Rule of Law Not Linked to Diversity

When I enrolled at New England Law in 1973, the student government attempted to require all students to become members of the student chapter of PIRG (Public Interest Research Group) — or, at least, pay its dues. As an aerospace engineer of seventeen years, I didn't know anything about PIRG. I asked if the organization took sides on controversial issues. The answer was yes. The students rejected the proposal.

It's that simple. Clearly, diversity is a controversial issue. The mandatory Virginia State Bar has no business promoting any side of an issue not directly related to its primary mission — certainly not one as controversial as diversity, even if some view diversity as remotely related to improving the profession and the availability of legal services.

I support the Virginia State Bar and its stated purposes, but I oppose this initiative!

Hooray for the well-stated views of Joseph W. Stuart and David E. Wilson in the December 2008 *Virginia Lawyer*. They and many others reject VSB President Manual A. Capsalis's view that "We cannot deny that the preservation of the Rule of Law is inextricably linked to diversity." It isn't, and shouldn't be.

Peter K. McCrary
Manassas

Focus on Individuals, Not Groups

I have followed the diversity debate in *Virginia Lawyer* with great interest. No matter what side of this issue one stands on — and on this issue no one is completely neutral — the immediacy and potential consequences are riveting. The recent U.S. Senate appointments highlight a danger inherent in pursuing an active diversity initiative within the bar.

Many impassioned arguments were made to fill President Barak Obama's vacated Illinois Senate seat with another African American. And now it seems that battle lines are being drawn along increasingly explicit racial lines around Roland W. Burris's appointment. Attacking or defending a senate seat as "racial property" is an extraordinarily dangerous way to think or act.

In the same vein, Hillary Rodham Clinton's former Senate seat in New York went to another woman, Joseph R. Biden Jr.'s seat in Delaware went to another elderly white male, and a deal was made to fill Republican Sen. Judd A. Gregg's New Hampshire seat with another Republican, if he had taken the position of U.S. secretary of commerce.

These are, of course, political appointments made for purely political, nonlegal reasons. The diversity debate is inherently political and must necessarily remain so. Perhaps this is why Virginia State Bar President Manuel A. Capsalis rightly declined to define diversity and wisely acknowledged that its outlines and priorities must change over time — as all things political do. But injecting such explicitly political choices and actions into our organization should give us grave pause.

As President Capsalis alluded, we cannot simply ignore the issue and pretend it doesn't exist. To turn a blind eye is to risk the kind of prejudice we all wish to stamp out. Nor can we allow this issue to control and pre-decide our actions through preferences. This would be to engage in the very discrimination we all wish to stamp out.

Most insidiously, however, the Diversity Task Force would unnecessarily focus our attention along generic group lines (racial, gender, religious, ethnic — fill in the blank) in the same way that the Senate appointments have. Determining that we must have a prescribed number of counselors from fill-in-the-blank group would be as dangerous over the long term as thinking of legislative seats as the property of fill-in-the-blank group.

Individual lawyers necessarily retain the right to voluntarily associate along group lines as they see fit. But by focusing the Virginia State Bar's attention on such generic groups, we retrace the lines of distinction that will always thread their way through any population. This explicit attention reinforces entrenched divisions. The lines of separation and potential fracture become harder to overcome.

Although it sounds like an impossible dilemma — being mindful of differences without focusing undue attention on them — in practice we do it all the time. For example, we listen to a traffic report on the radio, not ignoring the information, while focusing active attention on driving. The additional information usually is helpful, if it isn't too expensive to acquire. And actions may indeed be necessary. Thus, we should complete the diversity study to see what our bar actually is. But we should not allow our focus — our mission statement — to be changed or distracted.

So often the law is far better written in the negative than the positive, by setting out what we shall not do rather than what we must do. And so much in the law is best done in a limited and restrained fashion, doing only what is necessary. With these tenets as guide, our organization should not undertake to advance diversity, however we may define it. Instead, the VSB should swat unlawful discrimination, wherever we may find it.

When you really come down to it, discrimination — perhaps all injustice — is terribly personal, committed by one person against another, one tragic act at a time. When we refuse to defend or attack discrimination along generic group lines, we break the power of those old distinctions that might have been dictating our actions and thoughts, perhaps unconsciously. Isn't that the right path to progress here?

