Diversity Aspirations Will Encourage Future Black Leaders

I want to congratulate the Virginia State Bar on its Diversity Initiative. This is a much-needed initiative as the ranks of black law students and, subsequently, black attorneys seem to be decreasing not only in the commonwealth but across the country. The Diversity Initiative issue of *Virginia Lawyer* is a keepsake, and I plan on sharing it with my fellow lawyers across the country.

As associate commissioner of the Central Intercollegiate Athletic Association, the country's oldest historically black college conference, with member schools in Virginia (Virginia State University, Virginia Union University, and St. Paul's College), North Carolina, Maryland and Pennsylvania, I am constantly in contact with leaders in the black community nationally. Specifically, I am also in contact with our future black leaders at these respective campuses. I would certainly love to spread the word to these future leaders about the virtues of a career in law and the good things the bar is doing in our community.

Please let me know what I can do to assist in this very worthy cause. I look forward to hearing from you.

Jeffrey W. McLeod
Hampton

"Diversity" Ends in a Racial Head Count

Back in the mid-1990s, I was emerging from college to pursue the career I had before law: journalism. I was working as an intern for the Washington, D.C., bureau of a major paper and loving every minute of it.

The themes of the Virginia State Bar's Diversity Initiative swirled around me then, as they do now. The college paper I worked for filled its pages with coverage of minority events, staffers fretted over sensitivity, and the field of professional journalism that lay before me was much concerned with "diversity."

But what that meant for me, as a twenty-something white male, was not immediately clear until I sought my first job. I'd homed in on the *Boston Globe*, which had a one- or two-year fellowship for young journalists with limited experience. I was told, in no uncertain terms, that whites were prohibited from applying.

I was knocked for a loop by this. Though my familiarity with law was limited to the First Amendment and defamation cases I'd learned in journalism school, it just didn't strike me as something that could fly in America.

It wasn't. My complaint with the Equal Employment Opportunity Commission was affirmed. The program was found to be illegally discriminating against whites. In the meantime, I'd found other employment, but I've never forgotten this experience. In fact, it was one of the things that motivated me to go to law school.

It's this perspective that I bring to Manuel Capsalis's seemingly unopposed drive for diversity. Mr. Capsalis blows a polished trumpet indeed, intoning that "what we seek is, distilled to its purest form, an affirmation of the Rule of Law, the very essence of our system of justice. We cannot deny that the preservation of the Rule of Law is inextricably linked to diversity."

But "diversity," to me, is a nice way of saying "whites need not apply." There is simply no escaping the fact that whatever grandiosity its supporters adorn it with, "diversity" typically ends in a racial head count. Whatever one thinks of affirmative action, it is a policy that comes with undeniable costs and victims.

And I must ask, how does Mr. Capsalis's insistence that Virginia's legal profession "be more reflective" of its demographics square with the idea that race shouldn't matter? These notions are at direct odds. In the supposed pursuit of making race irrelevant, institutions practicing affirmative action succeed in making race so relevant that it excludes everything else.

It's particularly bizarre, as well, when he suggests that unless persons of a certain race see faces like theirs in the profession, the law loses legitimacy. By this reasoning, whites ought not view President Obama as legitimate.

Another problem with the bar's diversity crusade, striking in light of its societal position as an upholder of the law, is that the legality of many forms of affirmative action are very much in doubt. This is true even when clients demand that the firms they hire be "diverse." For a treatment of this issue, see Curt Levey's article, "The Legal Implications of Complying with Race and Gender-Based Client Preferences" (http://www.fed-soc.org/publications/pubid.744/pub_detail.asp).

Yet from the *Virginia Lawyer* articles, you'd never guess there were any doubts. I suspect that some of the programs sponsored or endorsed by the VSB are subject to court challenge. Is the Oliver Hill/Samuel Tucker Prelaw Institute offered to poor white students in Appalachian Virginia? Is a legal diversity pipeline program open to young people of all races?

