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## The Role of Assets in Assuring Equity

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*Alfred Dennis Mathewson\**

I am writing a book. It is entitled *Please Alfred Don't Talk About Race*. As senior class president, I delivered a commencement address at my high school graduation. My high school, Bertie Senior High in Windsor, North Carolina, had been integrated for three years after the black and white school systems had been consolidated in the late sixties. As we marched out, the senior class adviser uttered to me the unforgettable words of the title.

By then, it was too late to have heeded the advice for the speech had already been written. I still have a copy of it. It was rather routine stuff for a high school senior. Although I showed some creativity drawing then contemporary metaphors, it really was not very good. And it was not about race. Since then, I have in fact spent much of my professional life thinking about matters other than race, matters like corporations, bank regulation, securities and taxation. I have come to accept that my interest in teaching, writing, working on, and thinking about such issues is a luxury.

Over the past several years, however, I have become aware that my race is a part of everything I do. When I teach business associations or business planning, my race is there. When I teach sports law, my race is there. It shows up in the metaphors, analyses of the cases, hypotheticals, and values that I use in the classroom. It does not show up as some category of "Race and . . ." It is simply of a normal part of who I am, what I do, and what I think and write about. This essay included in a symposium on Racial Equity in the 21st Century will reflect that proposition. I am not now nearly thirty years after my graduation from high school going to write about race, although it will be large part of this essay in which I argue that enhanced access to corporate and commercial lawyers by people and communities of color can make a positive difference in the quest for racial equity in the 21st Century, and that law schools have a substantial role to play in facilitating that access.

Enhanced access to corporate and commercial lawyers will not in and of itself result in the remediation of four hundred years of racial oppression. If, however, people of color in the United States are to enjoy economic prosperity to the same extent as whites, they must have the tools to compete in the marketplace. Those tools necessarily include lawyers to advise, counsel, and represent them in entering into legally enforceable contracts, something implicitly contemplated by Congress in the Civil Rights Act of 1866.<sup>1</sup> It is

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1. The Civil Rights Act of 1866 was superseded by the Civil Rights Act of 1870 and is now codified at 42 U.S.C. § 1981 (1994). The Act explicitly invokes comparisons with whites as the standard for measuring equality.

doubtful, however, that the Act changed things much for the freed slaves, for despite the legal rights conveyed by the Act, there were few lawyers they could count to represent them in enforcement actions. Although much of the case law involving the Act deals with its proscription of racial discrimination, I shall dwell on its transactional trigger. In the 21st Century, to deliver the promise of the Act, law students, especially students of color, must be trained to provide transactional representation to people and communities of color.

I shall begin the development of this proposition with a theme from a "Last Lecture" I was asked to deliver by the UNM Campus Ministries several years ago. I was asked to pretend that I would die immediately after giving the lecture. I opened the lecture with a story my mother used to tell us about the time she was traveling on Trailways with two of my older brothers, then toddlers. The bus driver asked her to move to the back of the bus. She had not wanted to get up but decided that compliance with the demand was in order since she had the boys with her. After she got up but before she moved to the rear, she told the bus driver, "One day I will do you a service and you will do me a service." The story was confrontational in tone. I learned from her that I need not suffer indignities in silence, that speaking up even in the most trying, indeed the most inconvenient, of circumstances could make a difference.

The story also held out great hope for the future. My mother used the story to teach us not to hate. I will not hate. In fact, I used it in that Last Lecture to show the promise of cooperation. I told the audience that the moral of the story was that one good act invites another and another. Some time later while reading literature in Law and Economics, I learned that considerable scholarly research supports the proposition that one of the most, if not the most, successful strategy for cooperation within groups known to game theory is "tit for tat."<sup>2</sup> The scholarly literature thus confirmed that Mama Mathewson knew what she was talking about. In the 21st Century, racial equity will require such cooperation between people of color, their communities and whites, and between themselves, especially in commercial transactions. Such transactions will require access to well trained corporate and commercial lawyers.

Law schools have been very effective in preparing students to be confrontational in the adversary process. They have been equally effective in preparing students of color to confront the white majority over discriminatory practices. In recent years, law schools have paid more attention to cooperation skills with the increase in courses on alternative dispute resolution and

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2. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1012 (1989).

transactional lawyering in clinical programs. As a professor of corporate law, I believe that law schools can and should play a major role in increasing the accessibility of members of minority groups and communities of color to corporate and commercial legal services.

