Black Lawyers and Corporate and Commercial Practice: Some Unfinished Business of the Civil Rights Movement

John T. Baker
Indiana University School of Law

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Black Lawyers and Corporate and Commercial Practice: Some Unfinished Business of the Civil Rights Movement

BY JOHN T. BAKER*

Some people are beginning to realize that the problems which Blacks face in the 1970s are just as difficult—if not more difficult—than those encountered in the past. It is probably safe to conclude that the struggle of Black people has shifted, for the most part, from eliminating barriers to creating opportunities. Marches on Washington, sit-ins, legislation and court decisions will not be very useful in coping with problems associated with this new phase of the struggle.

While it is difficult to devise strategies for overcoming the crippling effects of past discrimination, the problem is compounded by the confusion surrounding the issue of the legitimacy of preferential programs designed to short-circuit the "catch-up" phase of the civil rights movement. Those who argue in favor of preferential treatment often fail to clearly articulate its basis; and there are those who are dubious about the efficiency of these programs. These important questions are correlative to the author's purposes. There is some doubt as to whether successful preferential programs can be devised; but whether or not this is the case, a systematic analysis of the situation of the Black attorney must precede any suggestions of programmatic redress.

* Associate Professor, Yale Law School; B.A., 1962, Fisk University; LL.B. 1965, Howard Law School.


2. "Although the preference is expressed in terms of favoring the 'disadvantaged' and the 'culturally deprived,' the differential as applied is commonly not based on any objective inquiry into whether the particular applicant is in fact disadvantaged or culturally deprived. Thus the son of a Georgia sharecropper will not get the benefit of the differential if he is white, but the son of a Boston lawyer will get the benefit of the differential if he is black." Summers, "Preferential Admissions: An Unreal Solution to a Real Problem," U. Tol. L. Rev. 377, 378-79 (1970).

I will examine the underrepresentation of Black lawyers in the practice of business and commercial law and sketch the causes of this underrepresentation. With this background, I will turn to an analysis of possible bases for preferential programs designed to increase the number of Black business and commercial lawyers.

There are three major reasons for selecting this area of study. The objective of many civil rights and progressive organizations in the '70s has become the economic development of Black America. Numerous programs designed to serve this end were begun during the late '60s and have continued into the '70s. To the extent that these programs help to create business and commercial enterprises owned and operated by Blacks, a demand is created for legal services. Black attorneys cannot respond to this demand, indeed very few of them specialize in business and commercial law.

It is not assumed that Black attorneys should, a priori, represent Black businesses. However, the possibility that connections between the two groups (attorneys and businessmen) can be structured to enhance the viability of both will be explored in this article. Black ownership and control of substantial businesses is still in a nascent stage in this country; and the specialization in business and commercial practice by Black attorneys is as well a recent phenomenon. The late entrance of Black professionals into the capitalist stage only emphasizes the enduring status of the corporate manager and the corporate attorney in our society. Corporations and their lawyers control financial resources and assert influ-

4. Business and Commercial Law practices are defined as those practices in which most of the time of the attorney is spent representing business and commercial firms in all aspects of their operations. Most of the business clients consist of corporate entities engaged in the production, distribution and to a lesser extent retail sale of consumer goods, commodities and services. Most attorneys who engage in this type of practice are associated with law firms as either partners or associates, or alternatively are employed directly by the business client as "house counsel."

5. Examples of these types of programs include: The Urban Coalition; The Inter-racial Council of Business Opportunities; The Model Cities Program, 42 U.S.C. 3301, Demonstration Cities, and Metropolitan Development Act of 1966, Title I, as amended, and the Special Impact Program Economic Opportunity Act of 1964, 42 U.S.C. 2763, Title I-D, as amended.

6. The term "black business" is defined, for the purpose of this article, as one in which in excess of 50% of the equity is owned by blacks.

7. For example, the current reported sales figures for the top 5 industrials exceed the GNP of 94 countries; the figures for the top 10, 89 countries; for the top 20, 74 countries; for the top 50, 79 countries; for the top 100, 52 countries; and for the top 200 industrials, 36 countries. The 1974 World Almanac and Book of Facts 619, 620 (1974); The 500 Largest Industrials, Fortune Magazine 232-251 (May,
ence in the larger society because this symbiotic structuring has so well succeeded. It would be a dramatic failing if this structuring were to be denied Black lawyers.

Finally, while it would appear that the socio-economic problems of the Black lower-class are far more serious than those of the Black middle-class, we should question the relationship between the two, and the benefits and liabilities of both classes when such a relationship can be established. What can the Black corporate lawyer earning $100,000 a year do to ameliorate the plight of the Black unemployed person living in Harlem? The latter portions of this article will, hopefully, shed some light on this question.

I.

Four major areas must be confronted if we are to fully explore the subject of the entry of Blacks into the practice of business and commercial law: (1) the magnitude of underrepresentation of Black lawyers with predominantly business and commercial practices; (2) the reasons for this underrepresentation; (3) the reasons for creating a substantial Black presence in the commercial bar; and (4) what the analysis of all of the above tells us about successful strategies to bring about this presence.

Proof of Underrepresentation

It can only be tentatively stated that there are few Black attorneys with business and commercial practices. A quick glance

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10. An article in the Chicago Sun-Times reporting on a study by the Chicago Reporter, a monthly information service that deals with racial issues in the Chicago area, which revealed that a survey of "17 of the most prestigious law firms in the city, showed that out of more than 1,300 lawyers, only 22 or 2 percent, were either Black or Latin." Chicago Sun-Times, Nov. 24, 1973, at 64. The study further showed that "of the 22 minority group lawyers, 14 were Black and eight were Latin. Of the 14 black lawyers, only one had achieved the status of partner." See also, Ed-
at the large law firms around the country, and the conspicuous absence of Black attorneys from these firms would certainly justify an impressionistic view that Blacks are not prominent in business practices.\(^1\) On the other hand, reliable data on this precise issue appears to be unavailable; we must infer the answer from more oblique inquiries.