A summer journalism program operated by Virginia Commonwealth University and the Dow Jones Newspaper Fund was challenged after a white student, Emily Smith, was denied entry because of her race. In response to the suit, the operators of the program agreed in 2007 to stop denying admission to whites. (http://chronicle.com/news/article/1660/dow-jones-will-end-race-exclusive-minority-programs-with-colleges)

It seems that the leadership of the VSB won't actually be engaging in much of a debate on this issue. Mr. Capsalis reports that the powers of the bar should now include "the power, obligation and responsibility to promote diversity in our legal profession and judiciary," and "promote diversity" is now proposed to be emblazoned on the mission statement. How easily dissenters will be brushed aside now!

But this does not mean that the Emily Smiths of the world cease to exist.

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If we truly mean to pursue justice, those voices must be heard as well.

David E. Wilson
Fairfax

Disband Task Force, Withdraw Proposal

I have read with growing concern the columns in *Virginia Lawyer* of Virginia State Bar President Manuel A. Capasalis, beginning in July and continuing in October and December, concerning his Diversity Initiative.

In the "President's Message" of the June/July 2008 issue, Mr. Capsalis wrote:

> I believe we must renew our commitment and focus on diversity. For our legal profession and our judiciary to be properly responsive to the needs of society, we must be more reflective of the demographics of society....
>
> I believe the preservation of the Rule of Law is inextricably linked to diversity. Simply put, the Rule of Law without diversity is, at best, an incomplete principal, and at worst, a hollow promise to many to who live among us. We cannot deny the need for a vigilant commitment to diversity.

Without defining what he means by "diversity," Mr. Capsalis announced that he was authorizing the creation of a Diversity Task Force, to "review the current state of diversity within our profession, both state and local, and report its findings and recommendations to the Bar Council for consideration."

In the October issue, Mr. Capsalis continued his disquisition:

> We began this task with two simple and undeniable facts. The first is that for our profession and judiciary to be truly responsive to the needs of society, we must be more reflective of the demographics of society.
>
> The second is that, as a whole, we are not….
>
> I am advised by some that we do not have a problem with diversity, that there is no longer discrimination de jure or de facto. I am advised the natural order of events, whatever that may be, eventually will take care of itself. To those who preach the counsel of patience, respectfully, I decline your advice.

Then, in the December issue, Mr. Capsalis continues his lecture. He reports that his Diversity Task Force proposed that the bar's enumerated powers be amended "to specifically and expressly include the power, obligation, and responsibility to promote diversity" and that the mission statement of the bar be amended to add that it must "promote diversity in the administration of justice and the practice of law." The task force also calls for a Diversity Conference whose membership would "flow through" the speciality bars — that is, certain associations defined by race, sex, or national origin.

Having argued vociferously that "diversity" is "inextricably linked to the Rule of Law," Mr. Capsalis then declines to tell the reader what it means.

> It has been said that we need to precisely define diversity to [make such structural changes]. I disagree. While diversity by necessity must not neglect consideration of race, heritage, and gender, … I believe that term must be allowed to evolve. What was considered in the scope of diversity some twenty-five years ago is not what we may think of it today, and we cannot know what the next generation may believe essential in its definition. That is for a Diversity Conference to have the freedom to pursue. Diversity must be allowed to grow and evolve organically, free from preconceived notions.

Mr. Capsalis ends with a rumination on the "transcendent ideal" of diversity and a call to lawyers to join in pursuing this "ideal."[1]

It's hard to know where to begin in addressing the fundamental flaws with Mr. Capsalis's manifesto.

First, it is sophistry. It is marked by his repeated statements of urgent personal belief in "diversity" and his affront and condescension to anyone who questions his meaning or firm intention. He answers one letter writer by telling the author that "he fails to understand the fundamental need for diversity," a term that Mr. Capsalis himself tells us cannot be defined. Thus, Mr. Capsalis casts himself as some sort of Gnostic keeper of the secret truths that mere mortal lawyers can neither understand nor question.