### I. THE SHORTAGE OF MINORITY CORPORATE AND COMMERCIAL LAWYERS

In *Black Lawyers and Corporate and Commercial Practice: Some Unfinished Business of the Civil Rights Movement*,<sup>3</sup> John Baker demonstrated that blacks were under-represented among the corporate and commercial bar. Of course, blacks were under-represented in the bar as a whole, but his point was that those blacks who were joining the profession were drawn to other areas of specialty like civil rights, criminal defense, and poverty law. They were not choosing commercial and corporate practice. He also saw significant obstacles to increasing the supply of commercial and corporate black lawyers. Not only would interested black lawyers encounter racial discrimination by firms that handled that kind of work, but they also would find black business owners holding negative stereotypes of black lawyers very leery of hiring them for commercial and corporate legal work. He thought that the prospects for solution were long term and would be solved by law schools continuing to use affirmative action programs to admit more blacks. Over time through natural selection, more black law students would gravitate to corporate and commercial practice.

In 1996, David Wilkins and G. Mitu Gulati followed Baker with *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*.<sup>4</sup> They examined the data and concluded that although the absolute numbers of blacks working in corporate practice had increased, they still comprised a disproportionately small fraction of the bar. Baker's prophecy thus remained unfulfilled. Interestingly, Wilkins and Gulati did not cite Baker.

Both articles are structured around the under-representation of blacks in corporate practice. Where Baker argued that under-representation justifies the implementation of race-based remediation efforts, Wilkins and Gulati demonstrated that the under-representation resulted from discriminatory and non-discriminatory causes. They argued that the under-representation should be addressed, and they recommended measures for corporate law firms to take

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3. John T. Baker, *Black Lawyers and Corporate and Commercial Practice: Some Unfinished Business of the Civil Rights Movement*, 18 HOW. L.J. 685 (1975).

4. David Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996).

in order to alleviate it. Baker came the closest to recognizing the part of the equation I wish to focus on. His ultimate goal was to do more than help individuals of color pursue careers as corporate and commercial lawyers. He recognized a connection between such under-representation and economic development in minority communities. He pointed out that although the Civil Rights Movement had opened the doors to economic opportunity, there was a shortage of black lawyers to represent the black-owned businesses that were expected to develop. Addressing the racial discrimination that produced the shortage thus has positive implications for economic parity.

I wish to broaden the focus from minority lawyers and law students who face discrimination to include the people and communities affected by the resulting shortage of lawyers to fill their needs for commercial and corporate legal services. Under-representation in this area of practice greatly reduces the access of individuals of color wherever they may be to such lawyers, and concomitantly, to their communities. Communities in which people of color predominate or have significant concentrations have even less access. There is a need then not merely for lawyers in corporate firms on Wall Street and its counterparts in cities across the country; there is a need for such lawyers in neighborhoods and communities. It is also true that not all minorities who need access to corporate and commercial lawyers are located in racially identifiable or in economically disadvantaged communities. Many affluent members of minority groups prefer lawyers who understand the problems they encounter in business transactions with nonminorities as well as other persons of color. I am not arguing that such access will bring about full equality and end racial discrimination. I am saying that without such access, neither the individuals nor these communities can compete in the American economy on a level playing field. I am saying that access to corporate and commercial lawyers can make a difference.

## II. THE DIFFERENCE ACCESS TO CORPORATE AND COMMERCIAL LAWYERS MAKES

Corporate and commercial lawyers provide many types of legal services. Some of these may be classified as cooperative in nature and are often referred to as transactional work. Other services may be described as confrontational in nature and may be referred to as commercial litigation. Both types of services require the following: (i) the mastering of complex technical legal rules governing the formation of business entities, the raising of capital, the operation of lines of business activities, property interests, taxation, and other matters; (ii) planning transactions in light of legal rules; (iii) advising and

counseling clients; (iv) drafting legal documents of varying degrees of complexity; and (v) negotiating transactions and law suit settlements.

