers affects so much more than the immediate environs of any individual lawyer. Firms employ most of America's practicing lawyers;²⁵ the largest ones exerting a massive influence that is economically, politically²⁶ and culturally disproportionate to their numbers.²⁷ The clients of these mega-firms are the "repeat players" that Professor Marc Galanter says usually come out on top;²⁸ these are clients that use the courts frequently and spend considerable wealth financing complex litigation that makes it all the way to the significant federal appellate courts and to the Supreme Court.²⁹ These clients—The New York Times³⁰, Microsoft,³¹ Big Tobacco,³² Bush and

23. For a comprehensive catalog of movies made about law firms and lawyers see Paul Bergman & Michael Asimow, *Reel Justice: The Courtroom Goes to the Movies* (1996), which analyzes dozens of courtroom movies. In the last decade, prime-time network television shows featuring law firms have become as much a staple as cop and doctor shows. There is the inimitable "Law & Order" franchise, "Family Law," "The Practice" and "Judging Amy." Last year, when Fox Television's fictional lawyer Ally McBeal announced her final season, mainstream and entertainment magazines commented on the profession's loss.

24. In 1993, only one American in five considered lawyers to be "honest and ethical." See Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60-65; Chris Klein, *Poll: Lawyers Not Liked*, Nat'l L.J., Aug. 25, 1997, at A6.

25. In 1980, only 7% of lawyers practicing in firms did so in firms with more than ten lawyers. See *The Lawyer's Almanac* 81 (1984). That has changed drastically. As of 1995, 62% of all lawyers in the United States practicing privately did so in firms, as opposed to solo. See Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in 1995*, at 25 (1995).

26. Not only do the large law firms represent political parties or political figures, law firms and lawyers also contribute millions of dollars to political parties. In my old firm, some of the first "treats" to arrive in a new partner's inbox were memoranda from senior partners dunning the juniors for contributions to seniors' chosen political candidates. Two of the really funny memos from the year when two candidates named "Richard" were on the Illinois ballot are still in the author's possession.

27. Independent Counsel Kenneth Starr, who investigated President Bill Clinton, was a partner of the law firm of Kirkland & Ellis. Kirkland & Ellis was itself a named defendant in allegations involving the savings and loan scandal of the 1980s. *Mr. Starr's Conflicts*, N.Y. Times, Mar. 31, 1996, at E14. Kirkland & Ellis was accused of aiding and abetting its clients' fraud against the government. See Joe Conason & Murray Waas, *Troubled Whitewater*, The Nation, Mar. 18, 1996, at 13.

28. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95, 97-103 (1974) [hereinafter Galanter, *The Haves*].

29. *Id.*

30. I refer to *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), a landmark First Amendment freedom of the press case.

31. This would be *United States v. Microsoft*, 530 U.S. 1301 (2000), in which Justice Rehnquist considered recusing himself because his son's law firm of Goodwin, Procter & Hoar, represented Microsoft in other antitrust litigation. See Tony Mauro, *Rehnquist Won't Bow Out: Refusal to Recuse in Microsoft*, Legal Times, Oct. 2, 2000, at 12.

32. The plaintiffs' lawyers get the splashy headlines, and they too sometimes come

Gore³³—hire the so-called “big gun” law firms as their attorneys, and together shape large swaths of the law and thus significant aspects of our everyday existence. The money changing hands alone boggles the mind. Many clients’ boards of directors include one or more of the major partners of their outside counsel.³⁴ These partners are very often key players in designing and activating the institutional mechanisms through which property is transferred, economic exchange is planned and enforced, injuries are compensated, crime is punished, contracts are dissolved, and disputes are resolved. They thereby affect decisions about markets, rights, responsibilities, wealth, education and the like not only through the structure of deals or litigation strategies, but often through direct input to company policies.

The public perception of large firms is fed heavy doses of hype by the Hollywood myth-making machine, which “heroicize[s] the plaintiff’s bar,”³⁵ while showing big firms more often representing the bad guys than the good.³⁶ Wherever the truth lies, bright graduates of the best law schools consider an offer from one of these firms to be a real coup.³⁷ Once situated, top-performing associates hope that with

from firms, but the money spent is nothing like what Big Tobacco spends on their outside firms to defend these enormous class actions. In some cases brought by classes or individuals, Brown & Williamson has been represented by Kenneth N. Bass of Kirkland & Ellis in Washington, D.C.; R.J. Reynolds has been represented by Robert F. McDermott Jr. and Paul S. Ryerson of Jones, Day, Reavis & Pogue in Washington, D.C.; Lorillard is represented by David L. Ross of Greenberg Traurig in Miami. See *Fla. Appeals Court Tosses Venezuela’s Health Costs Suit*, Tobacco Industry Litig. Rep., Oct. 4, 2002, at 6. Say what you want about smoking, the theories urged and countered in the tobacco lawsuits will have lasting impact on the responsibility of manufacturers to the people who buy their products.

33. *Bush v. Gore*, 531 U.S. 98 (2000). In the days following the 2000 presidential election, the “big boys” scrambled for some of the litigation action. The pace was frenetic, the stakes obviously high, and the major lawyer-players were all white and mostly men, a fact that drew sharp criticism. See Deborah L. Rhode & Charisse R. Lillie, *When Diversity Dropped Off the Agenda*, Chi. Trib., Jan. 17, 2001, at 6 (discussing how the century’s arguably most important case did not have a woman’s voice).

34. See Craig C. Albert, *The Lawyer-Director: An Oxymoron?*, 9 Geo. J. Legal Ethics 413, 415 n.2 (1996) (citing a 1992 study in which 17.5% of outside counsel were found to be serving on the board of directors of a corporate client) (citation omitted).

35. Richard H. Weisberg, “*The Verdict*” Is In: *The Civic Implications of Civil Trials*, 50 DePaul L. Rev. 525, 525 (2000).

36. In the litigation that arose from the poisoning of the community of Woburn, Massachusetts, immortalized by Jonathan Harr in *A Civil Action*, the alleged polluters, Beatrice Foods and W. R. Grace, were represented by two of Boston’s old line white shoe firms, the former by Hale and Dorr and the latter by Foley, Hoag & Elliott. According to the book, the plaintiffs’ lead counsel was from a small law firm that nearly bankrupted itself to sustain the litigation that it so believed in. See Jonathan Harr, *A Civil Action* 6 (1995).

37. Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 Geo. J. Legal Ethics 367, 386 (1996); see also *Pay for Class of ‘97 Is \$63K, But Money Isn’t the Only Issue*, L. Off. Mgmt. & Admin. Rep., Feb. 1998, at 2 [hereinafter *Pay for Class of ‘97*] (asserting that receiving an offer from a large law firm is “the feather

hard—maybe brutalizing—work and perseverance (and no small amount of sucking up) they will succeed to the partnership throne. From there they can have as clients the next generation of corporate titans, and they too will engage daily in work that will shape the very texture of everyday life.³⁸ They want to run with the big dogs. Oh yea, and they want to earn obscene amounts of money in the process.³⁹

You have to admit that all of this sounds tempting. Like their white classmates, many minority graduates of the best law schools succumb to cultural imperatives and also want to affect markets and mores, and breathe the rarefied air in these towers of power. Oh yea, and they want to earn obscene amounts of money in the process.⁴⁰ These folk do not want to be like Michael Jordan, they want to be like Vernon Jordan.⁴¹ And with good reason. Partnership in a prestige law firm

that most [students] want to add to their caps”).

38. Some believe that one reason for the magnetism of the elite firms is that students don't really know very much about the governance, culture and priorities of such places. See David B. Wilkins & G. Mitu Gulati, *What Law Students Think They Know About Elite Law Firms: Preliminary Results of a Survey of Third Year Law Students*, 69 U. Cin. L. Rev. 1213, 1214 (2001).

39. The raw figures of associate salaries make the case very strongly. The NALP 2001 Associate Salary Survey reported as follows:

The median salary for first-year associates ranged from \$60,000 in firms of 2-25 attorneys to \$115,000 in firms of 500 attorneys or more, with a first-year median for all participating firms of \$95,000. [As compared to 12 months ago], first-year salaries have remained stable in firms of 251 or more attorneys, with a median of just over \$110,000 In some major cities, such as Los Angeles, New York City, and the Silicon Valley area, the prevailing salary [was] \$125,000 As expected, each year of associate experience brings several thousand dollars in increased compensation: median salaries for eighth-year associates ranged from \$90,000 in small firms to \$175,000 in the largest firms, with a median for all participating firms of \$130,000.

Entry-Level Associate Salaries Remain Stable in Large Firms, NALP Survey Details Private Practice Compensation Ranges, available at <http://nalp.org/press/asr01.htm> (Aug. 24, 2001). To put those numbers in startling perspective, consider that one of the reasons cited by federal judges in defending a judiciary wage increase was that many of them earn less than associates in the firms that appear before them. See Paul C. Light, *Democracy on the Cheap*, Gov't Executive, available at <http://www.brook.edu/views/op-ed/light/20020601.htm> (June 1, 2002).

40. When you consider that minority attorneys make up around 13% of these associates, see NALP, *Women and Attorneys of Color at Law Firms—2001*, available at <http://www.nalp.org/nalpresearch/mw01sum.htm> (last visited Jan. 15, 2003), and consider that minorities are over-represented in government law offices, where the salaries are considerably lower than those offered at the large law firms, and public interest law offices, where the salaries are even lower than government offices, you can imagine how they would covet jobs that paid them more than their parents might have made in five years. The median income for a black family in 1980 was \$12,674. U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 132, *Money Income of Households, Families, and Persons in the United States: 1980*. By 1990, the median income for a black family had risen to \$21,423. *Id.* at No. 132, *Money Income of Households, Families, and Persons in the United States: 1990*.

41. In 1982, Vernon E. Jordan, Jr. parlayed his leadership of the United Negro College Fund, The Voter Education Project For the Southern Regional Council and his presidency of the National Urban League, into a partnership with the Dallas-

not only can provide a black attorney with clout inside the firm,⁴² along with social and political access, but it also, justifiably, opens many doors into significant leadership roles. Corporations and government have come to benefit from the crucible that success in a law firm represents, and use law firm partnership as a proxy for intelligence, imagination, perseverance and other leadership qualities much in the same way that law firms use graduation from Ivy League law schools as a proxy for potential to succeed. There was Conrad Harper,⁴³ a senior partner at New York's Simpson Thacher & Bartlett, conscripted by President Bill Clinton to helm the legal division at the U.S. State Department. In 1994, Deval Patrick⁴⁴ was safely ensconced with the Boston Brahmins of Hill & Barlow when Clinton chose him to head the Department of Justice's Civil Rights Division. Patrick went on to serve as general counsel to Texaco during its discrimination debacle and now calls Coca-Cola's Atlanta headquarters home.⁴⁵ Before Clinton's presidency was over, he would appoint Patrick's only black Hill & Barlow partner Reginald Lindsay to the federal district court in Boston.

Truth told, few black lawyers currently occupy law firm perches prominent enough to be scouted by presidents and CEOs.⁴⁶ Black

based law firm Akin, Gump, Strauss, Hauer & Feld. See Vernon E. Jordan Jr., *Vernon Can Read! A Memoir* 309 (2001). The press dubbed Jordan the "First Friend" for his intimate relationship with the Clinton family during President William Jefferson Clinton's White House years. See, e.g., Marc Fisher, *First Friend: Jordan is Comfortable with Power and with Himself*, Wash. Post, Jan. 27, 1998, at E01. Jordan serves on a dozen corporate boards, and is the managing director of Lazard, an international investment bank. See David Wallis, *Interview with Vernon Jordan: The Pioneer*, JD Jungle, April/May 2002, at 61. Notably, few of the black lawyers who ascended to the federal judiciary or high-ranking public office during the 1970s and 1980s did so after a partnership in a major law firm. The trend may be changing since the 1990s; many of the blacks elevated to the federal bench in the 1990s have had the experience, including the clout, connections and access, that prepared them for such selection.