Most lawyers, in private practice, who engage in business and commercial practice are associated with firms, either as partners or associates.\(^2\) Representation of a corporate or other substantial business client doing business as a partnership, joint stock company, or non-profit organization, usually calls for more manpower and specialization of function than any single practitioner can handle. Consequently, firms are an efficient structure for servicing business clients which require both a large amount of legal work as well as a variety of legal tasks. Another way of securing legal services is for the business to employ attorneys as "house counsel." These lawyers are paid a regular salary and work exclusively for the business which employs them. In 1970 there were 236,085 lawyers engaged in the private practice of law.\(^3\) Of this number, 117,122 were affiliated with a law partnership either as partners (92,442) or associates (24,680).\(^4\) Additionally, as of 1970 there were some 33,593 lawyers employed by private industry,\(^5\) although, there is no breakdown between those employed in legal departments and other areas. The net result of these figures is that lawyers practicing in firms and private industry account for a little over 64% of the attorneys in the private practice of law.\(^6\) There is no way of determining what percentage of these attorneys are Black. This problem is further compounded by the fact that there is some discrepancy in the statistics pertaining to Black attorneys.

\(^{11}\) \textit{SMIGEL, supra note 8, at 3.}
\(^{12}\) \textit{SMIGEL, supra note 8, at 3.}
\(^{13}\) \textit{1971 LAWYER STATISTICAL REPORT, 10 (1972) at 10.}
\(^{14}\) \textit{LAWYER STATISTICAL REPORT, supra note 13, at 10.}
\(^{15}\) \textit{Id.}
\(^{16}\) \textit{Id.}
A study conducted under the auspices of Howard University Law School and the National Bar Association (NBA) revealed that in 1966 the number of Black lawyers which the study staff was able to locate was 2,209 and included in this figure were Black judges. However, the Honorable Edward Toles reported in 1970 that there were 4,059 Black lawyers and judges in the United States. Apart from the actual increase in number in four years, one of the reasons for the apparent discrepancy in the 1966 study and the 1970 figures is that the Toles study included practicing as well as non-practicing lawyers. The problem is further muddied by the 1970 Census figures which state that there are 3,703 Black lawyers and judges in the United States. If one takes into consideration the dramatic increase in the enrollment of Blacks in law school during the past three years, it would probably be safe to place the number of “practicing Black lawyers” at a little over 4,000.

The task of trying to ascertain the number of Black lawyers who are engaged in business and commercial practices is just as vexing as that of attempting to determine the number of practicing Black lawyers. The most recent study of Black lawyers which was published in 1971 showed that of the lawyers who responded to the questionnaire only 3.5% reported that their primary source of income was from business and institutional clients and 2.8% reported that their primary source of income was from commercial clients. Therefore, only 6.3% of those responding reported that

17. Shuman, Black Lawyers Study, 16 How. L.J. 225, 227, n.7 (1971) (hereinafter referred to as Shuman). For the purposes of this study a lawyer was defined as a person “... actively engaged in an occupation requiring admission to the bar.” Id. at 227.
20. Id. The Howard-NBA study adopted a more restricted definition of the term “lawyer,” supra note 17, at 227.
24. 38.4% of those to whom questionnaires were sent (2,209) responded. Id. at 227,228.
their practice was derived from business and commercial clients.25

The results of the Howard-NBA study, while eight years old, can be compared to statistics contained in the American Bar Foundation (ABF) 1971 Lawyer Statistical Report which shows that only 14.5% of the total number of graduates of Howard Law School26 practice law in law firms as either partners or associates.27 It is not possible to determine what percentage of these lawyers handle business and commercial clients. The Howard-NBA study suggests that the percentage is somewhat under 7%. Between 1871 and 1970, 2,146 students received their law degrees from Howard.28 Howard has been responsible for producing a substantial percentage of all Black law graduates. Considering the statistics in the Howard-NBA study together with those in the ABF Report, it can be concluded that slightly less than 10% of all Black lawyers in this country are engaged in business and commercial practices.

If one uses the highest estimate of the number of Black lawyers in the country, that figure comes to less than 2%.29 Thus an optimistic estimate of the percentage of lawyers who are Black and engaged in business or commercial practices comes to 0.15% of the total number of practicing lawyers in the country.

II

Reasons for This Underrepresentation30

Before we examine the normative question of why there should be more Black attorneys engaged in business and commercial law

25. The breakdown of those responding was as follows: Negligence—41.3%; Criminal Law—17%; Domestic Relations—8.9%; Wills, estate planning, probate—8.9%; Real Estate—7.7%; trial work, excluding negligence cases—3.7%; business, institutional clients—3.5%; commercial—2.8%; administrative agencies—1.9%; constitutional law, civil rights—1.9%; bankruptcy, personal—1.6%; other—8%; Id. at 277.
26. Howard Law School is a predominantly black school located in Washington, D.C.
27. Lawyer Statistical Report, supra note 13, at 104. The percentages for Harvard and Yale respectively are 50 (Id. at 103) and 47.7 (Id. at 139).
29. It has been estimated that the number of black lawyers in the United States prior to 1960 was approximately 1,500. As of 1970 the number of black lawyers in the United States was approximately 3,406. However, in addition to this figure one must take into account the number of black law students currently enrolled in law school. See Ruud, supra note 22.
30. Many of the problems involved in working toward an adequate account of
practices, we must assess reasons for the present miniscule number of these attorneys, roughly, as we have seen, 1% of the profession.

There are two approaches to this question. First, one can simply deny that an exhaustive search for causative factors is profitable because, as the number of Black lawyers continues to increase, the number of those who will engage in business and commercial practices will also increase. This approach must assume that whatever barriers have historically excluded Blacks from the practice of business and commercial law (whether or not those barriers be self-imposed) will be or have already been removed. To determine the validity of this assertion, an analysis of the barriers to corporate practice must be undertaken and the very effort renewed, viz, a search for causative factors, that this approach was supposed to make unnecessary.

Therefore adopting the second approach we assume the need for a cause-centered inquiry. It is a truism to note that just as racial discrimination has been the major cause of the sparsity of Black attorneys it has also been the major cause of the inability of all but a few of them to acquire business and commercial practices. Black lawyers have had little opportunity until recently to acquire the requisite training, experience and opportunities which would permit them to become successful business and commercial practitioners. They were virtually excluded from the large and medium size law firms until the mid-sixties. Both law and custom prevented them from acquiring non-Black business clients until the last ten years or so. Moreover, because of the limited scope of most Black business there has been little opportunity to handle sophisticated business problems. Further, a second-class status has shaped the expectations of Black attorneys—a business practice was one field of law which simply was not considered by most Blacks admitted to the bar.

Although these reasons are commonly cited as explanations for the sparsity of black lawyers in various branches of the law originate in mistaken methods of analysis. Methods are adopted that circumscribe investigation, flawed assumptions are made: all because a certain kind of answer is expected. When that answer is exclusively programmatic, analysis proceeds from the unrealistic to the inappropriate and we are little better off for the effort.