There are numerous examples where access to high quality commercial and corporate legal services would have made a difference. I shall only relate a few. One need only read the opinion in *Garvey v. United States*<sup>5</sup> covering the appeal of Marcus Garvey's conviction for mail fraud in connection with the sale of stock in the Black Star Line, Inc. to realize that he might never have been charged if he had access to the same silk stocking law firms that J.P. Morgan had. The essence of the fraud was that he induced people to buy the stock through false valuation information. Apparently, the circulars and correspondence he mailed stated that the stock was worth \$5.00 per share when in fact it was worth much less. Raising capital in public or private securities markets requires the expertise of a coterie of highly trained lawyers, accountants, and investment bankers. Such professionals are well worth the additional transactional costs their involvement includes. However, a company that lacks access to these professionals has virtually no chance of raising money in the capital markets, and moreover may discover that it too has committed criminal acts. In Garvey's case, such professionals would have been involved at the point when Garvey was raising the money.<sup>6</sup>

Garvey's defense to the charges only highlights the importance of such professionals. His basic defense was that the Black Star Line, Inc. was only one part of a larger enterprise aimed at uplifting blacks. That enterprise included several nonprofit organizations including the Universal Negro Improvement Association, the Liberian Construction Loan, the African Legion, the Black Cross Nurses, and the Negro Factories Corporation. The various mailings, it was argued, were intended to raise monies for the general enterprise with its more eleemosynary objective.<sup>7</sup> Again, there was a need for trained corporate lawyers who would stay on top of the technicalities and paperwork. Would the outcome have been different if Garvey had had such access? What effect would it have had on racial equity in the 21st Century?

In 1999, another *Garvey*-like example is in today's headlines. Like Garvey, the Reverend Henry J. Lyons was convicted for embezzling from the National Baptist Convention USA and swindling some four million dollars

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5. 4 F.2d 974 (2d Cir. 1925).

6. He also could have benefitted from a criminal defense lawyer specializing in white collar crime as he fired his lawyer and represented himself.

7. Indeed Garvey was a charismatic fundraiser raising about several million dollars between 1919 and 1921. The shares of stock were sold at speaking events, and people literally put cash into the offering plate in exchange for stock. As a result, the stock ledgers were incomplete and many shareholders unknown. It is also true that much of the money never made it to the Black Star Line, Inc., which did actually exist and owned at least one ship, albeit unseaworthy.

from various corporations doing business with the Convention. His defense was quite interesting. He admitted spending lavishly but not stealing. He claimed that he earned the money in his capacity as president, that the money he was accused of stealing was never missing but floated from account to account, and that the inflated membership lists sold to corporations existed prior to his becoming president.<sup>8</sup> The Convention and Reverend Lyons may have utilized the services of corporate lawyers. I offer the example of unreasonably high compensation, shoddy record keeping, and white collar crime as the type of problems that access to corporate and commercial lawyers can minimize.

The Negro Baseball Leagues might have been more than modern history with access to transactional and confrontational legal services. In existence from the early 1920's until the mid 1950's, they represent the only significant African-American ownership of professional sports teams in the United States. The Indianapolis Clowns, the last surviving team, went out of business in the late 1960's. The owners, most of whom were African-Americans, surely had access to legal counsel, but the degree and quality of that access varied from owner to owner. The leagues were hampered by weak relational contracts with each other, financiers, stadium operators, and players. In fact, most teams did not use written player contracts until after Major League teams refused to pay compensation for signing their players without them. Although the opening of the Major Leagues to their players was foreseeable, the Leagues lacked a legal architect to design a strategy to compete with Major League or minor league teams. No one seems to have considered an aggressive antitrust strategy even though several antitrust cases were brought against the Major Leagues in the late 1940's. The American Football League successfully pursued such a strategy in the 1960's against the National Football League.

Both Garvey and the Leagues operated in segregated markets free from the competition of white-owned firms. The end of de jure segregation was followed by the collapse of other black-owned businesses that had thrived in segregated economies. Conventional wisdom holds that integration caused their demise as such firms were unable to compete with better capitalized firms. That conclusion assumes that better access to corporate and commercial lawyers would have made no difference in the competitive response of such firms to the additional firms entering their markets after integration.