How can we understand the "fundamental need for diversity" when its very proponent cannot tell us what he means by the term? According to Mr. Capasalis, if we must ask the question, we have already missed the point. We must, instead, allow it to "grow and evolve organically, free from preconceived notions" (as opposed, apparently, to the "natural order of events," which Mr. Capsalis soundly rejects). One day, perhaps, the augurs of his proposed Diversity Conference may let us know what it means; or perhaps not; or perhaps they will later change the meaning and the concurrent obligation.

In any event, the VSB Council must, according to Mr. Capsalis, change the very structure of the bar and the legal system to oblige the bar, its members, and even the judiciary to promote "diversity" — which is something, I know not what. And not only that, but it is urgent and necessary and unquestionable that the bar do so.

If Mr. Capsalis has evidence that the bar or the courts routinely or systematically discriminate against persons or groups based on race, sex, or national origin, let him put on his evidence and make his case as any other lawyer is required to do. That would show clarity and conviction. Mr. Capsalis demonstrates neither.

Second, Mr. Capsalis simply presses an ideology on the bar. If ever there was a code word involving race or ethnicity,

"diversity" is it. Mr. Capsalis offers us little glimpses at it — that it involves "taking into account gender, race, and heritage" in the administration of justice and the practice of law. But he is quick to close the curtain, noting that the "transcendent ideal of diversity" cannot be captured; it must be free to fly to the heavens or wherever it will. How on earth does Mr. Capsalis believe he can persuade thousands of lawyers with this kind of evasiveness and verbal sleight of hand?

Let's be clear: "diversity," in Mr. Capsalis's usage, is nothing but the preferential treatment of persons or groups based on race, sex, or national origin in order to remedy generic past discrimination — a political notion that remains hotly disputed. Mr. Capsalis appears to wrap himself in the mantle of civil rights in demanding indefinable "diversity." But many would take issue with this presumptive assertion.

Martin Luther King Jr. famously dreamt of a day when his children would "not be judged by the color of their skin but by the content of their character." Mr. Capsalis proposes the opposite: that unless we take account of the color of a person's skin, we can have no justice. This kind of thinking and action is hardly "transcendent"; in fact, it is both literally and figuratively superficial. It judges the worth of persons based on their outward appearance. It would have Lady Justice recast without her blindfold.

The notion is inimical to the first words of the Virginia Declaration of Rights: "that all men are by nature equally free and independent...." To be sure, in the past, some of the most noted members of the Virginia bar, such as Thomas Jefferson and George Mason, who inspired and penned these words, were unable to reconcile their view that all men are created equal with the routinely and relentlessly unequal treatment of African Americans and others under the law. Even after the Civil War and the adoption of the Fourteenth Amendment, requiring states to provide the equal protection of the law to all persons, Virginia continued for another century treating some persons "more equally" than others under Jim Crow — that is, by plainly unequal legal barriers based particularly on race and ethnicity.

Little more than a generation after this disparity was corrected by law, Mr. Capsalis proposes to lead the bar into the same disparity: to treat certain people more equally than others. Only now, he would have us prefer "people of color" to, if you will, "people of non-color" solely on that basis. This is simply a political ideology that rejects the civil rights movement of Dr. King as too limited and too timid. As Mr. Capsalis writes: "Despite these [prior] efforts, we have so very far to go. To suggest that our work is done is wrong." And, our work is what? To prevent invidious discrimination or to ensure that the bar, on the surface, is properly colored?[2]

If Mr. Capsalis wishes to promote his ideology, then he is free to do so on his own time and his own nickel and with those who voluntarily associate with him. But, the bar is not a voluntary organization. To practice law in Virginia, one must be a member of the Virginia State Bar. Forcing lawyers to associate themselves with this ineffable and "evolving" political ideology is wrong. Forcing lawyers to pay their tithes at the altar of the "transcendent ideal of diversity" is doubly wrong.