42. There is some question as to whether the kinds of partnerships that lawyers of color and some women are relegated to really offer actual power. Empirical research is going on right now; we have to wait for Professor Wilkins' book to see whether there is any truth to this rumor. See Wilkins, *supra* note 11, at 855. For now, I can dream, can't I?

43. Harper graduated from Harvard Law School in 1965, and was a Fellow of Harvard College. See Harper, *Winokur to Join Harvard Corporation*, Harv. U. Gazette (Feb. 10, 2000), available at <http://www.hno.harvard.edu/gazette/2000/02.10/corp.html>.

44. Patrick graduated from Harvard College in 1978, and from Harvard Law School in 1982. He was the Assistant United States Attorney General for Civil Rights from 1994-1997; a partner at Day, Berry & Howard, and the Executive Vice President and General Counsel for The Coca-Cola Company. See Deval Patrick '74, 2002 *Martin Luther King Speaker*, Milton News, (Jan. 16, 2002), available at <http://www.milton.edu/news/pages/Devalpatrick11602.asp>.

45. Now that I think about it, most of the examples of successful launches from law firms are men. Doesn't this work for women, or is the pool too small to make it feasible? I'll save that rant for another day.

46. David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and*

Ivy-leaguers will join these mega-firms, but few will succeed in and head them.⁴⁷ Sadly, we're being told lately that even those firms that do attract black lawyers as associates seem to hemorrhage them well before partnership, apparently despite their best efforts at retention.⁴⁸ Firms like my Chicago ex-firm hire diversity consultants, form diversity committees and even recruit outside the "usual suspects"⁴⁹ at historically black law schools such as Howard University.⁵⁰ According to annual surveys,⁵¹ the roller coaster retention pattern for black associates prevailed not only at my former firm but also throughout the country.⁵² Black lawyers do not, like more and more white women—and other non-black minorities—insinuate themselves into the fabric of the firm and ascend eventually to partnership. True, many of these white women partners (and other non-black minorities) find themselves knocking their heads against the glass ceiling beyond which lie corner offices, million dollar annual salaries, powerful committees and real clout. Black lawyers who enter these large law firms would be glad if they could stretch far enough even to touch the

Discrimination: A Theory of Employment Discrimination Law for "High Level" Jobs, 33 Harv. C.R.-C.L. L. Rev. 57, 84 (1998). Exceptions prove the rule: Sara Lee Corporation's Vice President and General Counsel Roderick Palmore is a black graduate of Yale College and University of Chicago Law School. Palmore previously held positions as a partner in Wildman, Harrold, Allen and Dixon, headquartered in Chicago, as well as Sonnenschein Nath & Rosenthal in Chicago. See Duane C. Quaini, *Sara Lee's New G.C.*, available at <http://www.mcca.com/site/data/corporate/GC/gcprofile1199.htm> (last visited Jan. 13, 2003).

47. The numbers of minorities who go into private practice (35.3%) is lower than the numbers of white men who do the same (58.7%). Of those minorities who do go into firms, only a smattering go into firms larger than 50 lawyers. On the other hand, five times as many minority law school graduates go into public service or public interest than whites. See *The Lawyer's Almanac* 132-33 (1984). Exceptions include the firms of Greenberg Traurig in Miami, headed by a Hispanic male, and Austin's Brobeck, Phleger & Harrison, also headed by a Hispanic man. For recent data, see A.B.A. Commission on Racial and Ethnic Diversity in the Profession, *Miles To Go 2000: Progress of Minorities in the Legal Profession*, (2000) [hereinafter *Miles To Go 2000*].

48. See Alan Jenkins, *Losing the Race*, Am. Law., Oct. 2001, at 90, which tells the woeful tale of how the New York law firm of Cleary, Gottlieb, Steen & Hamilton hired thirty black lawyers between 1989 and 1996 and none remained. In December 2001, the magazine published a correction to the original article because four black associates were still at the firm. See *In House*, Am. Law., Dec. 2001, at 13.

49. In my experience, the great majority of hires at the elite law firms come from the so-called "elite" and "prestige" law schools.

50. To my knowledge, this 300-lawyer law firm has never hired a graduate of Howard University's Law School.

51. See, e.g., Brian Zabcik, *Measuring Up (And Down)*, Minority L.J., available at <http://www.minoritylawjournal.com/spring02/texts/measuring.html> (Spring 2002) (containing the results of the "Diversity Scorecard," the journal's annual survey of minority hiring at the nation's largest law firms).

52. Many of the winners relaxed too soon. There was always a celebratory mood at the elaborately hosted luncheons in the mid 1990s with Chicago's own "Gang of Eight," the eight black women who were partners in the city's largest law firms. We considered ourselves proof positive that institutional change was underway, and that we were just the beginning.

ceiling, let alone bump their heads against it. According to most reports, black attorneys are finding themselves glued like cartoon characters to the sticky floor.⁵³ The profession that the public sees and marvels at is top-heavy with white male aristocrats, bulging around the middle with white women and some lawyers of color, and chock full of the latter at the entry level.

For many reasons, then, these highly visible markers ought to better reflect the public they so greatly influence. The nature of inequality in the profession can act as a mirror of society, if the profession tends, as it is said, to reinforce or shape social patterns.⁵⁴ If the public believes that race or gender or even social class is a determinant of one's ability to enter into the legal profession and to reach certain levels within it, why wouldn't the public also think that those same attributes affect the treatment that they will get from legal institutions?⁵⁵ Some observers say that inequality within the profession is a mirror of the broader society, and that inequality in the legal profession reinforces those social patterns.⁵⁶ Lawyers do everything from taking on fast food restaurants over the temperature of their take-out to drafting treaties to suppressing unlawful evidence to suborning perjury to leading the executive branch of the world's most powerful democracy. Because of this dynamic relationship between the legal profession and the civic consciousness, lawyers have a responsibility that goes beyond their purses. Additionally, as breeding grounds for future federal judges, cabinet appointments and corporate leadership, these firms must be integrated if we are ever to see integration and equal opportunity become a given rather than a divisive wedge among Americans.

53. I wish I could take credit for this expression, because I cannot for the life of me place where I first heard it. No matter the author, it's a great metaphor for the plight of black workers in all employment sectors. The "glass ceiling" that white women lament so much would be a boon to many black professionals, who never get close enough to the ceiling to dent it. When black women look through the glass ceiling, they don't see the men in corner offices and boardrooms; they see the bottom of white women's shoes.

54. See, e.g., Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976).

55. The Supreme Court has before it this term a case involving the Texas Attorney General Office's policy of routinely striking black juror prospects peremptorily. *Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001), *cert. granted*, *Miller-El v. Cockrell*, 70 U.S.L.W. 3514 (U.S. Feb. 15, 2002) (No. 01-7662). For more information on the unequal treatment of minorities by the legal institution, see Michael Higgins, *Few Are Chosen*, A.B.A. J., Feb. 1999, at 50. As to the effect on the public of white lawyers and jurors deciding the fate of so many black defendants, Judge Avern Cohn of the U.S. District Court in Detroit was quoted as saying, "You get the feeling the defendants and their families don't have confidence in the system." *Id.* at 51.

56. See Auerbach, *supra* note 54.

II. OLD SCHOOL INTEGRATION, OR WHY LAW FIRMS ARE ALL WHITE

Like American society in general, the legal profession has a history of discrimination against immigrants, blacks, Jews and women. Racial, ethnic and gender distinctions may be somewhat less important in the social organization of the legal profession than they were twenty-five years ago, but the upper levels remain safely in the hands of white men of privilege. The legal profession escaped the desegregation momentum started by *Brown v. Board of Education*⁵⁷ because, like many private spheres with legitimate, seemingly neutral barriers to access, it did not fit neatly into the categories targeted for, and susceptible to, change. At the risk of oversimplifying monumental events, it can safely be said that the desegregation struggle of the 1940s, 1950s and 1960s proceeded in mainly three strategic arenas: courts,⁵⁸ legislatures and the streets. The brevity of this description is not intended to add to the “benignly nebulous amnesia [that] settled over how in fact tenuous, fitful, and uncertain” the progress in this era was.⁵⁹ No matter the turf, the activity always seemed infused with a sense of the righteousness of the struggle and the moral inevitability of ending segregation that was expected to bring about changes deeper than mere removal of barriers. However, as we now know, any arena that required white America to simply and voluntarily reject racist notions of white superiority and prejudice still stood at the end of the era.

A. A Brilliant Strategy

Back in the day, the NAACP-led campaign to integrate public spaces—first, the elementary schools, then colleges, transportation, accommodations, and workplaces—soldiered on in federal and state courts.⁶⁰ Early on, NAACP Legal Defense and Education Fund lawyers scouted out perfect plaintiffs for cases for desegregating public accommodations and schools. The desegregation cases that followed were not aimed merely at interpreting laws and the Constitution; they embodied a normative goal: to have the courts of the land enshrine the rights of colored people for posterity, to concretize a national sense of justice, dignity, and universal human rights. In their heyday,

57. 347 U.S. 483 (1954). The case of *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955), is often referred to as *Brown II*. *Brown* involved public school desegregation, but is almost universally seen as the case that heralded an end to segregation in all spheres of life.

58. It was truly an “awesome” setup. For a good story well told, see Mark V. Tushnet, *The NAACP’s Legal Strategy Against Segregated Education, 1925-1950*, at 125 (1987).

59. See Marshall Frady, *Martin Luther King, Jr.* 6-7 (2002).

60. See Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (1975).

even arguments before the court took on a sermon-like quality. I am probably not alone in believing that *Brown* and others were cast deliberately as a contest of right and wrong, of victims of injustice against its perpetrators.⁶¹ Implicit, but by no means explicit, in the final Supreme Court opinion in *Brown* lies hidden the hope that courts could somehow consider needless suffering and insult to a particular race when formulating the rule of law.⁶²

Courts have obvious limitations. Perhaps it is something about the legal system itself that prevents it from being an effective engine for more redistributive social change.⁶³ Courts cannot engage in conspicuous moralizing,⁶⁴ especially in cases involving morally-freighted issues such as abortion, euthanasia and racial discrimination. In fact, judges are prohibited from allowing their own personal opinions and values from affecting their rulings.⁶⁵ Even in *Brown*, arguably a case ripe for a moral condemnation of segregation, the Court demurred.⁶⁶ It wrapped its reasoning around rationales like the value of education in uplifting blacks, psychological studies and interpreted segregation so as not to accuse Southern states of maintaining a caste system.⁶⁷ Fair-minded but shrewd judges and justices had to maneuver to reach what many thought to be the "right" result without preaching to anybody. They fully expected that even if resentful or defiant community leaders complied minimally with the decisions, the sheer relentlessness of the plaintiffs in seeking enforcement would wear down some opponents of integration. As a result, through the 1960s, courts remained a primary focus for defining the expanse of civil rights and enforcing them. But courts are political beasts, with ideological constituencies that fracture any single vision. Early successes have made the crafters of the *Brown* strategy too sanguine; they could hardly have foreseen either the erosion of judicial enthusiasm for racial complaints or the limited possibilities for even willing courts to be viable agents of social change.⁶⁸

61. See James T. Patterson, *Brown v. Board of Education, A Civil Rights Milestone and Its Troubled Legacy* (2001).

62. Richard Posner argues that almost all of the justices in *Brown* probably thought segregation was immoral, but they were politically unable to say so without offending Southern whites. See Richard Posner, *1997 Oliver Wendell Holmes Lectures: The Problematics of Moral and Legal Theory*, reprinted in 111 Harv. L. Rev. 1637, 1705 (1998).