Shouldn't the law view and treat us as individuals, and not as representatives of some group? Our organization must remain vigilant to root out what we know to be wrong — unlawful discrimination — and do it through the established remedy of individual suits for and against individual parties. To do more or less sets us on a dangerous path. We set the correct example when we place our attention on individuals, not group identities.

Robert L. Lamborn
Redding, California

Disband Diversity Task Force

I write to express my gratitude to Fairfax lawyer Joseph W. Stuart for his letter to the editor published in the February 2009 issue of *Virginia Lawyer*. I join him in urging Virginia State Bar President Manual A. Capsalis to disband the Diversity Task Force. If Mr. Capsalis insists on continuing the pursuit of this "improper initiative," I will join Mr. Stuart in strongly urging the Supreme Court of Virginia to put a stop to this effort.

In what seemed a show of arrogance in his October 2008 column, Mr. Capsalis wrote "[t]o those who preach the counsel of patience, respectfully, I decline your advice. I have no desire to stand by passively, and hope that history will surround us." Wow! Then in his December 2008 President's Message, "[d]iversity of ideas is itself inherently limited by the lack of diversity in those who are meaningfully able to put forth those ideas." Double wow! Shame on me, but at the time, Mr. Capsalis's statements were enough to cause this white guy to push away from the keyboard.

One challenge I recognized when I was initially moved to express my opinion was deciding where to start. Mr. Stuart noted the same problem when he wrote, "[i]t's hard to know where to begin in addressing the fundamental flaws with Mr. Capsalis's manifesto." The undaunted Mr. Stuart poured significant thought and energy into a two-plus page, clearly crafted letter. He does an outstanding job of organizing the issues and expressing an opinion that I suspect many other lawyers in the commonwealth share on the matter of the direction and existence of our bar's Diversity Task Force.

For me it is heartbreaking to read the following sentence that our president wrote in October: "We cannot deny that the preservation of the Rule of Law is inextricably linked to diversity, without which justice is an incomplete principle and, tragically, a hollow promise to many who live among us." That statement disparages thousands of Virginia lawyers, past and present, who have poured so much of themselves into the unending quest of justice for all. Virginia lawyers have a strong history that continues today of engaging in the most worthy and noble efforts in pursuit of justice. Those efforts are taking place each working day in countless cases and disputes, typically in unreported and unnoticed cases, at every level in our judicial system and in every corner of this commonwealth.

While Mr. Stuart noted that Mr. Capsalis evades defining "diversity," he and fellow Fairfax lawyer and letter writer David E. Wilson, both correctly note that Mr. Capsalis's diversity is nothing more than a racial head count or a preferential treatment of persons based upon race, sex, or national origin. Mr. Capsalis believes that justice has been an incomplete principle and a hollow promise in this commonwealth because the count of blacks, Asians, women, and other minorities on the bench or in the bar has not been "reflective of the demographics of society." Given what I've seen over the years of the hearts of many Virginia lawyers, I am left feeling extremely sad that such is the view of our elected leader.

This thinking is upsetting to me as a lawyer in private practice (who used to do criminal defense work), and I suspect it is upsetting to many judges in our state who take their seats on the bench each day with a commitment in their hearts and minds to do their very best to judge the facts and the parties without regard to the parties' or their lawyers' skin color, gender, or other irrelevant factors. I will add that this is from a lawyer who, early in my career in the late 1980s, requested a jury trial for a black defendant because I believed the judge (who is now deceased) tended to impose harsher sentences on black defendants. Though I was struggling with what I felt was a bias in a judge, I declined to adopt the belief that the answer was to request (or even have the option to request) that a black judge hear the case. Fixing the system so that the odds are improved that the races, sexes, or national origins of the judge, the litigants, and counsel will match up is not the answer today. That approach will leave all of us on a never-ending, increasingly divisive, and miserable course, which, unfortunately, is where it seems the Diversity Task Force is dead set on heading.

The answer, for the purposes of the Virginia State Bar, is for the bar to pour its efforts and energy in assisting the General Assembly in the judicial selection process. We should do all we can to aid the General Assembly in identifying and appointing judges who will be as unbiased as humanly possible in the administration of justice. We also should assist in removing those who prove unable or unwilling to so function.