31. SMIGEL, supra note 8, at 37, 45.
the absence of Black business attorneys as well as for the sparsity of Black law firms they are rarely subjected to analytical scrutiny. Consequently, we will examine supporting evidence for each of these reasons. Stated schematically they are: (1) *De jure* discrimination which resulted in a social structure in which Blacks were excluded from most important institutions connected with either business or the law—except those institutions in Black communities or designed specifically for Blacks, e.g., Black law schools; (2) unwillingness of Black businesses or Blacks with business or commercial problems to utilize Black attorneys; (3) the institutionalization of *de jure* racial practices which, even without any official policy of discrimination has prevented Blacks, until recently, from making any significant gain in business and commercial practices; and (4) the absence of Black business and commercial enterprises of significant size and scope to require the services of Black lawyers.

**A. De Jure Racial Discrimination**

The major reason for the lack of Black lawyers today is traceable to both state enforced and institutionalized racial discrimination. Historically, Blacks were prohibited, by law, from pursuing professional careers in most institutions of higher education; few Blacks were allowed to pursue business careers in Black communities; and finally, Blacks were systematically socialized in such a way that they came to believe in their inferiority and to project that feeling of inferiority onto other Blacks. Thus, it is not difficult to understand why there are so few Black business lawyers practicing in the United States.

It is somewhat difficult to trace the evolution of Black legal practice in this country. One writer on the subject has traced the development of Black lawyers through three historical periods:

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33. See Sec. 2C infra, at 22-35.
34. TOLLETT, supra note 28, at 326.
36. J. Comer, *Beyond Black and White* 11 (1972); Clark, supra note 32, at 64.
37. My research has produced nothing which comprehensively traces the history of the black lawyer in American society. This probably only shows that there are even fewer black legal historians than there are black business lawyers.
According to Doctor Kenneth Tollett there were 28 Black graduates from American colleges before the Civil War, however "... until, the turn of the century, generally Black professionals, like most professionals, received their training by apprenticeship rather than in higher educational institutions, except for the ministry." Although Doctor Tollett cites instances of two or three Blacks who were licensed to practice law via the apprenticeship process and another two or three who received their legal education abroad, he does not give the precise number of Black lawyers practicing prior to the Civil War period.

From the end of the Civil War to 1910 the number of Black lawyers increased rather dramatically. One of the reasons for the increase in numbers was the opening of Howard University Law School in 1869; although it was still quite common during this period for Blacks to earn their licenses via the apprenticeship method. Between 1876 and 1900 approximately 328 law students were graduated from Howard. There are no figures on the number of Blacks who became lawyers through the apprenticeship method or were graduates of other law schools. During this period, however, most of the practicing Black lawyers were located in the South.

Statistics are available from 1910 onward. In a study of the Negro professional, Carter G. Woodson stated:

"According to the United States Bureau of the Census, there were in this country 915 Negro lawyers, judges and justices in 1910; 950 in 1920; and 1,230 in 1930. Practically all of these may be classified as lawyers rather than judges and justices because of the known difficulty of Negroes to attain such positions in the United States."

The number of Blacks practicing during the following three decades were as follows: 1940—1,952; 1950—1,450; 1960—

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39. Id. at 327.
40. Id. See also, Carlin, supra note 8, at 22.
41. Since there were less than one half million free blacks before the Civil War, it is fairly safe to assume that the number of black lawyers was quite small.
42. Tollett, supra note 28, at 331.
43. Id.
44. C. Woodson, The Negro Professional Man and the Community 184 (1934).
The difficulties encountered by Blacks in their efforts to become practicing lawyers have been described elsewhere, and therefore we need only note the difficulties related to the thesis that de jure discrimination was the major cause of these difficulties well into the 1950s.

Prior to the Civil War most Blacks were slaves and as such prohibited by law from engaging in any form of legal education or apprenticeship. The reconstruction period provided a limited opportunity for Blacks to enter the professions, primarily through the apprenticeship method. This was a short-lived period in American history, and even these limited opportunities began to diminish around 1870. While it is true that a few Blacks were able to receive legal training in white law schools, in many instances their admission was forbidden by law. While Howard Law School opened in 1869, most other Black law schools were not opened until the late 1930s and early 1940s. Legal battles to integrate largely southern state-supported law schools, were begun in the mid-30s and continued into the late 50s and early sixties. It would appear that the major obstacle for Blacks wishing to pursue a legal career was presented by the southern law schools. Data is simply unavailable

45. Shuman, supra note 17, at 230, n.18. The 1970 statistics have been cited in an earlier portion of this paper, see n.29.
47. Frankling, A Brief History of the Negro in the United States, in The American Negro Reference Book 1-12 (J. Davis ed. 1966); Clift, Educating the American Negro, in Id. at 362-363.
49. Law Schools were opened at Lincoln University in Missouri and at North Carolina College in Durham, North Carolina in 1939. In the late 1940's law schools were opened at Texas Southern University in Texas, at Southern University in Louisiana, at South Carolina College in South Carolina, and at Florida A. and M. in Florida. According to Tollett, these later schools were opened in "an attempt to stem the determined effort of N.A.A.C.P.-backed lawyers to open up professional and graduate schools in the South. . . ." Tollett, supra note 28, at 335. See also, Washington, History and Role of Black Law Schools, 18 HOW. L.J. 385 (1974).
51. See Note, The Negro Lawyer in Virginia: A Survey, 51 VA. L. REV 521 (1965); See also Gelhorn, supra note 46, at 1069-1070.
establishing the number of Blacks enrolled in northern law schools prior to 1967.52

Of course the effects of *de jure* discrimination go far beyond the actual legal restrictions they impose. The injuries associated with these effects are too well known to delineate here. With regard to the legal profession these effects have an astonishingly quixotic quality. As a result of this discrimination, many Blacks took on expectations which caused professional careers to appear distant and irrelevant. For other Blacks, however, *de jure* discrimination provided an added incentive and these few entered the legal profession with a special zeal, an ironic effect that would have horrified the authors of Jim Crow legislation. The final irony is that the commitment and dedication of these few Blacks led them not into the practice of business and commercial law but into areas such as constitutional and criminal law.53

B. Unwillingness of Black Businesses or Blacks with Business Or Commercial Problems to Utilize Black Attorneys

While *de jure* discrimination had the effect of severely limiting the opportunities of black professionals, it nevertheless provided opportunities for some Black professionals who confined their activities largely to the Black community. Black physicians and dentists in the South and many parts of the North obtained Black patients because white physicians and dentists refused to treat Blacks or did so under the most humiliating circumstances.54 Black undertakers had a monopoly on Black funerals,55 and certain Black

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52. Beginning in 1968 a concerted effort was made on the part of some of the more prestigious law schools to attract minority students. See generally, Fleming and Pollak, The Black Quota at Yale Law School—An Exchange of Letters, 19 The Public Interest 44, 51 (1970); Edwards, *supra* note 10, at 1406; Gelhorn, *supra* note 46, at 1077.