63. See Galanter, *The Haves*, *supra* note 28, at 95.

64. Dissenters have more leeway to speak of good and evil. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

65. Model Code of Judicial Conduct Canon 3(C)(1) (1997).

66. Posner also comments that moralizing has no place in court decisions, as the court would "become bogged down in interminable debates over historical injustices." Posner, *supra* note 62, at 1707. The risk does not reside with private behavior; private behavior can be rationalized quite easily by resort to common values.

67. Richard Posner, *Reply to Critics of The Problematics of Moral and Legal Theory*, 111 Harv. L. Rev. 1796, 1806 (1998).

68. There has been much handwringing over how the civil rights movement lost

Where do you go when one battle terrain is spent and impassable (think Afghanistan in winter)? Find another one: the voting booth. Throughout the South, segregationists impeded blacks from exercising the hard-won franchise by violence, threats of it, intimidation and pure chicanery, correctly suspecting that blacks would attempt to claim their birthright of equal access and opportunity. Civil rights organizations such as the Southern Christian Leadership Conference ("SCLC") and Student Non-violent Coordinating Committee ("SNCC") educated and registered voters in order to elect blacks and progressive white candidates to state and federal offices where they could enact legislation to redress past discrimination and prevent it in the future.⁶⁹ Blacks found that progressive federal executives and legislators could champion civil rights by sponsoring and supporting federal statutes to expand the court's ability to achieve equality. The Civil Rights Act of 1964⁷⁰ and the Voting Rights Act of 1965⁷¹ stood out as proof of the power of targeted voter activity.⁷² Even more valuable became the ability of voters to install progressives in statehouses, school boards and city councils to further penetrate the recesses where racism burrowed. Equally important, voter activity installed in the executive branch integrationists who appointed to the bench fair-minded jurists who would interpret the statutes that were passed in a way to effectuate their drafters' wishes.⁷³ The combination of new statutes, more litigation, and fair and impartial judicial decisions focused on enforcing the rights thereby garnered, led to victory after victory right through the mid-1970s.

When the military troops succumb to the Afghan winter, and the air campaign nets only spotty results, call CNN. Where courts proved ineffectual and progressives could not legislate redress, the faithful

the court as an alley, and whether *Brown* really made a difference after all. *See, e.g.*, Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 39-169 (1991).

69. *See generally* Taylor Branch, *Parting the Waters: America in the King Years 1954-1963* (1988).

70. The Civil Rights Act of 1964 outlawed, among other things, race discrimination in public accommodations by using the Commerce Clause and not the Fourteenth Amendment. *See, e.g.*, 42 U.S.C. § 2000e (2002). Talk about your fancy footwork. Of course the Southerners responded. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 242-43 (1964) (adjudicating an attack on the constitutionality of Title II of the Civil Rights Act of 1964).

71. Pub. L. No. 89-110, 79 Stat. 437 (1965) (current version at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

72. The massive support from black voters that put Lyndon Baines Johnson in the White House in 1964 is largely credited (or blamed) for the Southern switch from Democrat to Republican after that year. Other successes include the Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994) and the Civil Rights Amendments of 1975, H.R. 5452, 94th Cong., 1st Sess. (1975).

73. President Jimmy Carter, among his other virtues, completely changed the complexion of the federal judiciary. He appointed thirty-eight federal judges of color to the bench. *See* Susan Moloney Smith, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, 28 U. Rich. L. Rev. 179, 181 (1994).

took to the streets; more accurately, they played out street theatre designed to sway public opinion. Many segregated institutions in the private sector responded to economic attack in the form of sit-ins, marches, pickets and boycotts. These folk morality plays received ample media attention, and the tragedians strutted and fretted until a scandalized audience insisted on relief.⁷⁴ Scene after scene of desegregation rituals in ice cream parlors and parks and buses freighted the public conscience. The televised images of black and white youth having coffee poured on their passive heads by mongrel goons were enough to sicken both good Americans and people abroad. By mobilizing white and black youth for blood-soaked passive resistance, activists brought about open hiring in department stores and businesses, and produced courteous service and dignified treatment in restaurants and hotels, transportation companies and charitable organizations. Pickets and boycotts, amidst TV cameras and favorable editorial commentary, achieved the dual result of the other strategies, that is, actual change coupled with new values.

B. *The Untouchables*

Eventually, by most accounts the goals of the civil right era were achieved: the time came when a majority of Americans would come to believe that it was immoral, and downright unchristian, to discriminate against people on the basis of race. Segregation as the rule of law toppled, making it harder but not impossible to discriminate overtly on the basis of race. In hindsight, given the seeming impenetrability of current barriers, that achievement now looks easy. By the era of Lyndon Johnson's presidency, large segments of the public were asking for the progress of integration and equality to slow down, if not stop. As Justice Scalia said in another context, "There is a problem, however, which arises when criminal sanction is eliminated . . . but moral and social disapprobation . . . is meant to be retained."⁷⁵ As a result perhaps of putting the legal end before the social approbation, today's most divisive racial issue is not whether the goals of the civil rights era were achieved, but to what extent additional measures⁷⁶ to redress slavery and Jim Crow's debts

74. Many collections of influential photographs of the century include photos of students being harassed and attacked by hostile whites, which were carried by both newspapers and television.

75. *Romer v. Evans*, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting).

76. For an example of such a measure in the area of education, see generally *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). For other examples of such measures see *Fullilove v. Klutznick*, 448 U.S. 448, 454 (1980) (discussing the Public Works Employment Act of 1977, which required 10% of the amount of money granted under the Act to local public works projects to be expended for minority business enterprises), and *Adarand Construction v. Peña*, 515 U.S. 200, 206 (1995) (discussing the Small Business Act, which declared it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by

were lawful and necessary, as integration morphed into “affirmative action.”⁷⁷ The corporate fortresses seemed impervious to any of the volleys lobbed at them; private behavior is outside the arc of the Constitution as interpreted, racial or gender disparity in promotions and salaries fails to make corporate offenders fit as subjects of litigation under any of the civil rights statutes. The sight of a paneled room in which old white patricians sit around a mahogany table, doing the business of running Citicorp, evokes no public outrage (except in the mind of the Reverend Jesse Jackson, and his is feigned). In those places where barely-fettered discretion is exercised in countless decisions that result in success or failure for blacks, integration proves elusive. The legal profession aided and abetted this elusion, and practiced what it preached.⁷⁸

There is no small irony in the realization that the profession responsible for the court victories for civil rights would itself be segregated until well into the twentieth century. Through the 1950s many law schools refused admission to outstanding black applicants, even offering to pay them to matriculate elsewhere.⁷⁹ From one vantage point, the benefits of the bar’s racism have redounded to us all: we would be the worse if the late Barbara Jordan, Judge Constance Baker Motley or Jewel Lafontant Mankarious⁸⁰ had been invited to join white-shoe law firms after graduation. While certain lawyers, like those in the Lawyers Committee for Civil Rights under Law and the Lawyers Guild, worked with civil rights organizations to achieve integration and equality, the mainstream organized bar, the American Bar Association (“ABA”), read from a different menu. The ABA, the largest professional organization of lawyers in the world, traveled a rocky road to integration that is by now the stuff of legend, but I cannot resist raking the muck just one more time. In 1968 the ABA commissioned a mea culpa in the form of a report

socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency” (citation omitted)).

77. See generally *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), cert granted, 71 U.S.L.W. 3387 (U.S. Dec. 2, 2002) (No. 02-241).

78. One author argues that lawyers are disproportionately liberal, for instance, in their support of ending discrimination against homosexuals. See William C. Duncan, “A Lawyer Class”: Views on Marriage and “Sexual Orientation” in the Legal Profession, 15 *BYU J. Pub. L.* 137, 138 (2001).

79. Senior Judge Arthur Burnett of the Superior Court of the District of Columbia, a black Phi Beta Kappa valedictorian of Howard University Class of 1954, received such an offer from the University of Virginia. He used their largesse to attend New York University School of Law, from which he graduated *summa cum laude* in 1957.

80. The late Mrs. Mankarious eventually became a partner at several corporate law firms by the end of her career. This 1946 graduate of the University of Chicago went to work for her father’s small firm, no doubt for lack of offers from any of Chicago’s finest firms. *Rebels in Law: Voices in History of Black Women Lawyers* 307 (J. Clay Smith, Jr. ed., 1998).

entitled "Negro Members and Their Participation in the American Bar Association"⁸¹ in order to put to rest the lingering discontent over its racist legacy. That report tells the tale as follows.

Founded in 1912, the ABA was a voluntary association of white male attorneys who were nominated for membership in the organization and were voted in by committee. The ABA had never "contemplated that members of the colored race should become members of this Association."⁸² (This despite the fact that exclusion of blacks from public accommodations was understood to be a "badge of inferiority" prohibited by the U.S. Constitution).⁸³ Nonetheless, membership applications made no reference to race, assuming only whites would apply.⁸⁴ Thus by inadvertence, the ABA voted into membership three men whom it later learned were members of the colored race. The matter caused so much turmoil that it was taken up at the annual meeting in August of that year. The body was so hell-bent on ousting these men that the ABA Board of Governors considered a resolution to terminate the membership of the black men and refund their dues.⁸⁵ At the meeting, a cryptic discussion ensued, designed, it seems, to avoid having a written record of the discussions.⁸⁶ A resolution passed, retaining these three men as members, but requiring that in the future, in order to maintain segregation, membership applications would require the applicant to state his race.⁸⁷

81. A.B.A. Office of the Sec'y, Div. of Executive Servs. (Dec. 2, 1968) [hereinafter 1968 Report]. The report's Introduction identifies it as the first known attempt to compile information about Negro participation in the ABA.

82. *Id.* at Exhibit A 1 (quoting 37 A.B.A. Rep. 12-17 (1912)).

83. *See, e.g.,* United States v. Baird, 85 F.3d 450, 454 (9th Cir. 1996) (discussing the manner in which the public accommodations provision of the Civil Rights Act of 1964 cured the "great evil" of imputing to blacks "badges of inferiority" through limiting access to establishments open to other members of the population).

84. 1968 Report, *supra* note 81, at Exhibit A 1.

85. The three black gentlemen who "stirred the bees" were Mr. W. H. Lewis, Mr. William R. Morris, and Mr. Butler R. Wilson. 37 A.B.A. Reports 11 (1912) [hereinafter 37 A.B.A. Reports].

86. A Mr. Dickinson of Tennessee referred to his hope that "the crisis which has been impending will pass by, leaving unimpaired an Association which has done so much for the usefulness and honor of the profession and for the good of the country . . ." *Id.* at 12. He asked that rather than engage in a discussion, men of "intelligence" could just vote upon it. The resolution read as follows:

That, as it has never been contemplated that members of the colored race should become members of this association, the several local councils are directed that, if at any time any of them shall recommend a person of the colored race for membership, they shall accompany the recommendation with a statement of the fact that he is of such race.

Id. at 13.

87. *See* 1968 Report, *supra* note 81, at Exhibit A 1. The application offered applicants the opportunity to disclose their race as White, Indian, Mongolian or Negro. *Id.* at Exhibit C.

Another thirty years would pass before the official face of the profession would, at the urging of some of its Northern members, cease to be segregated. In 1943 the Board of Governors passed a resolution to the effect that membership in the ABA was not dependent upon race, creed or color and the chairman made sure that the minutes reflected that the membership had unanimously favored the resolution.⁸⁸ The decree was lip service only. Because applicants still identified their race until 1956, black lawyers were still effectively excluded from membership by the voting influence of the Southern members on the Board who still had enough seats to defeat black candidates. Not until 1963 did it finally take a big step toward setting its racial house aright. Referring to the "special dignity and responsibility shared alike by all members of the bar as officers of the court,"⁸⁹ the ABA changed its official position, and determined to admit members without regard to race or creed.⁹⁰ Nonetheless, at the time of the 1968 report, the ABA counted a mere 241 black lawyers as members.⁹¹ The emergence of racial tolerance within the ABA had taken many decades, and was spurred by the persistent agitation of a few Northern members, some of whom boisterously resigned in protest of the refusal of the ABA to admit well-educated upstanding black applicants for membership.⁹² Pragmatic and dynamic leadership further transformed the ABA in the 1980's. As this essay reveals, the timing of the ABA's epiphany could not have been more propitious.