As to the bar's role in improving its non-judge members, many — I would hope all — of us acknowledge that minorities (perhaps not so much women any more) are underrepresented in our profession in Virginia. This is a challenge that came to my attention when I started law school at the University of Richmond in 1985. At the time University of Richmond had a dean, Thomas A. Edmonds, who was as committed as anyone to bringing minorities into the profession. There was no misunderstanding how Tom felt about the stain of racism in our country.

However, from my observations, efforts to increase minority enrollment were stymied by the stiff competition among law schools for qualified minority applicants. The effort to build up minorities in our ranks needs to start in high school or earlier. That, of course, is an order that might be translated into the daunting task of fixing our public schools — especially those serving largely minority communities. While that task is beyond the bar's focus, I would think that the leaders of the many fine law schools in Virginia might have some insight into a few (legal) things that our bar could do to attract applications to Virginia law schools from academically strong students of varied backgrounds and races.

Our Virginia State Bar (and our Supreme Court) should stick to supporting and promoting racially neutral efforts to improve the administration of justice and the practice of law. It seems clear to me that if our bar pursued only

efforts that are framed around the behavior that we are supposedly seeking — making choices and dispensing justice in a manner that is blind to the factors that we reject as irrelevant — then our state will be far more likely to attract lawyers of all sorts of backgrounds and races who will become integral participants in a legal system where the judges, the lawyers, and the litigants are judged by their demeanor, civility, integrity, intellect, work ethic, behavior, and other actions, and not by their race, gender, or national origin. Unfortunately, Mr. Capsalis has unequivocally informed us that he has not the patience for any approach other than appointment of judges and bar leaders based upon their skin color, sex, and national origin.

I urge all Virginia lawyers, if you have not done so, to go the bar's website and read Mr. Stuart's letter. (http://www.vsb.org/docs/valawyermagazine/vl0209_letters.pdf) And I urge my colleagues to oppose the use of our bar dues for the Diversity Task Force, the actions of which Mr. Stuart correctly observes puts the bar on a collision course with Article I, Section 11 of the Constitution of Virginia. As we find our voices, we will have the added bonus of showing that U.S. Attorney General Eric H. Holder Jr. was wrong — at least about Virginia lawyers. We are not cowards when it comes to discussing race. We are bold leaders.

John L. Lumpkins Jr.
Goochland

The Meaning of "Demean"

I have just finished reading the February 2009 issue of *Virginia Lawyer*, which includes an article by Travis J. Graham and James J. O'Keeffe IV. (http://www.vsb.org/docs/valawyermagazine/vl0209_legal-process.pdf) They quote the preamble of Virginia's Principles of Professionalism as stating "all Virginia lawyers pledge to demean themselves professionally and courteously."

Since I do not like to demean myself or anyone else, I checked the definition in my American Heritage Dictionary of the English Language where it states: "demean, transitive verb. 1. To debase in dignity or stature. 2. To humble (oneself). See Synonyms at degrade. [DE- (pejorative) + MEAN (base).]"

Did the authors leave the word "not" out before the infinitive "to demean"? If not, does "demean" have another archaic meaning not in my abridged dictionary? If so, does the preamble need to be modernized to replace "demean" with another word like behave,""comport," or "conduct"?

Joseph Scafetta Jr.
Falls Church

Editor's note: One meaning of "demean" is a synonym for "behave." One can demean oneself well or poorly (think "judicial demeanor"). A second definition is a synonym of "debase." Both are acceptable, depending on the context. The American Heritage Dictionary of the English Language, *3rd ed., traces the word from Middle English* demeinen, *"to govern," from old French* demener, *to "conduct."*

Did You Say *Maid* Service?

Your February 2009 article on diversity in *Virginia Lawyer* was informative and enjoyable. However, I was very surprised at your choice of words under the subhead "Don't Whine."

You stated that Betty Thompson had been unable to afford to pay for a "maid service." I looked up "maid" in several places and the definitions all refer to a specific gender: a female. It is a shortened version of "maiden" or "maidservant." The Merriam-Webster online dictionary defined "maidservant" as "a woman or girl employed to do domestic work."

I assume that Ms. Thompson was referring to a "cleaning" service and that she would have been happy to employ a cleaning person or service, regardless of gender. However, by using such a gender-specific term you are perpetuating a stereotype of women that is at odds with the whole message of your article.