53. "Fifty-seven percent of the lawyers in our sample were born in the South, while only forty-six percent of the respondents in the other professional groups were born and reared in that section. Our interview data suggest that numerous experiences of an untoward nature in negro-white relations were witnessed by members of the group. The loss of property by members of the family because of inadequate legal advice and protection, the witnessing of lynchings, etc., are recalled, in addition to other experiences as workers in race relations organizations. Identification with the legal profession offered an opportunity to serve in a capacity which is greatly needed by the Negro group." G. Edwards, *The Negro Professional Class*, 133-134 (1959).


businesses, such as barber shops, beauty parlors, bars, and restaurants benefitted from the pattern of racial segregation which prevailed in the South and much of the North through the late '50s and early '60s.

These professionals and entrepreneurs posed no competitive threat to their white counterparts and with limited exceptions did not have to utilize white controlled facilities in order to practice their profession.

Black lawyers have never been in this position. The nature of the work of most lawyers requires them to have rather extensive contacts with persons and organizations outside their own communities. Most Blacks with business and commercial problems believed that the Black lawyer could not obtain as favorable a result as a white lawyer could. In part, this perception on the part of the Black businessman was shared by many other Blacks, i.e., if a Black must deal with whites it is better to be represented by a white lawyer.

Potentially, there should be great opportunities for negro lawyers. . . . Actually, however, the legal insecurity of the negro is such that the negro attorney often has but little chance before a Southern court. Protection by a 'respectable' white person usually counts more in the South for a negro client than would even the best representation on the part of a negro lawyer.56

Many negroes preferred to give their legal work to white lawyers out of the conviction that white practitioners had a better chance for a fair hearing and judgment in the courts. The conception on the part of the negro public of the inability of the negro lawyer to get a fair hearing for his client was supported by the practice adopted by many negro lawyers of associating themselves with white lawyers in most of their cases and of splitting the fees.57

Some Blacks also believed that the Black lawyer was not competent:

Both lawyers and physicians complain that they are handicapped because many negroes are convinced that white professionals are better qualified than negroes.58

56. Id. at 325-26.
57. Edwards, supra note 53, at 135.
Woodson in his study of the Negro lawyer stated:

Addressing our attention to the negro lawyer himself as viewed by citizens in the communities who have made reports on them, we see such shortcomings as the improper attitude of the negro lawyer toward the profession, the lack of thorough education, disinclination to read extensively and keep abreast of things, poorly equipped offices, association with the lower elements of the races, dishonest handling of the business given them, and the tendency to neglect the profession for politics.\(^{59}\)

Perhaps the most salient reason for the underutilization of Black lawyers has been the acceptance and internalization by most Blacks of the highly negative image of Blacks held by the larger society.\(^{60}\) If a Black feels that he is not as competent as a white person and that this is solely attributable to his race, how can he feel that anyone of the same race is?

The extent to which Black businessmen have shared in some or all of the aforementioned perceptions is a matter of conjecture; the extent to which they used Black lawyers is not.

Most of the large negro business enterprises employ white lawyers. Some of them may retain a negro lawyer for minor matters, but for any question involving serious decisions and consequences they resort to the better known and more influential lawyers of the other race.\(^{61}\)

The same observation is made by Thompson in his study of the Negro leadership class in New Orleans approximately thirty years later:

... all negro lawyers pointed out that most negro businessmen and alleged criminals 'with money' almost invariably employ white lawyers in preference to negro lawyers because the former are believed to have greater influence with 'lilly white' courts and white officials.\(^{62}\)

Consequently, even those few Black businesses which have existed and prospered during the past 100 years have refused to allow Black lawyers to handle their affairs—or at least the more significant and consequently more profitable affairs.

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\(^{59}\) Woodson, supra note 44, at 222.


\(^{61}\) Woodson, supra note 44, at 226.

\(^{62}\) Thompson, supra note 58, at 126.
C. Institutionalized Racism

It could be argued that while *de jure* discrimination made it extremely difficult for Blacks to pursue legal careers, and that the socio-psychological conditions which resulted from the American pattern of race relations made it difficult for Black lawyers to obtain corporate and commercial work, things have changed considerably in the past twenty years. Yet there are still very few Black lawyers with business and commercial practices. The explanation lies in part in the effects of past patterns of racial discrimination. The removal of legal barriers does not immediately change racial attitudes which have become established, either as a result of the existence of those barriers or which were the reason for the creation of the barriers in the first instance. This is equally true for both whites and Blacks. It is certainly true that racial prejudice and the concommitant desire of Black lawyers to combat its pernicious consequences had some diminutive effect upon the commitment of the Black lawyer to aggressively pursue business clients.

However, I believe that if we examine institutional practices insofar as they relate to the inclusion or exclusion of Blacks during a period when both *de jure* and *de facto* segregation were considered as legitimate social phenomena and trace the evolution of these institutions to contemporary society most of these practices have remained relatively unaltered.

Although the amount of overt discrimination against blacks has decreased, the rules and procedures of many large institutions have become well enough established so as to predetermine outcomes with respect to racial discrimination. The essence of institutional racism lies in the unwillingness of many institutions in American society to admit that the application of standards which certain groups in the society cannot meet presently because of racial discrimination in the past results in members of that group being as effectively discriminated against as they were in the past. After

65. By institutions, I mean those reasonably stable social arrangements and practices through which collective actions are taken. *Id.* at 5.
67. *Id.* at 46, 49.
hundreds of years of racial discrimination it is no longer necessary for a firm seeking to employ a mineral and gas law expert to discriminate against a black applicant—the chances are slim that there are any blacks who could qualify for the position; and because a degree of tolerance has developed in the area of race relations in the past few years even if a black applied there would probably be little dissension, either within the firm, or among those with whom the firm had dealings if the black was hired.

The point to be made with respect to black lawyers is that they have been excluded from the opportunity to engage in business practice for so long that it is no longer necessary to exclude them today on racial grounds.\textsuperscript{68} Business law firms began to expand during the late 1890s and dramatically increased in size during the 1920s.