III. THE NEW DIVERSITY PARADIGM

By the time *Bakke*⁹³ struck down the admissions process at the University of California's medical school, the old adage that you cannot legislate (or litigate) morality had petrified into hard truth. For thirty years the Supreme Court and courts below it had gotten away with stretching *Brown* far past its original boundary of public elementary schools into broader educational arenas, and paved the way for scores of working- and middle-class blacks to become lawyers, doctors and chiefs of all kinds. It should have come as no surprise that the progeny of these early cases would wear out their welcome as whites began to bristle as states sought to redress prior discrimination

88. 68 A.B.A. Reports 110 (1943).

89. This obligation may be found today in the Preamble to the ABA Model Rules of Professional Conduct, which defines a lawyer as an officer of the legal system and a "public citizen having special responsibility for the quality of justice." Model Rules of Prof'l Conduct pmb1. (1999).

90. 88 A.B.A. Reports 617 (1963).

91. See 1968 Report, *supra* note 81, at 8.

92. For example, after Franklin S. Rivers, a black Phi Beta Kappa from Yale and graduate of Columbia Law School, had his application for membership rejected, several prominent New Yorkers resigned in protest. See *Judge Jonah Goldstein Resigns Over Failure to Elect Rivers, a Negro*, N.Y. Times, Aug. 28, 1943, at 24.

93. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 912 (1978).

and segregation whether overt or disguised as merit hiring and promotion.⁹⁴ If the courts cannot or will not enforce integration, and legislation hostile to diversity proliferates,⁹⁵ voluntary—seemingly at great personal cost—change has to occur by other means. Exit, integration; enter, diversity.

A. Diversity and the Bottom Line

Even the optimists admit that preaching old-time integration as a moral, social good is out; for corporate America at least, the paradigm has shifted.⁹⁶ Emblematic of practitioners of the old-school integration model is the Religious Society of Friends (Quakers): serve the Lord, embrace and encourage the simple human values of equality and dignity despite popular opprobrium.⁹⁷ To find today's Quakers, look for resolutely honorable people such as former Harvard University President Derek Bok⁹⁸ and Law School Dean Anthony Kronman.⁹⁹ Even though these new Quakers see integration and

94. *Compare* United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 208-09 (1979) (upholding temporary race-conscious remedies for racial imbalance caused by previous discrimination), *with* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510-11 (1989) (striking down Richmond's minority contracting program admittedly designed to redress prior discrimination).

95. In 1996, California voters narrowly passed Proposition 209, which abolished affirmative action in the state in employment, education and contracting. *See* Cal. Const. art I, § 31(a). The U.S. Supreme Court refused to hear a challenge brought against Proposition 209, which allowed it to go into disastrous effect. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 718 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997).

96. David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, Harv. Bus. Rev. Sept./Oct. 1996, at 79, 83 [hereinafter Thomas & Ely, *New Paradigm*].

97. Margaret Hope Bacon, *The Quiet Rebels: The Story of the Quakers in America* 122-50 (1985).

98. For an example of Bok's scholarship, see William G. Bowen & Derek Bok, *The Shape of the River: Long Term Consequences of Considering Race in College and University Admissions* (1998). Bok and Bowen, two former university presidents, helmed Ivy League schools and considered race a positive factor in admissions, but were concerned that the nation seemed to be debating the merits of such affirmative action policies without reference to any information about the benefits of such policies. To remedy this knowledge gap, they examined the college and later-life experiences of tens of thousands of students who graduated from their and twenty-six other "selective" schools. *Id.* at 54. These schools practiced affirmative action in admissions to a greater degree than less selective schools in 1976 and 1989. *Id.* at 258-59. The black graduates they studied from these "selective" schools (40%!) went on to earn law or other graduate degrees from equally selective schools at five times the rate (8%) of black graduates of less selective schools that did not practice affirmative action. *Id.* at 98, fig. 4. For reasons still unknown to me, these select of the select cannot make or keep partnership at the nation's "selective" law firms!

99. Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 Fla. L. Rev. 861 (2000). Kronman used the occasion of the Dunwoody Distinguished Lecture in Law to deliver his extended and impassioned plea to save the right of institutions of higher learning to be able to keep their student bodies diverse. He urged, as you might expect, an examination of the entire human condition. *Id.* at 865-

racial and ethnic diversity as a moral imperative, popular antipathy forces them to grapple necessarily with complex scholarly arguments of the *inherent* value of integration, especially in education. Former University of Michigan President Lee Bollinger knows viscerally that he “did right” in fashioning and standing by that university’s besieged race-conscious admissions policy, but inartfully defended it on the grounds that diversity “helps students understand the full complexity of life—to make the empathic leap.”¹⁰⁰ These intrepid men of good will, these old-school types buy into what researchers call the discrimination-and-fairness paradigm,¹⁰¹ the “it’s the right thing to do” rationale.

But another crowd is not so “Pollyanna” about the efficacy of the “do the right thing” mandate in some environments. In the retail corporate sector, diversity is all about money. There, integration’s messenger wears green, and speaks graphically in demographic and utilitarian terms. Researchers call theirs the access-and-legitimacy paradigm.¹⁰² In short, the rationale for the access integrationists is: “The world is multicultural; ethnic groups have buying power; we need employees who can talk to these ethnic consumers and give us credibility; diversity is good business.”¹⁰³ These diversity advocates read the newspapers, and see the headlines blaring “Whites to be Minority by 2050.”¹⁰⁴ Although most American corporations were already multinational by the 1980s, paying attention to demographic shifts had not become part of their marketing strategy.¹⁰⁵ Nowadays,

66.

100. Nicholas Lemann, *The Empathy Defense: Can the University of Michigan Save Affirmative Action?*, *New Yorker*, Dec. 18, 2000, at 46.

101. Thomas and Ely describe these leaders as those who acknowledge the prejudice of the past, abhor discrimination and value equality. They succeed best where they have the authority to issue top-down directives and ensure their compliance. See Thomas & Ely, *New Paradigm*, *supra* note 96, at 81. Although university presidents would not like to see themselves described as comparable to the U.S. Army, Thomas and Ely’s “extreme example” of this paradigm, presidents and deans obviously have the power to set policy and ensure implementation both in the letter and in the spirit of these policies.

102. *Id.* at 83.

103. *Id.*

104. “The numbers tell the story more convincingly than the most persuasive rhetoric . . . Put simply, the demographics of the United States are shifting rapidly. As the white majority agrees, the next and future generations increasingly are comprised of people of color.” *The Business Case For Diversity* (3d ed. 2002), available at www.DiversityInc.com (on file with author).

105.

Corporate America continues to be run largely by white men who have not exhibited particular interest in people of color or other diverse groups, including gays/lesbians and people with disabilities. And in their succession planning, or lack of it, corporations perpetuate leaders from the same backgrounds and mindsets as their predecessors. The failure to recognize the growing affluence and shifting demographics of emerging marketplaces and reach out to these consumers will prove very costly to many companies.

Id. at Part One: The Proof.

they are smart enough to count heads.¹⁰⁶ As a result, Kmart knows it had better hire black greeters and Hispanic assistant managers for its “urban” centers, because its CEO believes that “capitalizing on diversity turns into profit.”¹⁰⁷ Counting leads to strange outcomes. When Dixie’s favorite spectator sport, NASCAR, announced a search for a black racecar driver to appeal to the black consumers in North and South Carolina—well that takes the cake.¹⁰⁸

Companies for which the ethnic landscape is not so stark have help aplenty. They can buy books like *Measuring Diversity Results* for \$34.95.¹⁰⁹ If purchased with the “Diversity Start-up Metrics Software” the skittish CEO rates a package price of \$149.00 (a savings of over \$10!).¹¹⁰ Software for measuring diversity *return-on-investment* and performance will also be available soon.¹¹¹ If the return-on-

106. Take retail giant Kmart, which, after struggling to restructure its way out of financial woes, filed for bankruptcy protection. See Press Release, Kmart Corporation, Kmart Secures \$2 Billion Financing Package and Files for Chapter 11 Reorganization to Aggressively Address Financial and Operational Challenges (Jan. 22, 2002), available at <http://www.kmartcorp.com/corp/story/pressrelease/news/pr020122.stm>. To thrive again, Kmart recognizes it has to exploit its strengths. For instance, its spokespeople say, Kmart is in a better position to serve inner-city markets than Target and Wal-Mart, its main competition. Kmart already has “deep roots” in the cities, and stores in urban areas. As Kmart focuses on those areas, people of color, who already make up 39% of Kmart shoppers, will become an even more important demographic. Kmart, its leaders say, will “leverage” diversity to restore the conglomerate to its former glory. See Ruth Zeilberger, *The Man Behind Kmart’s New Emphasis on Diversity*, at www.DiversityInc.com (Sept. 23, 2002) (on file with author).

107. Zeilberger, *supra* note 106.

108. In October 2002, a broadcast on National Public Radio stated that the National Association of Stock Car Racing (“NASCAR”) is looking for black racecar drivers. A spokesperson said that NASCAR realizes it is missing out on the black consumer market in North and South Carolina, where blacks make up almost 20% of the population. *NASCAR Seeks More Fan Diversity* (National Public Radio Broadcast, Oct. 11, 2002). Never mind that the only representation of blacks in stock car racing has been as garishly painted clowns or as targets in intermission dunking contests. And don’t even start on that Confederate Flag on the back of half of the cars.

109. How do you measure the results? A number of points for raised consciousness? Fairness? Trust among colleagues of different races? Respect for difference? If the survey concludes that the company has maximized the benefit of diversity, I guess the company just erects a (figurative, I hope) “No More Negroes Needed” sign.

110. This product is available through the website of www.DiversityInc.com.

111. Use this software if you need to:

Calculate the dollar cost to the organization per hour, day or year when diversity is not managed effectively;

Calculate the dollar savings if diversity is managed effectively;

Isolate diversity’s contribution separate and apart from the contributions of other departments;

Analyze the number of years it may take to accomplish your diversity objectives based on your current rate of change;

Model and or forecast the number of years it will take to accomplish any diversity initiative based on a forecasted rate of change;

Calculate “what if” scenarios related to the time it will take to accomplish

investment is too low, perhaps there will be another program to measure the per-widgit cost of dismantling an ineffectual diversity program. Of course, not all CEOs who embrace diversity do so with both eyes on the bottom line,¹¹² it's just that the dialing-for-diversity conversation has taken center stage.¹¹³

B. How Does This Work With Lawyers?

Few would deny that the practice of law has become as much a business as a calling. Stripped down to its bare essentials, the practice of law is susceptible to a manufacturer-consumer mindset of beer makers, burger vendors and shopping centers. It has a "product," a "consumer," the "shareholders," and a "market," although the terms elude the clear definition the retail sector enjoys. As a consequence, the diversity stratagem chosen by the corporate clients of elite firms smacks of that retail construct, and follows the access-and-legitimacy paradigm. The unlikely author of the strategy appears to have been none other than the integration holdout, the mainstream organized bar. At the same time that corporate America was watching and reacting to the browning of America by increasing corporate diversity,¹¹⁴ the ABA was examining its own house, and fretting that the rhetoric of fairness and goodness had failed to produce more than trickles of diversity within the profession itself. Like many corporate bureaucracies, the push for change came from a bar leader who championed the idea.¹¹⁵ In 1985, ABA president Wallace D. Riley established a Task Force on Minorities in the Legal Profession¹¹⁶ to investigate why the legal profession still looked suspiciously white and male—although less so the latter by then—and associated

an initiative.