As a female who worked for five years as a criminal defense attorney before taking a year off to go sailing, I am not one who is easily offended. However, your use of the word "maid" was offensive on more than one level.

First, "maid" implies that only a woman could or would do this job. Because there is a perception by some that cleaning for someone else is a menial job, using the word "maid" in this context implies that men are "above" this type of employment. Second, by calling a cleaning service a "maid" service, you implied that cleaning is women's work.

It is especially ironic that you would use this word in an article about diversity and women in particular! It is not clear to me whether the choice of words was yours or Ms. Thompson's, but regardless, I believe the use of "cleaning person/service" would have been much more appropriate.

Sheryl K. "Sherry" Netherland
Richmond

Writer's Note: Ms. Netherland caught me. My experience is that so-called "maid" services employ both men and women. But the dictionary rules, and I should have used "cleaning" service as a gender-neutral term, as Virginia Lawyer*'s editorial style requires. It was my word, not Ms. Thompson's. — Dawn Chase*

Hill-Tucker Admissions Explained

We read with intrigue the letters section in the February 2009 *Virginia Lawyer*. One letter in particular struck us, titled "'Diversity' Ends in Racial Headcount." While most of the letter is about the Virginia State Bar's Diversity Initiative, it mentions the Oliver Hill/Samuel Tucker Prelaw Institute sponsored by the Millennium Diversity Initiative and the VSB Young Lawyers Conference.

In his mention of the institute, writer David E. Wilson challenges the legal validity of such a program, and questions whether it is available as "a legal pipeline open to young people of all races."

As the codirectors of the program for the past two years, we were compelled to submit a response to Mr. Wilson's

rhetorical question. In describing the goal and mission of the institute, we state on the YLC website: "The Institute targets a diverse group of students. We seek to attract minority high school students who would not normally have access to or positive interactions with members of the Virginia State Bar." (http://www.ohli.org) In our online application there is no mention of race or ethnicity.

All applications are reviewed on their merits and students are admitted as space is available. In 2008, we admitted twenty-three students to the Oliver Hill/Samuel Tucker Prelaw Institute. Twenty-one students were able to attend the program. One was Russian and another was Hispanic.

We have partnered with area school districts to notify them of the availability of applications, and the districts then disseminate that information to the high schools. There is no mention that the program is limited to minority students, as all students are welcome to apply. In fact, our response to inquiries related to whether a non-minority student can apply is: "While the program is targeted towards minority students, we welcome and encourage all students who are interested in attending the program to apply."

We do not request information on a student's racial or ethnic background on the application, and we make no assumptions regarding such during the review of applications received. All fully completed applications are reviewed for acceptance into the program, as space permits.

While we have come a long way in terms of diversity, we have a long road ahead of us. It is unfortunate that a program that was designed for students who may not otherwise have access to members of the bar could be challenged on the basis of a false assumption.

Yvette A. Ayala
Rasheeda N. Matthews
Richmond

Diversity in the Legal Profession Benefits Us All

The February 2009 edition of *Virginia Lawyer* published letters joining the current debate over the merits of Virginia State Bar President Manuel A. Capsalis's initiative to promote diversity. We should acknowledge and welcome the debate but not the tonality of personal attack directed at Mr. Capsalis, whose motives to better our profession are unassailable.

Opponents of his initiative attempt to define "diversity" as establishing quotas for the unqualified, which is not what promoting diversity is all about. By defining diversity in this manner, they attempt to win the debate in painting the diversity initiative as nothing more than an effort to victimize and take from the qualified and give to the unqualified. This is a tried-and-true but unwelcome tactic sometimes evident in litigation — namely, to refashion the arguments of opponents into something they are not, in order to then defeat a worthy effort now recast as an affront to the sensibilities of the audience to which the communication is directed.

Promoting diversity in the law is not about securing some narrow niche of privilege for a particular group, but is rather an effort to end a pattern where such diversity is suppressed, whether intentionally or merely by replication of past custom. Diversity is about encouraging tolerance, respect, and inclusiveness of persons in the law who have been otherwise discouraged from full participation because of their race, gender, ethnic origin, or social background. Virginia has come a long way in encouraging diversity, but not far enough.