The period from the turn of the century to World War I witnessed the first substantial growth of law firms, with some firms in the larger East Coast cities expanding to as many as 20 or 30 lawyers. But the large firm as we know it today did not appear until the twenties, when metropolitan lawyers in increasing numbers were being called upon to shape the legal framework of the emerging economy of the giant corporations. The increased magnitude and complexity of the legal and general business advice required for the operation of these new giants necessitated a degree of specialization and concentration of legal talent that could be realized only in a very large firm . . . The 1929 crash may have momentarily toppled the corporate structures that the large firms had so ingeniously assisted in creating, but the depression and the flood of governmental controls and regulations that it brought about cemented further the interdependence between the large firm and big business and lent additional assurance to the permanence and importance of the big firm.\textsuperscript{69}

During the time when these firms were being established and expanding the \textit{total} number of black lawyers was miniscule.\textsuperscript{70} Even

\textsuperscript{68} This statement relates primarily to the exclusion of black lawyers from the opportunity to represent predominantly white businesses, or to participate, as a co-owner, in the white firms which are representing these businesses. This statement is not meant to imply that all, or even a majority of these businesses and/or law firms are desirous of excluding black attorneys. It simply states that by "objective" criteria they are now able to do so. For a discussion of the problems facing the black lawyer in his attempt to establish a business practice by representing predominantly black businesses, see p. 51-68, \textit{infra}.

\textsuperscript{69} Carlin, \textit{supra} note 8, at 19.

\textsuperscript{70} The total number of black lawyers in the country, including judges and jus-
without racial discrimination it would have been difficult for blacks to form a law firm in the hopes of obtaining a large corporate client, and even assuming the existence of a far greater number of black lawyers the racial climate in the country at the time would still have foreclosed any such possibility.

The alternative, for a black lawyer, of joining one of these expanding corporate law firms as a partner or associate was also foreclosed. While most of the larger firms existed in metropolitan communities in the north the belief in, or the willingness to acquiesce in the belief of others regarding the inferiority of blacks, among the partners of these firms and their corporate clients created as much of a barrier for blacks as did de jure discrimination in the South.71

The opportunities for black attorneys in smaller law firms was even more restricted. In addition to sharing the normative judgment of their large firm counterparts about blacks, partners in these firms hire associates with the expectation that the overwhelming possibility is that the associate will eventually become a member of the firm. Consequently, not only must the partners assure themselves that the presence of a black associate will not offend any of their clients—which are much smaller and in many instances closely held corporations—they must also make an initial judgment that the potential associate will be able to adapt to the firm's environment and has a personality which is compatible with the other members of the firm.72

Possible responses to the foregoing from members of corporate law firms are: (1) very few black lawyers have applied for positions with law firms specializing in business and commercial law; and (2) most of those who did apply were not “qualified.”

71. The problem of proving that race prejudice is a factor in a firm's hiring policies is a relatively complex one and it is not all together fair to categorically state that until the mid-sixties, with 5 or 6 exceptions, the absence of blacks from large law firms is solely attributable to racial prejudice. However, given the extremely small number of black associates in law firms and blacks in corporate legal departments it is fairly safe to conclude that discrimination is at least one of the explanatory factors. See Note, The Jewish Law Student and New York Jobs—Discrimination Effects in Law Firm Hiring Practices, 73 YALE L.J. 625 (1964).

72. This factor is even more important in smaller firms because most associates are hired with very high expectations that they will become partners in a few years. See YALE L.J. Note, supra note 72, at 656.
I do not know how one would proceed to establish the validity of either of these statements but both are probably true because of the existence of institutional racism as well as the effects of *de jure* discrimination.\(^73\)

One writer conducting a study on the impact of lawyers' social background on the type of practice in which they engage commented:

To explore the possible causal nexus between background characteristics of lawyers and type of law practice, a statistical technique for making causal inferences was applied. Four of the previously considered variables were selected for this causal analysis: religious origin, father's occupational stratum, father's entrepreneurial status, and quality of law school. Selection of these variables was based on the manner in which the labor supply is distributed among occupational positions. At least two major forces appear to be operating in this social allocation process: (1) personal *self-selection*, which motivates individuals toward certain work positions rather than others; and (2) organizational recruitment, which brings about the occupational placement of some and the rejection of others. Personal self-selection (choice) is, socially, the culmination of accumulated early experiences, knowledge, values, and skills cultivated in social groups such as family, friendship group, church and school. Recruitment criteria are of two classes: general criteria of age, experience, apprenticeship, education, license, etc., which in varying degrees, applies in all occupations; and ascriptive criteria, such as race, religion, ethnicity, and family ancestry, which handicap some would-be acceptable candidates while favoring others. Ascriptive criteria in many instances may partly replace talent, education and experience. Among lawyers it is commonly held that the conspicuous over-representation of religious and ethnic minorities in solo practice issues in large part from the selective recruitment procedures of business, industries, and law firms.\(^74\)

In the case of Blacks, the "self-selection" criterion probably has *at least* as much to do with their perceptions of limited occupational mobility as the "organizational recruitment" criterion did.

\(^73\) *See supra*, p. 17.

\(^74\) Ladinsky, The Impact of Social Background of Lawyers on Law Practice and the Law, 16 J.L. Ed. 127, 136 (1963). This study interestingly enough, did not include blacks. *See p. 130.*
Until the late 1960s most black lawyers probably did not believe, if they gave it any thought at all, that they could obtain a position with a business law firm. It is doubtful that law schools, bar associations or members of the legal profession took any action designed to counteract this belief. The absence of role-models for young black attorneys has been an additional reason for their lack of interest in corporate and commercial practice.

Consequently, the cumulative effect of "accumulated early experiences, knowledge, values and skills cultivated in social groups such as family, friendship groups, church and school," has resulted in very few black applications to business and commercial law firms until quite recently.

Certainly, organizational recruitment, the second factor mentioned in Ladinsky's social allocation process75 has been almost totally lacking as far as the hiring of black law graduates by white firms is concerned. Neither the general criteria76 nor the ascriptive criteria77 described by Ladinsky have been met by blacks if the hiring of blacks by corporate law firms throughout the country is used as an indicator. Prior to the mid-sixties, very few white corporate law firms recruited at Howard and other black law schools. Moreover the self-selection process allowed the firms which did recruit at predominantly white schools ample rationalization for rejecting black candidates. The selection process was (and still is) easier and plausibly less discriminatory where the proportion of blacks is very low—especially in the so-called elite schools such as Yale, Harvard, and Columbia. Until the late 1960s these schools never had more than four or five blacks in a class in a given year, and rarely did these blacks possess the academic credentials (law review and high class standing) to meet the "general criteria" so that the issue of "ascriptive criteria" rarely had to be faced by these firms. The "ascriptive" criteria probably became more relevant when black law graduates applied to the smaller firms.