There are also numerous examples of successful minority business enterprises. In case after case, I suspect that each such story involves the

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8. See Rick Bragg, *Jury Will Decide if Preacher Chose Profit Over His Pulpit: Defense Lawyers Cite 'Cultural Differences'*, N.Y. TIMES, Feb. 25, 1999, at A16, col. 5.

utilization of highly trained corporate and commercial lawyers. The acquisitions of Beatrice International and McCall Pattern Company by the late Reginald Lewis are classic examples. Lewis, a corporate lawyer himself, understood the significance of his access to first rate corporate professionals. Robert Johnson's Black Entertainment Network is another, as are John Johnson's *Ebony Magazine* and Berry Gordy's Motown.

The demand for access to the financial markets is the *raison d'etre* for Jesse Jackson's opening of Rainbow/Push Coalition offices on Wall Street and in Detroit to press Corporate America to trade with minority-owned firms. That effort has recently displayed Mel Farr of Detroit Lions fame who is trying to raise \$45,000,000 through Wall Street for a used car dealership chain in urban communities. His need for legal services goes beyond the raising of capital for the venture. Indeed, the company will need lawyers to represent the dealerships in transactions with manufacturers, lenders, and consumers.

People of color will need corporate and commercial lawyers for transactions on not so grand scales as well. In the Clinical Law Program at the University of New Mexico, we have represented a number of small businesses in very modest formation and loan transactions and tax matters. The program has also assisted a number of community organizations with applications for tax exempt status. The full range of commercial and corporate legal needs is unknown and work needs to be done to ascertain what they are.

So far I have written largely about African-Americans, but my concerns are not limited to them. In fact, some of my ideas flow from observations of the Southwest Indian Law Clinic at the University of New Mexico. Native American communities need corporate and commercial legal services, and my law school and others have been preparing students to provide them. The same is true of the many African, Asian, Latino, and West Indian communities in the United States. Although I am writing about the need to help communities of color, many of the principles I am articulating would be applicable to white communities like many in Appalachia.

### III. THE ROLE OF LAW SCHOOLS

Wilkins and Gulati addressed the under-representation of minority lawyers at the law firm level. They recommended removing discriminatory barriers and requiring law firms to implement practices that would improve the retention and promotion of blacks to partner. Baker argued for preferential practices to address the under-representation problem by corporations, law firms, and law schools. As noted above, the law school role was limited to continuing to admit more and more blacks or students of color. He thought through some sort of natural selection, many of them would choose corporate

and commercial practice. Wilkins and Gulati argue that the hiring and retention practices of corporate firms have adversely affected that choice and the human capital investment decisions of lawyers of color.

For half a century, law schools have admitted and generally prepared students of color to confront a majority white power structure to redress racial inequities. They have prepared students of color in the words of Derrick Bell to confront authority. I now would have law schools also prepare students of color for corporate and commercial practice since the hiring and retention practices of existing law firms make them impractical training grounds for large numbers of students of color. For whatever reasons, existing corporate law firms simply do not hire very many of students of color, and therefore do not serve as training grounds for them. Law schools should assume that role.

I propose that law schools develop curricula in law schools to prepare minority law students in these fields, to train them to enhance the "tit for tat" that goes on among members of minority groups and with others, and to train them to be confrontational in enforcing contractual rights. I do not suggest that law schools develop racially segregated educational programs. I am, however, asking law schools to recognize that preparing a student to engage in a corporate and commercial practice with clients who are leery of the economic system or communities that are devastated economically is not the same as preparing a student to work on Wall Street or whatever its equivalent is in a locality.

Lawyers representing minority business enterprises would be expected to have expertise in more than general corporate, tax, and securities laws. They will need to be trained to understand the legal concept of a "minority business enterprise" and laws specifically related to them. They will need knowledge of laws and programs promoting economic development in economically disadvantaged business communities. They will need knowledge of antidiscrimination laws, and they will also need sensitivity to issues raised within minority communities by business issues.