One example to which we can point with pride is that diversity came to the Supreme Court of Virginia not because of quotas but because of the breakdown of barriers that previously prevented the best candidates from reaching the Court if they happened to have been other than white men. It would be hard to argue that the current Court's two African Americans and two women are other than jurists of the highest qualifications. Thus, promoting diversity is in essence about encouraging the most qualified to enter the law — no matter what their background — and not allowing the impression that the profession is unwelcoming of a particular group.

Diversity enriches the bar. It does not detract from the profession. The debate should be framed in terms that state a truism: promoting diversity benefits the profession by increasing the talent pool from which lawyers, judges, and others engaged in the legal system are drawn.

David Bernhard
Falls Church

In Defense of Hope

In a letter in the February 2009 edition of *Virginia Lawyer*, an argument was made that because diversity had been left undefined, it could not and should not be pursued; the argument then sustains itself by defining diversity in a manner most supportive of the letter's position that diversity is discrimination. We define diversity differently. Diversity is opportunity, and it paves the way for hope.

True diversity does not tolerate unlawful discrimination or the failure to provide equal protection in any form. It is never a place where "whites" are not welcomed or are told they need not apply.

Diversity measures quality by merit — not by the accident of birth, upbringing, or cultural heritage. It recoils with disapproval from decisions driven by race or ethnicity alone. It strikes down laws that favor one group over another based solely on the physical characteristics of the favored group.

It is not a quota, racial or otherwise. Diversity is tolerance. It is an unquestioning acceptance of the proposition that merit can be achieved regardless of background and no one should be limited in their opportunities to serve the bar by anything other than their abilities and availability. Successes and personal accomplishments in any field of endeavor are inextricably bound to relationships. Wherever our life begins, we all navigate through life marked and

affected by our relationships. Most of us get to where we are going because of the relationships we build along the way. A diversity task force seeks to make those relationships available to anyone who wants to work hard enough to sustain those relationships.

Fewer than fifty years ago, we forbade certain relationships from ever forming. In *Loving v. Commonwealth,* 206 Va. 924, 147 S.E. 78 (1966) the Supreme Court of Virginia affirmed a felony conviction of persons who violated the commonwealth's ban on interracial marriages.

That ban had been upheld years earlier in *Naim v. Naim,* 197 Va. 80, 87 S.E.2d 749, *remanded* 350 U.S. 891, 100 L.Ed. 784, 76 S.Ct. 151, *aff'd.* 197 Va. 734, 90 S.E. 2d 849, app. dism. 350 U.S. 985, 100 L. Ed. 852, 76 S. Ct. 472 (1955). In *Naim,* we concluded that laws prohibiting miscegenetic marriages were constitutional, to "preserve the racial integrity of its citizens," to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride". 197 Va. at 90; 87 S.E.2d at 756.

The U.S. Supreme Court reversed *Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). Citing two prior decisions the Court repeated the principles that "distinctions between citizens solely because of their ancestry" were "odious to a free people whose institutions are founded upon doctrines of equality", *Hirabayshi v. United States,* 320 U.S. 81, 100 (1943) and *Korematsu v. United States,* 323 U.S. 214, 216 (1944). (There is an irony to this citation, which is not a part of this note).

The cases cited above are now considered historical and are consigned to the back shelves of the nation's law libraries. Virginia's judiciary today is composed of men and women whose beliefs, judicial temperament, and awareness reflect a community from all corners of this commonwealth, from Fairfax County to Wise County to Poquoson. Our judiciary is as close a model of tolerance as we have seen — not because of the color or gender of the bench alone, but because of the strength of their character. Meanwhile, diversity within the bar itself continues to grow at an astounding pace, but it is still in a state of growth. As we seek to better serve justice, we seek to improve all aspects of our profession, including the growth of diversity. The creation of a diversity task force is intended to foster such improvements.

It is not surprising to hear that this effort is coming from the Virginia State Bar. The governing body of the VSB in many respects is formed and rests upon a model of diversity. The bar council purposefully draws its members from each of Virginia's thirty-one judicial circuits, and nine additional members are appointed by the Supreme Court from the active members of the bar at large. Any judicial circuit that has more than five hundred active members is entitled to one additional council member for each additional five hundred members. Consequently, although the most densely occupied circuits may have more representatives as a group on the council, the entire governing body comes from all across the commonwealth, and the diversity of their ranks is enhanced by the at-large seat appointments.