In summarizing this section it is fair to say that a major revolution in the practice of business and commercial law took place in the first 40 years of this century.78 The private business practitioner

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75. Ladinsky, supra note 74, at 136.
76. Id.
77. Id.
78. Smigel, supra note 8, at 3. Q. Johnstone and D. Hopson, Lawyers and Their Work 199 (1967).
joined forces with his counterparts and formed firms which have now grown to immense size. Business law became increasingly specialized, which was in no small measure a result of increased governmental regulation of business.\footnote{Smigel, supra note 8, at 3. Johnstone, supra note 78, at 199-200.} Standards for admission to these firms continued to become increasingly higher partly because of the need for intelligent, hard working attorneys and partly because elitism breeds elitism (partners in firms who are graduates of Ivy League Schools genuinely believe that Ivy League graduates are superior to graduates of "lesser" law schools; partners from upper-class backgrounds feel more comfortable with associates who are from upper-class backgrounds, etc.)

During the period when this revolution in the practice of business law was taking place blacks were fighting to get into state-supported law schools, to work their way through night law schools, and to gain admission to the few black law schools which existed.\footnote{Tollett, supra note 28, at 346-348; Gellhorn, supra note 46, at 1070-1076.} Those blacks who were already lawyers had engaged in other areas of practice too long to convert to business law practices.

The patterns of operation, standards, and criteria for admission which were being formulated in the twenties, thirties and forties were fairly well institutionalized by the mid-fifties and early sixties.

When the civil rights movement gained its greatest momentum in the sixties there was very little need for business and commercial law firms to resort to devious and deceptive devices to discriminate against blacks. Any black lawyer who could meet their standards would be employed. The "rules of the game" had been established long before the 60s and they made it pretty hard for blacks to play in the game despite the genuine expressions of willingness on the part of the firms to allow them to participate.

A poignant example of this may be found in a study conducted by Professor Harry Edwards at the University of Michigan Law School. The study was conducted in 1971 among law firms in nine midwestern cities.\footnote{Edwards, supra note 10, at 1423.} The midwest was selected because it contained at the time of the study "the second largest area of black population concentration with almost 21% of the national black figure,
The study showed that only 1 out of 1,249 partners (.08%) in the responding firms was black, and only 12 of 976 associates were black (1.2%).

D. Absence of Black Business of Significant Size to Require Legal Services

Historically, the number of black businesses in this country has been quite small relative to the general business community and those businesses which have existed have been so limited in size that their needs for legal services have been minimal.

Because racial discrimination has limited the earning capacity of blacks, they have been restricted in their access to the market for goods and services which has had not only the consequence of limiting the number of black businesses but also determining the characteristics of, proportionally the largest number of those which do exist.

The effect of these constraints have been essentially the same as that produced by a protective tariff in international trade: two markets have merged. One is open to the white public virtually without limitations, and whites are free to purchase both goods and services with complete freedom of choice. However, for Negroes entry into this market is extremely circumscribed. While they enjoy considerable freedom of choice in the purchase of goods (except housing), a wide range of services (especially personal services) offered to the general market is unavailable to them. Consequently, a second market has arisen. This is basically a Negro market, and the provision of personal services lies at its core. Thus, the Negro market is entirely derivative; it has evolved behind the walls of segregation to meet a demand left unfilled by business firms operating in the general market.

Blacks have historically been permitted to operate businesses

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82. Id.
83. Id. at 1425.
84. "Negro businesses are generally small in scale and possess the attendant points of strength and weakness of all small-scale enterprises." Pierce, supra note 35 at 34.
85. See generally, Pierce, supra note 35.
involving personal services in black communities which whites have had no desire to operate.

The lines of business in which Negroes met with greatest success were those which whites did not wish to operate. These were mainly of the labor and service type. Negro barbers, mechanics, artisans and restaurant and hotel operators could be found in most southern cities.\(^{87}\)

The above statement referred to black businesses existing before 1885. Not much has changed in the past eighty-nine years. Andrew Brimmer and Henry Terrell, referring to a 1967 survey of black businesses in Washington, D.C. state:

These data demonstrate quite clearly that Negro businesses are heavily concentrated in services with a secondary concentration in retail trade. An examination of the subcategories is particularly revealing. Within the main heading of services there is a heavy concentration of barber and beauty shops, and dry-cleaning establishments. The retail sector is comprised primarily of food stores, while the category of finance, insurance, and real estate is almost exclusively unincorporated real estate agents. The general pattern which emerges is a mosaic of small, service orientated businesses which owe their existence to the protective barriers of segregation.

To date, little has been known about the detailed characteristics of black businesses. However, a seven-city survey of 564 black-owned businesses conducted by the National Business League (NBL) in early 1968 has helped to fill this data gap. The NBL survey found roughly the same industry orientation as the Washington area displayed. Of the 564 businesses surveyed 102 (18.1 per cent) were barber or beauty shops, 82 (14.5 per cent) were grocery stores or supermarkets, 54 (9.6 per cent) were restaurants, 38 (6.7 per cent) were laundry or dry-cleaning establishments, and 40 (7.1 per cent) were service station or auto repair places.\(^{88}\)

The most comprehensive data on black businesses to date was compiled by the United States Bureau of the Census in 1969. It showed that there were a total of 163,000 black owned businesses in

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the United States with total receipts of $4.5 billion. An analysis of tax returns filed with the Internal Revenue in 1968 showed that 39% of these black-owned businesses reported gross receipts under $10,000 a year, and only 2% reported gross receipts of more than a million dollars. Seventy-two percent of all black businesses had annual receipts of under $50,000. This means that as of 1968 only 326 black businesses in the entire country reported gross receipts of more than one million dollars; 6,520 black businesses reported gross receipts of under $10,000, while slightly more than 158,110 reported gross receipts under $50,000.

The Census Bureau figures showed that the largest number of black businesses are in selective (personal) services (34.4%) followed by retail trade (27.6%). Manufacturing accounts for 1.8% of all black businesses and construction for 9.8%. Regarding the size of black-owned firms the census data showed that:

The distribution of minority-owned firms by employment size . . . indicates that over 71 percent of minority-owned employer firms have fewer than five employees but account for only 40 per cent of total receipts.