For example, students should understand the concept of the "Black Tax" and its counterpart as applied to other groups. They need to understand it because a part of their task will be to work to eradicate or minimize it. The term is sometimes used to refer to the burden that individual blacks bear in white settings as representatives of their race, but as used in this article, it refers to the difference between what whites pay for goods and services and what members of minority groups pay for those same services.<sup>9</sup> There is much

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9. See, e.g., Calvin J. Allen, *The Continuing Quest of African-Americans to Obtain Reparations for Slavery*, NAT'L B. A. MAG. 33 May/June 1995 (citing L.G. Sherrod for proposition that racial discrimination against Blacks "functions as a Black Tax"). A similar idea is expressed in John J. Donohue, *Further Thoughts on Employment Discrimination Legislation*,

anecdotal evidence of this usage. The latter has been the subject of debate in law and economics scholarship. The taboo against discussion was broken by Ian Ayres in his landmark work *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*.<sup>10</sup> In that article, he described an experiment he conducted using testers to go into car dealerships to purchase a car. The test was bipolar using blacks and whites. He showed that blacks paid more than whites even when the tester was an experienced car salesman.

A careful reading of *City of Richmond v. J.A. Croson Company*<sup>11</sup> reveals that the tax was in play in the circumstances in which the case arose. At issue were supply contracts for restroom fixtures. The bid of the plaintiff white subcontractor was lower because it could obtain the fixtures at a lower price than the successful black bidder. A common form of set-aside programs directly target the tax with price breaks.

They will need to be able to engage in discourse with clients and others on cultural issues such as those raised upon the death of the late John Sengstacke. Sengstacke had access to corporate and commercial lawyers and operated the largest chain of African-American owned newspapers in the country. The newspapers were sold in cities with substantial African-American populations in predominantly African-American communities. I do not know the race of the corporate lawyers that he used, but his estate plan placed 90 percent of his stock in a trust with a white banking firm as trustee of his estate with the mandate to maximize its value for the beneficiaries. His death led to a fiery debate over the future of the newspapers when community activists feared that the trustee would sell the papers to whites.

I have used this case in my business planning course to show the types of questions that would be raised. The class was asked to tackle the problem on behalf of one of the beneficiaries in the same manner as the law firm representing the trustee may have. That the case received extensive coverage in *The Wall Street Journal* facilitated student interest in the problem. Students researched questions ranging from whether a sale limited to African-Americans was legal to how to pay the \$4,000,000 in federal estate taxes. It was clear from the perspectives reflected in the discussion that the editorial content and coverage would have been affected by which students owned the paper.

Corporate and commercial legal matters in Native American communities present another set of issues that require special sensitivity. Native Americans

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136 U. PA. L. REV. 523, 536 (1987) (discussing losses from of behavior of employers in reaction to antidiscrimination laws as a tax on hiring or not hiring Blacks).

10. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

11. 488 U.S. 469, 482-83 (1989).

may reside on or off reservations. Tribal and pueblo governments may hold business and nonprofit entities, and so may individuals. Those entities may be formed under state or native laws. To the uninformed, the issue may sound like a routine choice of law problem, but it necessarily involves intricate issues of sovereignty, culture, and self-determination that may vary from tribe to pueblo to reservation. Several state and federal laws have special provisions for such entities and may provide for the establishment of others.

My proposal to lodge corporate and commercial law preparation in the law schools is a rather modest proposal. Many law schools are developing areas of concentration in their curricula. My proposal does not necessarily involve a new concentration; it could require only additional courses within an existing concentration. These concentrations would include the standard corporate, commercial, and tax courses, and other courses aimed at preparing students for business practice in minority communities and representing minorities. Such courses might cover minority business enterprises, community and housing development, the Community Reinvestment Act, representation of "unsophisticated" investors, and minority farmers. Antidiscrimination law courses would also have to be included.

Skills training, clinical law, externship programs, or some combination thereof exist in all accredited law schools. Those programs could add components targeting the representation of small businesses located in communities of color. Externship programs may be particularly promising in that law schools may tap into already existing resources without having to build within. Several local bar associations have established special summer clerkship programs for students from disadvantaged backgrounds. Law schools also should explore tie-ins with federal and state programs for community economic development to provide externships and possibly jobs after graduation.

I do not propose that law schools establish programs limited to students of color. Programs should be available to all students within the school. Moreover, the thrust of my proposal is to provide access to legal services. Providing job opportunities for students of color and others is a by-product. Although nonminority law students and communities would be expected to benefit as well, this symposium is about racial equity. Unless we can talk about race and consciously direct efforts at that goal, we will be destined to convene 100 years from now a conference for our grandchildren entitled "Racial Equity in the 22nd Century."