A diversity task force and a diversity conference are thus a natural outgrowth of the core values of a bar leadership which, over the years, has undertaken efforts to increase diversity in the profession.

We believe that instead of "racial balancing," the Diversity Task Force's mission is one of promoting sober reflection on whether the divisiveness of the past — the vestiges of the 1970s — is truly vanquished from our society. The question remains whether we can honestly say that within Virginia's legal profession there is tolerance and opportunity for all its members worthy of an institution entrusted with ensuring equal justice under the law.

This concept of equal justice does not demand symmetry; it simply requires that all should have equal opportunities. When we foster equal opportunities we encourage people from all walks of life to come into our profession because the doors were opened for anyone with the merit and courage to walk through. Diversity opens the door. It does not usher in the unwilling or unqualified, but it does and should welcome the application of a poor white student from Appalachia to join the Oliver Hill/Samuel Tucker Prelaw Institute.

Diversity allows for hope.

History has shown us that real progress and change cannot occur without hope and that hope comes from the leaders of our community when they challenge complacencies. These leaders are unafraid to examine their prejudices because they believe that when they face those prejudices, they better themselves and foster justice for all.

Democracies exist when opportunities and hope abound. Lawyers, whether from Pakistan or the United States, are the natural guardians of democracy. The Rule of Law understands that freedom can be sustained only when we promote the hope that a few find inconvenient.

Regardless of the inconvenience, it is inescapable that diversity is America. Nowhere else in the world can there be found the variety of lives that exist from the winters of Alaska to the summers of Hawaii; from the West Coast to the corn fields of Iowa to the East Coast; from the Florida Keys to the Southern Gulf to the Great Lakes. The diversity initiative seeks to build on the recognition that the strength of this nation comes from all corners of the country and the talents of its citizens.

These are more than just words, more than sophistry. These are the voices of America. And in keeping with those voices, we applaud the current VSB president and his courageous colleagues of the Virginia State Bar who are willing to raise those voices and challenge us to do the same.

Asian Pacific American Bar Association of Virginia
Hispanic Bar Association of Virginia
Northern Virginia Black Attorneys Association
Virginia Trial Lawyers Association

Editor's Note: More letters are posted at VSB.org

Editor's note: We have received several letters since the April 2009 issue of Virginia Lawyer *was printed. They are available below.*

What's to fear …?

The February 2009 *Virginia Lawyer* had two letters to the editor questioning the wisdom — even legality — of the bar's diversity program. One argued that diversity equals affirmative action and that constitutes reverse discrimination. The other claimed the bar should "stick to its knitting" and not press its ideology on its members.

Surprised by their tone, I returned to President Manuel A. Capsalis's proposals to see if I could detect what troubled them.

President Capsalis's proposal had three parts:

1. To add to the VSB Council's powers and purposes clause the following language: "To encourage and promote diversity in the profession and the judiciary";

2. To create a Diversity Conference for:

   (a) Encouraging aspiration to a legal career among diverse individuals;

   (b) Enhancing access to a law-school education for diverse individuals and promoting their success;

   (c) Promoting and maintaining the quality of legal services in Virginia;

   (d) Promoting and assisting the advancement in the legal profession of diverse individuals;

   (e) Fostering diversity at all levels of the judiciary;

   (f) Enhancing participation by lawyers of diversity in the governance and activities of the Virginia State Bar and other organized bar groups; and

   (g) Providing a forum to assist the legal profession and judiciary in understanding and addressing the legal needs of Virginia's diverse population.

3. To make the Chair of the Diversity Conference an ex officio member of the VSB Council and the Executive Committee.

What's to fear in these?

If past is prologue, diversity is a great benefit. Over my forty-three years of practice, our bench has morphed from an all-white, all-male bastion to one a good bit more diverse. There was a natural sequence. As the bar became more diverse, and as its newest members become more widely known, understood and appreciated, some ascended to the bench. It happened that way for African Americans and women at the bar.

Yes, there were some early tensions as each assumed powerful roles previously reserved to white males, but those times have passed. Women and African Americans occupy seats on our highest courts, and practice amongst us not just as tolerated colleagues but as respected and admired practitioners.