Most of these businesses are operated as sole proprietorships (82%) while less than 2% are organized as corporations.

There has undoubtedly been some increase in both the number and size of black businesses during the past six years. The top 100 black businesses, according to Black Enterprise had total revenues amounting to $601.1 million for the year 1973. This represented a 17.7% increase for the previous year's figure of $510.9 million. Only 30 of these businesses have been in existence for more than 10 years, which means that there is certainly a good possibility that some of them will continue to grow stronger in the years to come.

91. Id. at 733.
93. Id.
95. Id. at 5.
96. BLACK ENTERPRISE, June 1974, at 31.
97. Id.
However, even the largest of the Black Enterprise "Top 100 Businesses", Motown Industries with gross revenues for 1973 of $46 million dollars,98 is still essentially a "small business," relative to non-minority owned businesses.99 Even if one hypothesized a "merger" of all the businesses listed in the "Black Enterprise 100" the surviving business would only rank as number 263 among the current Fortune 500.100

By now the point should have been both obviously and painfully made that during the Black man's existence in this country he has never made much progress in business and industry, relative to non-Blacks. The purpose of this article is not to proffer explanations for this disparity but simply to identify it in order to explain at least in part the reason for the absence of significant numbers of Black business and commercial lawyers. Small proprietorships with fewer than five employees and gross revenues of $50,000 and under have very little need for legal services and even assuming that there was a need the financial resources of these businesses simply would not permit them to obtain legal counsel.101 As of 1968, 72% of all Black businesses fell into the above category.102 There is some evidence that the most commonly occurring types of legal problems encountered by these businesses are in the areas of debt collection, insurance, real estate, contract negotiations, and criminal matters.103

There is also some evidence to show that large Black businesses104 use lawyers in connection with their business activities on a

98. Id. at 33.
99. The Smallest Business in the Fortune 500 had sales of approximately six times that of Motown for 1973. See FORTUNE, supra note 11, at 250. The last business listed in the Fortune 500 (No. 500) was Avery Products with 1973 sales of $242,711.
100. The Co. which ranked 262nd on the Fortune 500 list for 1974 was Kaiser Steel with 1973 sales of $608,830 million. Number 263 was Airco with 1973 sales of 553,811 million. See id. at 242. The combined sales of the Black Enterprise 100 were $601.1 million. Black Enterprise, supra note 96, at 31.
101. A study conducted at the Business School at the University of Washington showed that of the 676 business responding to the questionnaire only 72 had lawyers on retainer, and only 109 said that they consulted lawyers "periodically." The median annual gross sales of the business replying was approximately $180,000 and the median expenditure for legal services was approximately $275. See S. Marcus and E. Chambers, How Small Business Firms in the State of Washington Cope with Their Legal Problems 23, 51 (1963).
102. See Reiss, Study of IRS Data, supra note 90, 1 at 733.
104. Black Enterprise has been able to identify 100 business with gross receipts
regular basis. A recently completed empirical study to determine the extent to which these larger Black businesses used lawyers and the ethnic background of the lawyer used revealed that approximately ninety-four percent of the business had a retainer agreement with a lawyer or law firm. Close to forty-two percent of these businesses retained a Black lawyer or law firm; 21.2% retained a white lawyer or law firm; 14.8% retained an integrated law firm; and 21.9% did not indicate the race of the lawyer or law firm used.

The surprising thing is that while the indirect evidence cited in an earlier portion of this paper relating to an earlier time period showed a reluctance of Black businesses to use Black lawyers this direct evidence shows that 57% of the businesses in the study who retained lawyers used either Black lawyers or integrated law firms. Even if we assume that all of the businesses, which did not indicate the race of the lawyer whom they retained, used white lawyers the evidence still shows that a majority of the businesses use Black and integrated law firms.

Assuming absolute equality among Black, white and integrated law firms, 70% of the businesses stated that they would prefer to use Black firms, while the remaining 30% preferred integrated firms.

Approximately 60% of the businesses responded that there were enough qualified Black lawyers to handle their business affairs. The two industries in which the number of businesses interviewed felt that there were not enough qualified Black lawyers were manufacturing and publishing. Eighty percent of all of the businesses felt that Black lawyers were as competent (experience plus ability) as white lawyers. In every industrial category there were more businesses which felt that Blacks were as competent as whites. Of those who felt that blacks were not as competent, 55% stated that Black lawyers were not as experienced as white lawyers; 35% felt exceeding $1 million; 37 commercial banks with total assets as well as deposits in excess of $3 million; 41 life insurance companies with assets in excess of $185,000 and life insurance in force in excess of $1 million; and 43 savings and loan associations with assets in excess of $130,000 and deposits in excess of $95,000.

106. Id.
107. Id. at 12.
108. Id. at 11.
109. Id. at 12.
that whites had more "contacts" than Blacks; 5% felt that whites were better educated; and 2.5% felt that white lawyers were easier to work with than Black lawyers.  

The study also sought to correlate the types of transactions for which the businesses in the sample used lawyers and the race of the lawyer used. The businesses were asked to rank six transactions for which they used lawyers in order of importance and frequency of occurrence in the life of the business. The activity ranked most often was real estate transactions and 40% of the business which ranked this activity used Black lawyers to handle their real estate transactions. The most frequent use of Black lawyers was for contract negotiations (47.5%) and debt collection (42%). Twenty-seven percent of the lawyers used for litigation were Black and twenty-one percent used for local, state, and federal regulatory matters were Black. The activity ranked least frequently was tax and those ranking this activity reported that of the lawyers used only 19% were Black.

This data provides partial support for the conclusion that there are still very few Black lawyers who possess the necessary expertise to handle sophisticated and complex business transactions, i.e., only 19% of the lawyers used for tax matters were Black and 21% of the lawyers used for local, state and federal regulatory matters were Black.

The data on the issues of competence of and preference for Black attorneys gives rise to the conclusion that demand for Black tax lawyers by Black businesses exceeds the supply. It is predictable that the same disequilibrium exists in other types of business law. Paradoxically, there are on the one hand not enough Black businesses of sufficient size to require the services of lawyers and those which are large enough cannot find enough Black lawyers with the requisite skills in certain business law areas.