112. *Fortune* magazine cites Tony Burns of Ryder System, who started minding diversity back in the 1970s when he became Ryder's president and met Vernon Jordan. He did it because it was right, having no idea if it would "pay off." Likewise, Rich McGinn, CEO of Lucent, said "It was an issue around equality." They seem to be small voices in a raucous crowd. See Colvin, *supra* note 10, at 53, 54.

113. *Id.* at 54-55. Most of the CEOs who made comments spelled out the business sense rationale, usually offering a variation on Thomas and Ely's access-and-legitimacy paradigm. Occasionally one hears the moral argument, but the business rationale is more often cited. This could be because the *Fortune* survey only includes publicly-traded companies, at which CEOs have to speak to stockholders as well as the employees.

114. See Wilkins, *supra* note 11, at 862 (discussing companies' hiring of minorities in order to match "the needs of their customer base").

115. See Debby Garbato Stankevich, *Matching Colors*, Retail Merchandiser, March 1, 2001, at 30 ("Companies that are successful in recruiting minorities are companies where the CEO really wants to embrace this as an issue." (quoting Tracy Mullin, president and CEO of the National Retail Federation)).

116. Its charge included obtaining "facts and perceptions" about why minority lawyers had failed to integrate into the legal profession. A.B.A. Task Force on Minorities in the Legal Profession, Report with Recommendations 8 (Jan. 1986) [hereinafter Task Force Report].

professionally in segregated groups.¹¹⁷ The Task Force's 1986 Report exposed a catalogue of failures of the profession to integrate minorities at all levels, from law school to government, to private practice to the bench and beyond. The profession, which many say had fallen short of its creed of ensuring equal justice for all, was even less likely to accomplish this goal from its barely integrated ranks. The 1986 Report led the association to establish a president-appointed Commission on Opportunities for Minorities in the Profession (now renamed the Commission on Racial and Ethnic Diversity in the Profession) to "increase professional and associational opportunities for minorities."¹¹⁸

The epiphany could not have been more exquisitely timed. Inasmuch as the association had not accomplished by moral suasion or otherwise the improvement of the lot of those formerly excluded by law and custom from the profession's ranks, perhaps a combination of an economic carrot and stick would do better. The confluence of events provided the perfect opportunity to marry the legal profession's malady with the corporate need for access to emerging markets and legitimacy with the new browner consumer. Here came the cavalry, in the form of the Minority Counsel Demonstration Project,¹¹⁹ which was designed to "facilitate relationships between corporate decision makers and minority counsel."¹²⁰ Eventually, recognizing that the few minorities who were trying to rise in majority firms were truly stranded without the clout of fee-generating clients, the idea evolved that the ABA would persuade corporations that had converted to demographic diversity to invert the demography rationale: corporations, as "consumers" of the "product" that law firms sell, would be urged to pressure their outside law firms to look like *them* . . . *voila!* Thus the ABA leapt headfirst into the new diversity paradigm: It's all about money.

The ABA was right about one thing: corporate clients had muscle and they knew how to use it. In most corporations, the general counsel "sits close to the top of the corporate hierarchy as a member of senior management."¹²¹ The ABA was able to exploit what many

117. The National Bar Association, the professional group of black attorneys, came into existence as a response to the exclusion of blacks from membership and participation in the ABA. Needless to say, it survives still. See generally Elmer C. Jackson, Jr. & Jacob U. Gordon, *A Search for Equal Justice by African-American Lawyers: A History of the National Bar Association* (1999).

118. See Task Force Report, *supra* note 116, at 2.

119. Now called the Minority Counsel Program, it "assists corporations and lawyers of color in developing mutually rewarding business relationships" through structured networking. See *Miles to Go*, *supra* note 47, at 41.

120. Eileen Letts, an African-American woman and founder of Greene & Letts in Chicago, cited the Minority Counsel Program for bringing business to her firm. See Lynne Eckert Gasey, *Retention and Promotion Issues Face Minorities and Women at Firms*, Chi. Law., May 1998, at 4 [hereinafter Gasey, *Retention and Promotion*].

121. See Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite*

had criticized as the increasing power of business clients over their lawyers.¹²² The decision whether to retain outside counsel or handle the issue inside—the “make or buy” decision—is made by the general counsel. These general counsel spend millions of dollars a year on outside legal fees and are poised to push the big firms they hire to catch up with the changing demographics if the firms want to maintain the clients’ business.¹²³ Today’s corporate integrationists are not trudging down the well-worn path of the fairness paradigm; these pinstriped evangels take a different tack. As in the Kmart example mentioned earlier, diversity is a “bottom line” issue. And many of them really mean it.

In 2000, William G. Paul, then President of the ABA, convened a National Summit on the Retention of Minority Lawyers in the Private Sector (“ABA Summit”).¹²⁴ The received wisdom was that minority retention and promotion had to be addressed along with entry-level hiring. Paul deeply felt that the lack of diversity was a matter the

Law Firm, 37 *Stan. L. Rev.* 277, 277 (1985).

122. See Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* 33-39 (1994) (discussing the shift in the balance of control in recent years between large firm lawyers and their corporate clients); see also Heinz & Lauman, *supra* note 18, at 164 (finding that lawyers who serve corporate clients exercise less professional autonomy than any other segment of the profession and citing evidence that law firms are cautious about giving “offense to their regular clientele”).

123. Corporations report terminating outside counsel for refusal to take direction. “Responsiveness to Office of General Counsel input has been second only to the quality of legal product, and more important than cost as a criterion for selection of outside counsel in nearly all cases studied.” Chayes & Chayes, *supra* note 121, at 292-93.

124. Entitled the National Summit on the Retention of Minority Lawyers in the Private Sector,

the conference invitation proclaimed that the attrition rate of minority lawyers in law firms and corporations is grossly disproportionate when compared to the attrition rate of non-minority lawyers, [that] little or no progress is being made in advancing lawyers of color in law departments or law firms [and that] half of all Fortune 1000 companies have no minority lawyers in managerial roles.

Phillipes, *supra* note 14, at 54. The ABA termed these developments and the lack of progress in confronting them “a serious matter of concern.” *Id.* at 54 (quoting a letter dated January 13, 2000 from the A.B.A. Commission on Opportunities for Minorities in the Profession, to members of the Honorary Committee overseeing the 2000 National Summit on the Retention of Minority Lawyers in the Private Sector); see also A.B.A. Network, *A.B.A. Minority Lawyer Retention Summit Set*, (April 2000), available at <http://www.abanet.org/intelprop/apr00chair.html>. In 1986 the ABA had also created the Commission on Opportunities for Minorities in the Profession—now called the Commission on Racial & Ethnic Diversity in the Profession—to promote the Association’s Goal IX, the full and equal participation of minorities in the profession. See A.B.A. Network, *Commission on Racial & Ethnic Diversity in the Profession*, available at <http://www.abanet.org/minorities/home.html> (last visited Jan. 13, 2003). I must disclose here that I am a member of the Commission, but the opinions I express here are entirely my own, not those of the Commission or of the American Bar Association.

profession had to take up with all its energy.¹²⁵ America is “a nation that’s blessed with the richness of diversity,” and as such, “a 90% white bar would not be administering justice to a nation that is now 30% minority, projected to be 50% in coming decades.”¹²⁶ Just as General Motors recognized that its workforce ought to look more like its customer base, the complexion of one’s work force—lawyers, a firm or general counsel’s office—“had better” approximate its customer base.¹²⁷ When Paul referred to this matching requirement as the “number one reason why we must have racial and ethnic diversity,”¹²⁸ he was eliding into the access-and-legitimacy paradigm, wooing allies through the bottom line.

Some corporations, such as Dupont and General Motors, started asking questions about the lawyers who did their legal work in the early 1990s.¹²⁹ These two companies and others actually have tracking programs to monitor the number of hours worked by minority and women lawyers on their matters.¹³⁰ In 1998, BellSouth took the diversity struggle to a new level. Its General Counsel, Charles Morgan, increased the commitment when he designed a Statement of Principle¹³¹ relating to diversity goals, and circulated it among his

125. I think President Paul was “old-school.” Seeing that we as a nation cannot afford for the pipeline of minority lawyers to dry up as many black attorneys are faced with grim prospects, he launched a campaign during his presidency to raise a million dollars for an endowment to assist minority law students. Then he put his money where his mouth was: He and his wife were the first donors, anteing up \$100,000 to assure that minority law students would not be forced to abandon their education due to financial hardship. My hat is off to him.

126. A.B.A. Commission on Racial & Ethnic Diversity in the Profession, *Raising the BAR: Diversity and Retention in the Legal Profession*, Retention Summit Highlights 3 (2001) [hereinafter *Raising the BAR*].

127. *Id.*

128. *Id.*

129. Tamara Loomis, *Corporate Counsel Push Law Firms to Diversify; Data Collected on Billable Hours for Minorities and Women*, N.Y. L.J., Oct. 25, 2000, at 8.

130. *Id.*

131. See Phillipps, *supra* note 14, at 52, which provided the text of the pledge as follows:

Diversity Statement

General counsel of more than 500 companies [as of 2001] have signed the following diversity statement:

Diversity in the Workplace: A Statement of Principle. As the Chief Legal Officers of the companies listed below, we wish to express to the law firms which represent us our strong commitment to the goal of diversity in the workplace. Our companies conduct business throughout the United States and around the world, and we value highly the perspectives and varied experiences which are found only in a diverse workplace. Our companies recognize that diversity makes for a broader, richer environment which produces more creative thinking and solutions. Thus, we believe that promoting diversity is essential to the success of our respective businesses. It is also the right thing to do.

We expect the law firms which represent our companies to work actively to promote diversity within their workplace. In making our respective decisions concerning selection of outside counsel, we will give significant

colleagues at other corporations. In an effort to encourage diversity in the law firms that did their outside legal work, the Statement of Principle asked its adopters to sign on to this language: "We expect the law firms which represent our companies to work actively to promote diversity within their workplace. In making our respective decisions concerning selection of outside counsel, we will give *significant weight* to a firm's commitment and progress in this area."¹³²

The principal drafter of the Diversity Pledge boasted of the influence General Counsel have on their outside counsel, noting that if anyone thought the Statement of Principle meant nothing, then "[Y]ou may not know much about law firms."¹³³

At first blush, it looks like everybody's problems are solved. You can hear the armies of corporate clients chanting the new mantra of diversity as a business strategy.¹³⁴ Scores of corporations have signed the diversity pledge and are dangling the legal business carrot from the get diverse or else stick, and law firms are reportedly intensifying their efforts to recruit talent that fits the paint-by-numbers outline. Quite telling is BellSouth's remark that doubters must not "know much about law firms." Trouble is, we do know much about law firms, and what we know does not hearten us. Ironically, the Minority Counsel Project and the Diversity Pledge amount to one segment of the "lawyer class" (the organized bar) identifying another segment (elite law firms) as reluctant integrationists and seeking the assistance of another segment (elite in-house counsel) to bring the errant segment into line with a stick.¹³⁵

weight to a firm's commitment and progress in this area.

General Counsel who wish to sign this letter should fax Charles Morgan at BellSouth Corporation, 404/249-5948, or email holman.cynthia@bsc.bellsouth.net. Also, please visit ACCA Online at www.acca.com/gcadvocate/calltoaction/index.html.

132. *Id.* (emphasis added).

133. Raising the BAR, *supra* note 126, at 16.

134. Fred Alvarez, president of the San Francisco Bar Association and partner at Wilson Sonsini Goodrich and Rosati opened his remarks with, "It's a business issue." *Id.* at 4. Charles Morgan, executive vice president and general counsel of BellSouth, and the architect of the Corporate Pledge, also knows his numbers. *Id.*

135. It is worth noting, that in Chicago at least, one finds more minority attorneys in-house than at the large law firms. See Lynne Eckert Gasey, *Corporate Law Departments Top Law Firms in Diversity Hiring*, Chi. Law., May 1998, at 20. Topping the list in Chicago was Abbott Labs (whose general counsel Jose DeLasa is Hispanic) at 20.4% minority; Amoco Corporation had 14.3% minority; Advocate Health Care chimed in at 12.5%; and Ameritech followed at 12.2%. *Id.* Perhaps this is because manufacturing companies such as Abbott and companies that provide services such as Ameritech have a more vivid concept of what their "consumer" looks like, and apparently, if the BellSouth Statement of Principles is any indication, want their own staffs to look more like that consumer. I find it ironic because many corporate general counsel come from the large law firms. Perhaps another day, I will research how that transformation from "bad guy" to "good guy" occurs.