As a white, male lawyer who has lived through both experiences, trying cases in a white, male system and later one significantly more diverse, I pray that I be spared the former and allowed to enjoy the latter.

Homogeneity is a natural cousin of power, and under it some of my clients suffered the invisible consequences of biases and prejudices. "Sameness" wasn't so much admired, it was comfortable. In that environment there were no checks and balances. The system was "clubby," and if you weren't a member of the club you were at a disadvantage. Interestingly, being white and male was no guarantee of membership. One also needed an attitude.

Diversity, with its variety of life experiences and cultural richness seemed to bring with it a template for a more compassionate system. Having to ride in the back of the bus or being denied access to resources because of one's gender couldn't help but shape one's perspective on fairness.

But diversity in the bench and bar isn't just about the individuals now allowed to percolate to the top. It also is about what their participation does to reshape attitudes and images. Litigants from all backgrounds feel more assured that they, too, are eligible for justice. The bench and bar seem proud of their diversity, not apprehensive. Inclusion breeds trust, confidence, camaraderie, and compassion — elements missing from the earlier paradigm.

I agree with President Capsalis. Much work needs to be done. In some respects women and African Americans are not yet full partners in this profession, and significant portions of our community — Hispanic, Asian, and others — are not fully accommodated in our professional home. I applaud President Capsalis's initiative, am optimistic about its adoption, harbor no fears about it and say to the one letter writer, diversity is not just the bar's knitting. It should be the bar's mission.

Robert T. Hall
Reston

Diversity Defined

In the February 2009 edition *Virginia Lawyer*, a Virginia State Bar member criticized VSB President Manuel A. Capsalis's initiative to promote diversity. One of his central arguments was that a major problem with President Capalis's diversity effort was the president's failure to define the meaning of "diversity." The author proceeded to equate diversity with affirmative action and suggested that President Capalis's effort would unfairly penalize the majority of Virginia attorneys — white male attorneys. This is a familiar argument has been rebutted effectively time and time again in vari-

ous contexts, but it continues to be offered by some beneficiaries of the lack of diversity to justify maintaining the unequal status quo.

Professor Cedric Herring of the University of Illinois University of Illinois provided a useful definition of the term "diversity" in his August 2006 paper titled "Does Diversity Pay?: Racial Composition of Firms and the Business Case for Diversity." Defining "diversity," Professor Herring wrote:

> For some people, the term *diversity* provokes intense emotional reactions because it brings to mind such politically charged ideas as affirmative action or quotas; yet, at its base the term merely refers to variety. Diversity is an all-inclusive term that extends beyond race and gender and incorporates people in many different classifications. It includes age, … sexual preferences, … and a myriad of other personal, demographic, and organizational characteristics. Generally speaking, the term *workforce diversity* refers to policies and practices that seek to include people within a workforce who are considered to be, in some way, different from those in the predominant group.

I believe that President Capsalis's definition of diversity most probably would come close to Professor Herring's. President Capsalis, of course, can speak for himself with regard to this subject and likely has done so already. The central point that the author who criticized him missed is that diversity includes white males. It is not an exclusionary term meant to prejudice anyone's rights. Rather, it is an inclusionary term meant to expand participation to all competent individuals regardless of how one wishes to classify them.

Donald O. Johnson
Richmond

"Minority" Quotas?

I don't know if you can stand one more letter about the diversity initiative in our bar, but I totally agree with Peter K. McCrary's views as expressed in the April 2009 *Virginia Lawyer*.

It is either naïve or disingenuous to suggest, as do Yvette A. Ayala and Rasheeda N. Matthews, that a solicitation "to attract minority high school students who would not normally have access …" would not be interpreted to intentionally exclude white males, regardless of the declared objective intentions.

Given Virginia State Bar President Manuel A. Capsalis's apparent refusal to define exactly what is meant by "diversity," most people infer that it means hard-line "minority" quotas. I grant that true diversity would provide many benefits to us all, but I am ever mindful that our rights belong only to individuals and not presumptuous groups. We white males don't need special assistance as a group, but white male individuals are entitled to not be arbitrarily excluded as such. Willfully undefined buzzwords like "diversity" cause apprehension.