Rather, the bar should continue, as one prior bar president phrased it, to "stick to its knitting": that is, to require competent and ethical practice, and to encourage access to legal services. The race, color, creed, sex, or national origin of those who so practice is now, and should remain, irrelevant to the bar's mission. The best and brightest of practitioners should be considered for the bench without regard to color, creed, sex, or heritage on the one hand, or quotas, tokenism, and conditions of "diversity" on the other. To argue for a different institutional structure is plainly political.

Third, and most importantly, Mr. Capsalis's initiative puts the bar, and by extension the Supreme Court of Virginia, on a collision course with the Constitution of Virginia. Article I, §11 of the constitution provides, in part, that "the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex or national origin shall not be abridged...." That is to say, no Virginia government agency may legally discriminate against or in favor of any person on these bases. But, this is precisely what Mr. Capsalis proposes: that the bar and the courts specifically promote individuals and groups solely on the basis of race, color, sex or national origin, to the detriment or exclusion of others on the same basis.

This constitutional provision proves that Mr. Capsalis's assertion, that "the preservation of the Rule of Law is inextricably linked to diversity" is false. The law specifically prohibits the preferential or detrimental treatment required by "diversity" and, in doing so, allows for a true flourishing of freedom and independence and the enjoyment of life, liberty, and happiness envisioned by the opening words of the Virginia Constitution, without regard to the superficial and irrelevant characteristics of color or race or sex.

It would be bad enough if, say, the County of Fairfax or the Virginia Department of Agriculture applied the discriminatory scheme proposed by Mr. Capsalis and his task force; but for the bar and the Supreme Court to adopt it would be the worst possible case. The Supreme Court is the ultimate guardian of Virginia's Constitution and laws and the bar is charged with aiding in this duty. For the Court to encourage or even allow an obligatory program of preferential treatment based on race, color, sex, or national origin in the administration of justice or in the practice of law, in specific contravention of the constitution, would bring shame and scandal on it.

What would the public think about an organization of thousands of lawyers and judges who never even bothered to check their own fundamental laws in their haste to promote "diversity"? How would the public think that the courts could avoid applying the same discrimination in cases before them? This initiative invites disaster.

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I urge Mr. Capsalis to disband the Diversity Task Force, withdraw its proposals to the bar council, and cease funding or supporting it immediately. If, in his conscience, he believes that he cannot abandon this initiative, then let him have the honor and courage to resign and pursue it on his own with his own resources.

If Mr. Capsalis will not end this improper initiative, then I urge the bar council to reject the recommendations of the task force, and vote to disband it, cease all bar funding and support for it, and require an accounting from Mr. Capsalis for the members' funds applied to it. If the bar council will not act, I urge the Supreme Court to end this initiative before it taints the judicial branch.

Finally, I urge members of the bar to oppose this illegal and ill-advised initiative and to make their opposition known.

Joseph W. Stuart
Fairfax

Endnotes:

1 In this passage, Mr. Capsalis quotes the "profound" words of Rev. Susan Brooks Thistlethwaite, a self-described "progressive" and "expert in contextual theologies of liberation." Rev. Thistlethwaite made a name for herself last fall in her persistent castigation and questioning of Alaskan Gov. Sarah Palin's qualifications to serve as vice president based on the governor's perceived religious beliefs. *See, e.g.,* "Palin: Is She Subject to Her Husband?" 9/3/2008, and "Extreme Religion", 9/15/2008, in Washington Post/Newsweek *On Faith* weblog (http://newsweek.washingtonpost.com/onfaith/susan_brooks_thistlethwaite/). Perhaps this was an application of Rev. Thistlethwaite's "transcendent ideals" – to question the articles of a person's faith and apply a religious test to public office.

2 Mr. Capsalis alludes to Abraham Lincoln in calling on the "better angels of our nature" to promote "diversity" in the administration of justice. Mr. Lincoln used the phrase in March 1861, during his First Inaugural Address, appealing to the Southern states to avoid civil war. How did that work out for Mr. Lincoln? Probably in the same way "diversity" will work out, since discrimination based on race or color or any other superficial characteristic always invokes far more demons than angels.