IV. WHAT'S SO BAD ABOUT GIVING BLACK LAWYERS JOBS?

Call me cynical. If law firms respond to their clients' calls for diversity using the access-and-legitimacy models prevalent in the manufacturing and retail community, the results will mirror those of that community. Diversity researchers identify real and perceived tokenism as one of the six challenges of diversity, occurring when an employee is hired [over other clearly more qualified candidates] in order to "address stakeholder concerns, or simply to fulfill numbers."¹³⁶ A majority of lawyers surveyed for the ABA believed that diversity efforts were mere tokenism.¹³⁷ Fulfilling the clients' goals, if not undertaken with respect for the goal of diversity as inherently valuable, can result in three variations on tokenism: race matching, mascots and props. Fealty to demographics undercuts the quest for true diversity on a wide scale, and at most augurs well for the small number of individual people of color who are in the right place at the right time.¹³⁸

A. Race Matching

Demand-side diversity calls for matching communicators' race or ethnicity with that of the consumer. Kmart's assumption that a black consumer will communicate better with a black provider of services affirms two myths: the myth that being black defines a person regardless of educational, social, cultural, economic or gender differences; and the myth that blacks and others are so different as to need U.N. translators between them. Yet race matching is precisely the result of such diversity endeavors. The "diverse" employees occupy similar posts in human resources, community relations and

136. Janice R.W. Joplin & Catherine S. Daus, *Challenges of Leading a Diverse Workforce*, 11 Acad. Mgmt. Executive 32, 41, 42 (1997). "[Q]uota systems may be the only method to ensure that diverse individuals are included in recruitment and selection," in an "intolerant organization," but in those same organizations is where you find the "most resentment toward members hired under a quota system." *Id.* Where tokenism is perceived (even if not actual) others tend to attribute failures to the "diverse characteristic" and successes to happenstance or organizational benevolence. *Id.*

137. Research USA reported to the NBA that over 90% of black attorneys and more than half of white attorneys polled saw firms' efforts at diversity among partners as tokenism only or did not know the rationale behind the efforts. Note the disparity between the perceptions of black and white attorneys. Even if the truth lies somewhere in between, the perception is prevalent enough to cause concern. See Wendell Lagrand, *Getting There, Staying There*, Nat'l B. Ass'n Mag., Jan./Feb. 1999, at 28-29.

138. Wilkins discusses the effects of "self-interested diversity" and describes the preliminary results of his research for a book about black corporate lawyers. He reports finding that many of the black partners he interviewed "work primarily or extensively in the labor and employment area, where their race is seen as a plus in defending companies in discrimination cases." See Wilkins, *supra* note 11, at 863. Wilkins also concludes that most do so voluntarily. See *id.*

sales in ethnic markets.¹³⁹ The insurance sector has formed a conclave to work on diversity in response to criticism that it lagged behind other race-matching companies. A critic has said:

If you're a person of color purchasing an insurance product, whether it's a policy for your automobile or home, or life insurance, you're much more apt to be serviced by a person who is white than one who is African American, Asian American or Latino. Considering it's an industry many consumers find confusing and intimidating, it only makes business sense to make the process as stress-free as possible, which means having a salesperson to whom the consumer can relate.¹⁴⁰

Such myths demean and alienate. This kind of essentialism¹⁴¹ only reinforces racial separateness, and takes us further away from our supposed laudable goal of cultural pluralism and real integration.¹⁴² Even more bothersome, race matching frees whites from ever having to work toward the "empathy" that Bollinger intuits so well.

In the legal context, race matching reinforces and relies on assumptions that, for instance, Asian lawyers can better communicate to Asian clients, and that Hispanic associates will be good for a firm hoping to expand into Latin America. Whereas the ethnic minority may have some cultural facility that the European may lack, the perfidy arises if the ethnic attorney is relegated *only* to that function and in effect "shunted into an [ethnic] practice."¹⁴³ The practical result is that the fortunes of the black attorney rise and fall dependent on motile factors like geography and demographics. Because there

139. While the bigger discount chains have some blacks and Hispanics, you do not see them at the trade shows. They are in distribution, human resources, and PR. In other words, they are where they can be seen and heard by the Hispanic or black consumer. This phenomenon has been referred to as "matching colors." See Stankevich, *supra* note 115, at 29.

140. See Eric L. Hinton, *Agents of Color Crucial to Insurance Companies' Success*, Oct. 7, 2002, at www.DiversityInc.com (on file with author).

141. Do African-Americans, Hispanics, and women seek only "their own kind" in lawyers? This raises the specter of racial, ethnic, and gender "essentialism" that bothers many theorists and lawyers. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 585 (1990) (arguing against the idea that an "'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience") (citation omitted)); see generally Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989) (criticizing the claims of "essentialism" made by critical race and feminist legal theorists).

142. See Carrie Menkel-Meadow, *supra* note 13, at 906. Menkel-Meadow refers to the use of minority or women lawyers to defend against race or sex discrimination cases as "'negative' instrumentalism," which she says could suffer from the "dangers of essentialism and stereotyping." *Id.* (citation omitted).

143. Gasey, *Retention and Promotion*, *supra* note 120, at 4. Sandra Yamate, staff director of the A.B.A. Commission on Racial & Ethnic Diversity in the Profession, has said, "Hispanic attorneys and Asian attorneys, especially the ones who are bilingual, find themselves shunted into an international practice. If that's what they are interested in, great; but [if not] it can be a difficult stereotype to break out of." *Id.*

are likely few black jurors in, say, a town like Bismarck, North Dakota, a firm there need not look to hire minority candidates, who will have no interpretive or communicative "role" to fill. The manufacturer of high end European sports cars may believe he can do without the small number of black consumers, so why have blacks in the workforce?¹⁴⁴ By expecting the value added by the black attorney to be limited to certain circumstances, the attorney and the organizations are diminished.

B. *Mascots*

Recently, commentators have documented the experiences of black partners practicing labor law, not management versus the AFL-CIO, but representing Fortune 500 companies as defendants in suits alleging racist or sexist practices, and becoming experts in Title VII.¹⁴⁵ Professor Sumi Cho calls this repugnant tactic "racial mascot[ing]."¹⁴⁶ The likelihood that firms will take the numbers bait is strong. Studies show that during times when cities have mayors or other purchasing agents who are black and who impose racial requirements on firms, the number of black and other minority partners increases, and those attorneys do the bulk of their work in municipal finance or government contracting for that insistent client. A particularly nasty form of mascotting places the black attorney in the unenviable position of the engine for discriminatory action.

Gary Davis sued Baltimore Gas & Electric ("BG&E") in 1997 for race discrimination claims, and lost the case by the verdict of an all-white jury. The lawyer for BG&E, a black attorney from a Baltimore firm, used peremptory challenges (where the striker is not required to show any disqualification) to eliminate the two possible black jurors.¹⁴⁷ The practice has been condemned by the Supreme Court,¹⁴⁸

144. Although diversity advocates and consultants have tendered the argument that racial and ethnic minorities will bring a race- or ethnicity-specific insight to parts of the consumer market, such groups may be minimizing the implications of the converse notion, which is that if that market does not exist in sufficient number to matter to the corporation's bottom line, then those same minorities have no virtues in the larger consumer marketplace. Menkel-Meadow, commenting on the work of Wilkins, has said, "[Self-interested diversity] is largely a demographic argument, suggesting that 'race, ethnic, and gender matching' . . . is a potentially dangerous continuation of racial, ethnic, and gender stereotyping." Menkel-Meadow, *supra* note 13, at 904 (citations omitted).

145. See Wilkins, *supra* note 11, at 863.

146. See Gabriel Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 UCLA Asian Pac. Am. L.J. 129, 161, n.161 (1996) (attributing the term "racial mascot" to Cho's remarks at the First Annual Asian Pacific American Law Professors Conference in 1994). As an example, Sheila Thomas of the Equal Rights Advocates in San Francisco, Ca., told me a story about a friend at the NAACP LDEF who brought a case for a black realtor who was assigned to black clients in black neighborhoods only. A jury gave her \$100,000 for the way she was "racially mascotted."

147. See Higgins, *supra* note 55, at 50-51 (discussing the case of *Davis v. Baltimore*

but persists daily in courtrooms across the country. The defense mascot said he “wasn’t particularly concerned about the racial makeup of the jury.”¹⁴⁹

C. Props

The most crass form of token is the one who actually has no duty except to be present and ethnic, to be “the spook that sits by the door.”¹⁵⁰ Rather than dredge up a painful personal anecdote or a friend’s¹⁵¹ as an example of ruthless utilitarianism, let me offer a celluloid law firm propping up a black lawyer.¹⁵² We can barely ascertain whether pop culture follows reality or vice versa. In any event, the film idea of law firms rings of truth.¹⁵³

Gas & Electric Co., 160 F.3d 1023 (4th Cir. 1998)).

148. See *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (“The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . or on the false assumption that members of his race as a group are not qualified to serve as jurors.” (citation omitted)).

149. Higgins, *supra* note 55, at 50-51.

150. See generally Sam Greenlee, *The Spook Who Sat by the Door* (1969). Greenlee caused a stir in his novel, in which the protagonist, Mr. Freeman, is hired by the CIA (get it—he’s a “spook”) so that a candidate for public office can say to the black community that he tried to integrate the CIA. *Id.* “Freeman was appointed the next week as special assistant to the director. He was given a glass-enclosed office in the director’s suite. His job was to be black and conspicuous as the integrated Negro of the Central Intelligence Agency of the United States of America.” *Id.* at 47. Earlier in the book, the candidate calls into his office the token black on his campaign team to find out why the candidate is not selling well in the black community. A staffer remarks that the token is not very smart, and the candidate replies, “I guess it’s not brains we’re looking for in him anyway.” The retort is, “No . . . That’s his least valuable commodity to us.” *Id.* at 3. Another provocative quote that is pithier is “For five years he had been the CIA nigger and his job had been to sit by the door.” *Id.* at 76.

151. I commend to you Paul M. Barrett, *The Good Black: A True Story of Race in America* (1999), a chilling tale of affirmative action misused and abused. The author tells the saga of a black male associate in an elite law firm in the Midwest, who sued the firm in 1998 alleging race discrimination. The associate lost the lawsuit, but not before putting issues of integration in high places back on many a radar screen. See Professor David B. Wilkins’ review of the book in *On Being Good and Black*, 112 *Harv. L. Rev.* 1924 (1999).

152. Many scholars deconstruct movies to illuminate legal constructs and to measure the civic tolerance for certain representations. See, for example, Professor Keith Aoki, who used the movie *Snow Falling on Cedars* (Universal Pictures, 1999) to examine the evolution in the way Asian Americans are represented on and off the celluloid, and in American legal consciousness. See Keith Aoki, *Is Chan Still Missing? An Essay About the Movie Snow Falling on Cedars and Representations of Asian Americans in U.S. Films*, 7 *UCLA Asian Pac. Am. L.J.* 30 (2001).

153. See Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 *UCLA L. Rev.* 1339 (2001). Asimow says that celluloid law firms are populated with repulsive or greedy human beings who work in “sweat shops . . . conduct scorched-earth litigation,” and lay to waste everything in their paths. *Id.* at 1374-75. He then compares those depictions to reports of accounts in real-life firms and concludes that while law firms are not the most evil entities found in America, as they are portrayed in movies, they do pose troubling problems for the profession. *Id.* at 1391-92.