We lawyers and our bar need only to promote and stand firm for professional integrity, equal justice, and personal liberty.

H. Watkins Ellerson
Hadensville

Discrimination Led to the Law

I have fought against discrimination all of my life. For this reason I am against affirmative action and automatic use of diversity. People should be judged as individuals and not as a class when being admitted to the Virginia State Bar or holding an office in the bar. Favoring some people by way of affirmative action perpetuates discrimination against others who are not in the favored group or groups.

I am thoroughly familiar with discrimination and in fact am only a member of the bar because of discrimination against Jews in the chemical field in 1940 when I graduated with honors from the Massachusetts Institute of Technology. My senior thesis involved the use of ribose, a rare sugar that was donated by Merck & Co. INC. When Merck came on campus to interview people for jobs, I was not included on the list. When I asked the head of the chemistry department why, he replied that Merck did not hire Jews. As a result of the discrimination against Jews in the chemical field, I entered the U.S. Patent Office and switched careers. I went to the T.C. Williams School of Law at night while I was a patent examiner, and I passed the Virginia Bar Examination when I was not quite two-thirds of the way through law school.

Also there is a question of what percentage of your ancestry determines your race. Thus President Barak Obama is called black although, like many of us, he is actually of mixed race, since his father was black and his mother was white. What is the race of my children? From me, they inherit German, French, Czech, and Jewish backgrounds. From my wife, Norma, they inherit English, Dutch, Scotch-Irish, and American Indian ancestors. Norma has enough Cherokee blood that she is entitled to live on a Cherokee reservation if she wants.

I repeat that is a mistake to arbitrarily decide that people should be chosen in order to provide diversity or for affirmative action. They should be chosen as individuals based on their own merits.

Alvin Guttag
Gaithersburg, Maryland

Diversity Enriches Legal Profession

I write to address the criticism you received from two members of the Virginia State Bar in letters published in the February 2009 *Virginia Lawyer*.

The letters of David E. Wilson and Joseph W. Stuart unequivocally demonstrate the need for the diversity initiative you have spearheaded. Mr. Wilson made

the statement that "diversity to me, is a nice way of saying whites need not apply." Mr. Stuart's assertion that you propose "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" erroneously equates diversity with discrimination. The two letters reflect both a lack of knowledge on the subject and the same type of irrational fear-mongering that led to the discrimination against and subjugation of American citizens for decades.

The very fact that attitudes such as those noted above continue to exist shows the need for education about the importance of diversity and interactive experiences that can shatter preconceived notions and build positive personal and professional multicultural relationships. Far from promoting discrimination, diversity encourages inclusiveness and enriches the legal profession in numerous ways by bringing together people from different backgrounds and experience, different socioeconomic, educational, geographical, racial, religious, ethnic, cultural, and familial backgrounds, and different ages, genders, and sexual orientations, for example.

Minorities have historically been underrepresented in the legal profession generally, and it is particularly unsettling, in light of the burgeoning minority population in this country, that fewer minorities are enrolling in law schools. Moreover, according to a 2005 American Bar Association report on the progress of minorities in the legal profession, African Americans comprised 3.9 percent, Latinos 3.3 percent, and Asians 2.3 percent of 811,115 attorneys in this country. According to the last census, 35 percent of Americans are members of a racial or ethnic minority, and minorities in America are predicted to constitute the majority in America by the year 2042. These facts underscore the importance of the Virginia State Bar — and all other bars around the state as well, being proactive in anticipating, debating, and advocating for diversity in the bar.

The Old Dominion Bar Association congratulates you on your forward thinking and leadership in bringing these facts and corresponding issues to the attention of the Virginia State Bar membership and encouraging them to understand and support your diversity initiative. In my first remarks as president of the Old Dominion Bar Association, I reminded our membership that we could not afford to merely bask in the glow of our legacy as "Virginia's Advocates for Equal Justice" and rest on our laurels, because the struggle continues.

The Old Dominion Bar Association is very appreciative of, strongly supports, and will continue to support the Virginia State Bar's leadership on this issue in every way possible. We truly hope that your diversity initiative is a harbinger of things to come and will continue to evolve and progress with future changes in Virginia State Bar leadership.

The Virginia State Bar can count on the Old Dominion Bar Association's continued support.

Beverly A. Burton
Richmond