In the 1982 movie *The Verdict*,¹⁵⁴ once described as one of the “great civil law films of our time,”¹⁵⁵ Paul Newman plays a downtrodden solo practitioner who gets handed a personal injury case with a comatose hospital patient as a client. James Mason struts around haughtily as the head of a team of ruthless big firm litigators for the defendant hospital. In the words of Newman’s second chair, Mason is “the f—king prince of darkness.”¹⁵⁶ Of course, Mason’s patrician, bow-tie-sporting, white-shoe-firm lawyer stands in stark contrast to Newman’s outcast. Mason’s minions are obsequious if not servile, draping his coat over his shoulders, blocking, then handing him his hat, scurrying about like rodents. Newman’s ace in the hole is a courageous ER doctor willing to testify as an expert witness against the defendants. When the defendant “disappears” this witness, Newman desperately searches for a replacement who can testify on short notice. Mason’s firm gets a tip on the identity of the replacement. In a plush conference room at the firm, five associates—all white—meet with Mason to plan the cross-examination of the new witness. One minion recites the good news: the doctor is in his late 70’s, he graduated at the lower end of the class from a so-so medical school, has only one hospital staff appointment, and even it is a courtesy appointment. The description continues:

Minion: (*looking positively salacious*) And . . . he’s black.

Mason: (*stern and indignant*) I’ll tell you how to handle the fact that he’s black. You don’t touch it. You treat him just like anybody else, neither better nor worse.

(The associates look crestfallen as their colleague is upbraided for making an apparently racist [they would say “politically incorrect”] remark.)

Mason: (*forcing back his smirk*) And, um, let’s have a black lawyer sit at our table.

Minion: (*brightening again*) Yes, sir!¹⁵⁷

I suppose the firm must have some blacks stashed away for just such an occasion. Have a black lawyer *sit at our table*—not even mascotting the black lawyer by inviting her onto the trial team to do the dirty work of ripping apart the old black doctor on cross. Billed out at perhaps \$275 an hour, the only assignment for the associate was to be black and visible. There are assignments I find completely

154. See *The Verdict*, *supra* note 1. In discussing examples found in *The Verdict* of how big firms cheat, Asimow ignores the “mascotting” of the black associate that I put right up there with satanic child sacrifice. See Asimow, *supra* note 153, at 1384. Reasonable minds can differ, but is that not the point of true integration?

155. See Weisberg, *supra* note 35, at 527.

156. See *The Verdict*, *supra* note 1.

157. *Id.*

unobjectionable that take race into account. Maybe, “Let’s invite our black associate to join our team to offer some insight into the racial dynamics, if any, of examining this witness.”¹⁵⁸ To read some of the withering critiques of the profession—and they are legion—I would not have to be a cynic to envision life imitating art, played out in the corner offices of fine, white-shoe, ostensibly all-white firms that have been urged by their corporate clients to “get thee to diversity.”

D. *Risk-shifting*

All of these scenarios unfold in ways that shift the difficult decision to the party that least deserves the dilemma. The black attorney may have to choose between living a life free of compromises to her integrity, and one free of debt. If offered a challenging, complex race or sex discrimination case to handle for a valuable firm client (isn’t everybody just happy?) the poor soul must go through a difficult mental process. The perception of tokenism affects everyone in the organization, including the putative token. The black attorney may be put in the awkward position of questioning whether her enormous talents or her very convenient race predominated in the decision to offer her the matter. Will she be asked to skirt the boundaries of permissible conduct in performing due diligence on behalf of the client? Will she be assigned to the matter to satisfy the client’s scrutiny and then offered demeaning or rote work that provides billable hours but no valuable experience? Perhaps the Alameda County minority attorneys indeed wish to be practicing in the discrimination defense area, or maybe they want to survive.

V. THE ABC’S OF TRANSFORMATION, OR YES, THEY CAN BE SAVED

A. *What Change Agents Are Up Against*

Every successful transformation must have change agents. Corporate leaders interested in truly transforming the opportunity landscape in their own organizations and who have the muscle to affect efforts elsewhere are positioned to act as such agents, if they equip themselves to do so. Clearly many are serious about the commitment to diversity. The best arguments for integrating law

158. Legal philosopher Nancy Rourke offers two possibilities: having several observers with different conceptual frames observe the object from the same vantage point as the lone individual will yield several different interpretations; having several observers with the same conceptual frame as the individual observe the same object from different vantage points will also yield several different interpretations. The former is the strongest argument for racial and gender diversity. See Nancy Rourke, *How to End the Acrimony Over Affirmative Action*, 28 Sw. U. L. Rev. 309, 312 n.16 (1999).

firms should have both a logical component, not necessarily utilitarian or instrumentalist, as well as the passion of St. Joan. The preference for and value of ideas and opinions formulated out of various worldviews are basis enough for insisting on diversity in law firms. It is the one astutely and passionately urged in *The Shape of the River*.¹⁵⁹

The leadership of these firms—often white men in their 60's and 70's—spent their youth during legalized segregation and certainly during Jim Crow, and as young adults may have experienced little contact with blacks other than those in service positions.¹⁶⁰ As young lawyers many were no doubt complicit—by their silence—in the segregated state of the organized bar itself. If they were young members of the ABA, they saw that organization sit by idly during some of the nation's most turbulent contests of right and wrong. As a result of the legacy of intentional discrimination in the profession, the segregation at the elite firms cannot be explained as either accidental or benign; firms like these need more than mere numbers of minorities. These firms need a moral reconstruction, and only a “social gospel” will take them there. If these champions really mean to be agents of change, willing corporations will have to go themselves one better, and foment a moral reconstruction. In a related context, Judge Richard Posner coined the term “moral entrepreneurs.”¹⁶¹ He defined moral entrepreneurs as prophets, politicians, or preachers who “spot [a] discrepancy between the existing code and the changing environment and persuade the society to adopt a new, more adaptive code.”¹⁶² I like that: corporate moral entrepreneurs.

Law firms are widely considered to be “not nice.” There is a growing body of legal and other scholarship devoted to vilifying law firms.¹⁶³ If what most commentators say is true, the invitation to maximize attorneys' self-interest by racial integration will be perverted by the unscrupulous among them. Diversity on cue may be rational, and have instrumental efficiency, but it lacks at its fundament any moral philosophy. Moral entrepreneurs can change moral codes,

159. See Bowen & Bok, *supra* note 98, at 279-80.

160. Even under the statute challenged in *Plessy v. Ferguson*, blacks who were nursing white children could ride in the whites-only railroad car. See 163 U.S. 537, 541 (1896).

161. See Posner, *supra* note 62, at 1667. In an article that derived from his Oliver Wendell Holmes Lectures at Harvard and devolved further into a book by the same title, Posner drew a fundamental distinction between professional moral philosophers, whom he basically considered worthless and what he calls “moral entrepreneurs,” genuine agents of social change. *Id.* I think these corporate leaders are also capable of becoming moral entrepreneurs.

162. Richard A. Posner, *The Problematics of Moral and Legal Theory* 44 (1999).

163. See Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* 1-22 (2000). See generally the sources cited in Asimow, *supra* note 153; Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871 (1999).

not only by rational arguments, but also by altering the boundaries of altruism with persuasion. One feature of moral entrepreneurship is prominently holding one's own way of life up as an example.¹⁶⁴ Without it, the corporate clients' best-laid plans may cost more than they benefit. With no ability to monitor implementation, good will could lead to, if not invite, racial mascotting and stereotyping, which would in fact hurt the intended beneficiaries. Corporations expect firms to respond to the threat because of firms' baser characteristics—a focus on maximizing profit, ensuring sustainability in the market, and sharpening their competitive edge.¹⁶⁵ Paradoxically, these very qualities, unchecked, suggest those firms will “sidestep, crawfish and wheedle”¹⁶⁶ their way around true integration and redistribution of power and money.

If the corporate diversity movement is to qualify as a *movement*, it has to act like one. Movements use the visceral power of rhetoric to their advantage; the Pledge needs a better narrative. Many legal scholars have studied the effect of narrative in court decisions, for instance, where the words chosen by a judge reveal more than their surface meaning.¹⁶⁷ Even the demise in the race conversation of the powerful terms “desegregate” and “integrate” and the nearly wholesale adoption of the word diversity (weak), or diversification (weaker) conveys something about the crusade. We have talked about the differences between the new economic diversity paradigm and the old morality-based integration paradigm. They differ as well in that the former has none of the latter's *seen-the-mountaintop* rhetorical flourish, its narrative potency. We have heard Jack Kennedy, and corporate CEOs do not sound like Jack Kennedy.

The successful moral arguments for integration, the transformative kind that results in redistribution of power, and which endured changes in demography, fortunes and fashions had both intellectual cogency and emotional power to change beliefs because the

164. Posner, *supra* note 62, at 1667.

165. Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. Rev. 723, 725 (1994) (“Lawyers are little more than prostitutes quick to compromise principles for a fee.”). See generally Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (1991); Robert L. Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (1988).

166. President George W. Bush, Address to the United Brotherhood of Carpenters and Joiners of America (Sept. 2, 2002). I could not resist mining the alliterative beauty of Bush's prediction as to how Iraq's Saddam Hussein had responded once before to attempts by the United Nations weapons inspectors to search his country for weapons of mass destruction. This is a “yummy” phrase.

167. Thomas Ross, *The Richmond Narratives*, 68 Tex. L. Rev. 381 (1989). Ross argues that the various opinions in the case of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) did much more than add to the Court's affirmative action jurisprudence. As narratives, Ross contends, the language reveals “the deeper nature of our struggle to move to a world where discrimination on the basis of race truly has no place, no purpose, no logic.” Ross, *supra*, at 381.

entrepreneurs made their own lives the example. Only under a moral visionary would some intractable institutions integrate under the leadership of men—and a few women—who dared to promote change out of an abiding sense of right and wrong and who had the courage to take on not only those who criticized but also those who defied. Integration, the prequel, was nothing if not dramatic. In its favor, the old movement had a powerful narrative and rhetoricians; it had moral clarity; it had heroes.

B. Narrative

It had a language, a vocabulary of its own, and great orators to dazzle and humble. Speeches about civil rights had a rhythm and cadence that imbued the mission with appropriate gravitas. That era used the rhetoric of faith in the desegregation struggle; speakers used an unabashed moral tenor that forced people to flat out choose between good and evil. Some invoked Scripture. There was fire; there was brimstone. In fact, the desegregation polemic often came from a pulpit, and made its way into the popular media. Many invoked religion: “We are *God-fearing* men and women. We placed our *faith* in the brotherhood of man under *the fatherhood of God*”¹⁶⁸ Others, the history of the nation’s founding to stimulate it into action: Dr. King wanted to help this nation “*live up to the true nature of its creed—that all men are created equal*”¹⁶⁹ Some of them managed to summon the muses of both history and religion to great advantage:

The American people stand firm in the faith which has *inspired this Nation from the beginning*. We believe that all men have a right to equal justice under law and equal opportunity to share in the common good. We believe that all men have the right to freedom of thought and expression. We believe that *all men are created equal* because they’re created *in the image of God*.

. . . .

From this faith we will not be moved.¹⁷⁰

168. See *The American Reader: Words That Moved a Nation* 298 (Diane Ravitch ed., HarperCollins 1990) (emphasis added) [hereinafter *American Reader*]. “In 1948, the Democratic Party was a quandary To the Democratic convention in Philadelphia came Hubert Horatio Humphrey (1911-1978), the exuberant young mayor of Minneapolis who was running for the U.S. Senate On July 14, 1948, Humphrey delivered the following impassioned plea for a bold stance on civil rights. When the convention sided with him, the southern Democrats bolted the convention and the party.” *Id.* at 296.

169. Martin Luther King, Jr., *I Have a Dream, Address at the March on Washington for Jobs and Freedom* (Aug. 28, 1963), *reprinted in A Call to Conscience: The Landmark Speeches of Dr. Martin Luther King, Jr.* 81 (Clayborne Carson & Chris Shepard eds., 2001).

170. Harry S. Truman, *Inaugural Address* (Jan. 13, 1949), *reprinted in American*

Interpose between the sentences an *Amen* or a “*speak the truth, brother,*” and you have an old-fashioned church service and a call to do God’s will. Would that we could hear a corporate call to diversity interrupted by prolonged applause or a rumbling “Preach, brother.”

C. Moral Clarity

Once the battle was cast in honored historical traditions, using words that were still freshly ringing from the nation’s own emancipation, the result was foregone. The fight for equality for former slaves demanded that the legatees of former slave owners demonstrate whether we as a nation remembered a set of normative values that led America to its very creation. No one parsed rights into economically exchanged units. “I’ll give you two black admissions to Ole Miss if you’ll show me where the state of Mississippi will stand to benefit within four years of their graduation.” The authors of the play wanted to vividly define a *bright line rule* to help separate the Good Guys—who cannot by the way, stand by in “appalling silence”¹⁷¹—from the Bad Guys. The fiery oratory and ever-ready TV cameras helped draw it. “In far too many ways American Negroes have been another nation; deprived of freedom, crippled by hatred, the doors of opportunity closed to hope.”¹⁷² You could instantly know good from bad.

D. Heroes

Today’s diversity moral entrepreneurs could take lessons from yesterday’s integration heroes. They displayed an unequivocal moral posture that made observers either love or loathe them, but not ignore them. The conduct of mere individuals, at certain crucibles, gave a moral tenor to the desegregation struggle that galvanized good people. Their resolve led to personal and institutional changes that

Reader, *supra* note 168, at 298-99 (emphasis added).

171. Dr. Martin Luther King Jr., Letter from Birmingham City Jail (Apr. 16, 1963), reprinted in American Reader, *supra* note 168, at 325.

172. Lyndon B. Johnson, Howard University Address (June 4, 1965), reprinted in American Reader, *supra* note 168, at 340. President Lyndon B. Johnson spoke to the Howard University graduating class of 1965. Howard University is symbolic because it operates the greatest (and longest enduring) of the historically black law schools, and it was there Johnson laid out his plans for the Great Society. He acknowledged in his speech,

You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair.

Id.

were followed by action based on that moral commitment. Let me offer three examples, one each from the worlds of sports, arts and war.

1. Sports

When, in October 1947, Brooklyn Dodgers General Manager Branch Rickey signed Jackie Robinson to the 1947 Brooklyn Dodgers as its first black player, he did a good, moral thing at his peril.¹⁷³ The players on opposing teams who slid into Robinson with their spikes high in order to draw blood, who sent death threats to Rickey and to Robinson, who hurled rotten fruit onto the field, were seen in the eyes of the nation and the world as pitiful and evil. Their guttural epithets clanged around the airwaves as emissaries of America's embarrassing past. Rickey's moral leadership could not have been more necessary and effective; pure, courageous, unmediated and without rationalization. Very simply good guys and bad guys.

2. Arts

A pivotal event in the black liberation struggle came in the spring of 1939 when Howard University tried to arrange for Marian Anderson, a world-renowned black contralto, to perform in Washington, D.C. The President of the Daughters of the American Revolution ("DAR"), whose home, Constitution Hall, is a great concert venue, refused to allow Anderson to schedule her concert there.¹⁷⁴ Anderson was humiliated, but took the rebuff with dignity. DAR's conduct struck many as just plain wrong and shameful.¹⁷⁵ When the Secretary of the Interior Ickes arranged for the concert to take place on Easter Sunday on the steps of the Lincoln Memorial, 70,000 people came to hear her. But the act that focused worldwide attention was not the racist incident itself, but the response of a prominent individual willing to exploit that prominence in the service of society. First Lady Eleanor Roosevelt, a lifetime member of the DAR, as well as probably the New Deal's most vocal civil rights champion, publicly resigned from the organization in protest of the conduct. She had often showed more chutzpah than her husband—actively supporting

173. See Paul Finkelman, *Baseball and the Rule of Law*, 46 Clev. St. L. Rev. 239, 248 (1998) ("Branch Rickey . . . hired Jackie Robinson nearly a decade before the 'Brown Revolution' of 1954. No court or judge ordered the integration of the sport." (emphasis in original)).

174. See Alton Hornsby Jr., *Chronology of African-American History: Significant Events and People From 1619 to the Present* 85 (1991); Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 Colum. L. Rev. 1577, 1578-79 (1998).

175. For a discussion of the criticism, see *Marian Anderson 1897-1993*, at <http://www.pbs.org/wgbh/amex/eleanor/peopleevents/pande06.html> (last visited February 20, 2003) ("Outraged, the 'Marian Anderson Committee' formed to petition the D.A.R. and likened the organization's actions to those of Hitler's racist regime.").

the NAACP's desegregation efforts and financing the work of the Quakers,¹⁷⁶— as she was neither empowered nor hobbled by elected office. Guided by her conscience, the First Lady turned away from women she had worshipped with, cried with, suffered with,¹⁷⁷ because she believed what they did was wrong.¹⁷⁸ The nation followed as the DAR tried to nimbly retreat, its provincial ladies' knickers all in a bunch. Editorials criticized their backwardness, and lauded Mrs. Roosevelt's principled stand.¹⁷⁹

3. Military

The military always provides primeval battles between good and evil. Efficient top-down leadership provided the model for many a corporation and probably a law firm.¹⁸⁰ Nonetheless, even a uniformed leader who forced change in the normative values of the organization acts like a moral entrepreneur. He has to *believe* in the rightness of his mission, articulate those beliefs unequivocally, act with courage, brook no dissenters, and follow through. Compare, for instance, President Truman's order to desegregate the armed forces,¹⁸¹ with President Clinton's meltdown when he encountered opposition to his promise to end the gay ban in the military. The hero is Admiral Elmo R. Zumwalt, the Chief of Naval Operations (CNO) from 1970–1974. Admiral Zumwalt used his watch¹⁸² to institute drastic change in

176. See Bacon, *supra* note 97, at 148; Rochelle Chadakoff, Eleanor Roosevelt's My Day: Her Acclaimed Columns 1943-1945 (1989). Mrs. Roosevelt said in one of her famous newspaper columns that she resigned because "[t]o remain as a member implies approval of that action." Eleanor Roosevelt, *My Day: DAR Resignation*, (Feb. 27, 1939) available at www.pbs.org/wgbh/amex/eleanor/sfeature/mdri01.html.

177. Joseph P. Lash, *Life Was Meant to be Lived: A Centenary Portrait of Eleanor Roosevelt* 130 (1984).

178. *Mrs. Roosevelt Says She Has Resigned over Refusal from DAR Hall to Negro*, N.Y. Times, Feb. 23, 1939, at 18.

179. See, e.g., Russel J. Upton, *Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking its State-Level Tax-Exempt Status*, 50 Am. U. L. Rev 793, 856 (2001) ("Following [the Anderson] event, D.A.R. 'lost stature and public support. . . as it became identified with racial bias.'") (citation omitted).

180. When I returned to my law firm in late 1987, after spending six years in Navy, for weeks the change was not apparent to me.

181. Truman first insulated himself by creating the President's Committee on Civil Rights in the Armed Forces (called the Fahey Committee after its chairman). Based on the Committee's unequivocal recommendation in a work entitled "To Secure These Rights," he signed into law Executive Order 9981. See Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948) (requiring equal opportunity "for all persons in the armed services without regard to race, color, religion or national origin"). Afterward, when Southerners in the Army balked at implementation, he brought them to the attention of the Committee. The Army fell into line reluctantly, until today it is cited as a model of true integration. See F. Michael Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 Wm. & Mary Bill Rts. J. 273, 316-17 & nn. 312-17 (2000).

182. In Navy parlance, a sailor's "watch" is the period of time that he or she serves

the Navy culture, specifically “to throw overboard once and for all the Navy’s silent but real and persistent discrimination against minorities.”¹⁸³ He felt blacks were the chief victims.¹⁸⁴ The Navy was 300 years old, older than the nation, and of all the services, the one most steeped in white male aristocratic mythmaking.¹⁸⁵ And it was thoroughly racist in ways that should have been obvious. Whole career fields were closed to blacks, Filipinos and Mexicans.¹⁸⁶ Mess cooks were all colored. Ship’s stewards were too, in a lurid reproduction of the conquering ships that first plundered the southern islands.

Zumwalt thought racial injustice in the military was flat out wrong, not to mention that it was a horrible waste of perfectly good manpower.¹⁸⁷ Although his vigorous campaign to root out racism nearly got him fired, he acted because his parents “bequeathed [to him the] knowledge that color of skin or racial origin provided no clue to a person’s character or worth.”¹⁸⁸ Whether he knew it or not, he had the makings of a moral entrepreneur. Powerful enemies did not stop him. Even his critics admit he transformed the modern Navy. When you compare the results of Zumwalt’s moral campaign to the still unsatisfactory results of coeducation in the service academies, you see the difference moral persuasion makes.

CONCLUSION

As this essay has described, the client-driven current movement for diversity and inclusion at top law firms is guided not so much by a sense of right and wrong, of equity and goodness, but by an instrumentalist examination of the balance sheet. At the very least, spokespersons for diversity have made the economic argument their loudest and clearest. Over thirty corporations and other organizations filed amicus briefs supporting Michigan’s race-conscious admissions policy, most of them citing the economic need for a diverse workforce in order to compete globally and in a less white America.¹⁸⁹ In its

on board ship as the lookout, responsible for the safety of the ship and its crew, and by extension, the nation. Zumwalt selected this term to describe his term of service, signifying that he identified with the enlisted men standing on the ship’s bow, carefully keeping a watch on the horizon, and that the Navy was under his careful scrutiny. See generally Elmo R. Zumwalt, Jr., *On Watch: A Memoir* (1976).

183. *Id.* at 168.

184. *Id.* at 197.

185. Zumwalt said, “It had to change, and change fast, the opinion . . . that [the Navy] was a humorless, tradition-bound, starchy institution owned by and operated for the benefit of white males.” *Id.* at 178.

186. *Id.* at 198.

187. *Id.*

188. *Id.*

189. See Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 *Yale L. & Pol’y Rev.* 1, 61 n.313 (2002) (“A number of Fortune 500 firms have filed amicus briefs defending the programs in the pending University of Michigan cases.”);

brief, General Motors, Corp., headquartered in Michigan, urged the Supreme Court to accept the case and uphold Michigan's policy, because "the future of American business and, in some measure, of the American economy, depends upon it."¹⁹⁰ When firms more heavily recruit black attorneys or enter into widely publicized agreements to achieve certain levels of diversity within certain time periods, they turn out to be hollow promises. Within a few years, the studies show, most of those black attorneys have left. Some, the "Jackie Robinsons" of law, stay and make good, and do so well in their roles, even if disingenuously offered, that they "prove themselves." One example that many like to offer of how people brought in as tokens take advantage of the circumstances and prove they are in fact good coin is the black GIs in WWII.¹⁹¹

I am a child of the sixties. I want rhetorical flourishes, hellfire, brimstone, and derring-do. I want heroes. Is that so wrong?

Jonathan D. Glater, *Some Companies Back Michigan in Affirmative Action Policy*, N.Y. Times, Jan. 29, 2003, at C01; Barbara Frankel, *33 Major Companies Support U. of Mich. Affirmative-Action Plan, Many More to Join* (Jan. 16, 2003), at www.DiversityInc.com (on file with author).

190. Brief of Amicus Curiae General Motors Corporation at 1-2, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 01-1447). The brief is available in its entirety at <http://www.acca.com/gcadvocate/gm/cover.html> (last visited Jan. 13, 2003).

191. See Higginbotham, *supra* note 181, at 282-84.

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