III

The thesis of this section is that minority lawyers have been deprived of the opportunity to pursue careers as business lawyers and

110. Id.
111. Id. at 9.
112. Id.
113. Id.
114. Id.
that there are compelling social reasons for rectifying this condition. Moreover, I will argue that while equal treatment, i.e., the absence of a selection process which prefers one individual for a position over another on the basis of race, is essential, it is not enough.

The problem with non-discrimination as the exclusive remedy for increasing the number of Black business lawyers is that the effects of past discriminatory practices have left Blacks with handicaps which cannot be overcome by equal opportunity.115

People who start their lives at a disadvantage rarely benefit significantly from equality of opportunity because, unless they are outstandingly superior in skills or in upward-mobility techniques, they can never catch up with the more fortunate, and most disadvantaged people never even get access to the supposedly equal opportunity. A few poor children may eventually end up in the prestigious professions, but many do not finish high school.116

The market for legal services, like the market for other services is far from perfect. Skilled lawyering like skilled doctoring involves great heterogeneity of product. Productivity measures are not easily determinable, especially in advance, and standards of performance have many dimensions. (More in larger firms). Still, two factors are of primary importance—technical competence, and customer acceptance. These two criteria are deserving of special attention in assessing the prospects of substantially increasing the number of Blacks in business and commercial law.

Large law firms and corporate law departments still seek to obtain law graduates who have been members of a law review and who have high class standings, which is presumptive evidence of technical competence. Unfortunately, as of this date, there are probably few Black law graduates who possess these credentials. This is a serious problem because it is probably in the large law firm and corporate law department that technical competence is considered most important when promotion decisions are made. Quite obviously the lawyer who possesses all of the technical skills in addition to a capacity to attract business for the firm or

utilize his "contacts" on behalf of clients is even more likely to be promoted. However, large firms already have a relatively stable client base in addition to one or more persons in the firm whose primary value to the firm lies in their ability to attract clients and utilize their vast and extensive contacts and connections on behalf of clients. Consequently, the large firm or corporation is generally more interested in promoting lawyers who possess the technical competence to adequately service clients obtained by this person or persons.

Even though there have been few Black law graduates who have possessed the traditional credentials for employment in a large law firm there has nevertheless been a dramatic increase in the number of Black lawyers employed by them. In addition to hiring Blacks who have met the traditional criteria there are certain advantages to hiring Blacks who might not meet these criteria. First, the large firm is much more likely to have charges of discrimination levelled at it by both private individuals and governmental agencies than are the smaller firms. Employing one or two Black associates will obviate this. Secondly, the large law firm would not want to embarrass any of its corporate clients who in attempts to establish images of being socially progressive institutions have added Blacks to their management staffs and board of directors. Some of the managers and directors of these client corporations are certainly interested in and may inquire about the hiring policies of businesses which supply services to the corporation. Thirdly, the large law firm is concerned about its image and reputation among law students. Law students purport to value non-discriminatory hiring policies. When a law firm can represent that it employs minority and women lawyers this helps to enhance its reputation among those whom it is attempting to recruit. Finally, many large firms—as well as small ones—are sincerely interested in helping Blacks and other minorities to overcome the effects of past discriminatory policies.

Not only is it often in the best interest of the large firm to hire blacks it is also in its interest to promote some of these associates to partners. The same considerations apply to promotion decisions as those which enter into hiring decisions. The "costs" of satisfying
clients, creating a favorable image, and participating in a process of rectifying past injustices may, in some instances, involve hiring and promoting Black lawyers.

In addition to technical competence, i.e., the ability to perform those basic tasks which lawyers are expected to perform as a result of their legal training and experience there are numerous other factors which a lawyer should possess in order to successfully engage in the practice of business law. Among the most important are: (1) access to those institutions, governmental and private, which exert some influence or control over some aspect of the client’s business or which can be beneficial to the client; (2) contacts and/or influence which enables the attorney to bring business into the firm or to help the client establish relationships with sources which are beneficial to the client; (3) a reputation for having successfully handled difficult and complex business and commercial problems in the past; and (4) a willingness to make extreme personal sacrifices on behalf of clients who in many instances are pursuing goals which, in the view of the Black attorney are antithetical to the interests of Blacks in particular and society in general. Blacks do no possess as many of these attributes as their white counterparts.

Not every attorney in every firm has all of these characteristics, rather they are found in varying degrees and combinations among the lawyers in corporate law firms. Some of the younger non-minority associates in these firms lack these characteristics to the same extent as do the younger minority associates. However, it is still probably easier for non-minority attorneys to acquire them in the nascent stage of their careers. Non-minority associates have a much greater chance of marrying someone whose family will provide access to those institutions and social situations which will facilitate the acquisition of some of these characteristics; they will not be adversely affected by that percentage of attorneys in the firm or managers in a corporate client who are prejudiced, which may have the effect of preventing or limiting the minority attorney’s access to that particular partner or client; and they will probably have greater access, both social and professional, to both firm personnel and client personnel.

Many of these contacts-connections attributes are valued more by the smaller law firm and corporation because they cannot afford
both “contacts” partners and “technical” partners. A partner in a smaller law firm must be able to attract clients and efficiently handle all or most of their legal problems including those which demand a high degree of “technical competence.”

It should be clear that merely providing Black lawyers the opportunity to practice business and commercial law is not sufficient to overcome their under-representation in this area. Even though few Blacks will possess those attributes which are necessary for a successful career as business practitioners and even though there are good reasons why some firms will hire and promote blacks, the net result for the foreseeable future will be a very small increase in the number of Black business and commercial lawyers. If the emphasis is shifted to Black or predominantly Black business or commercial law firms the picture becomes even more bleak. Business and commercial law has become too complicated for persons with little or no experience to form firms with the expectation that they will be able to attract sufficient clientele to operate the partnership at a profit. But, since some Blacks are obtaining this experience black businesses are more willing to utilize their services and some white businesses are concerned primarily with quality legal representation irrespective of the race of the lawyer, the possibility of creating Black and integrated law firms which have growth potential is quite realistic.

The author’s concern with the underrepresentation of Blacks in business and commercial law practices stems from a conviction that if the objectives expressed in those documents which purport to delineate the moral and legal basis upon which this society operates are ever to be fully realized Blacks and other minorities must occupy meaningful roles in every aspect of life. This is not a simple statement calling for participation by minorities in business law in order to fulfill the “American Dream.” It is based upon an assumption that institutions in our society, both public and private, are shaped in accordance with some commonly agreed upon “theory” of an ideal society. We are now living in an era in which both the process or processes by which institutions are governed or should be governed as well as the quality and quantity of these institutions is widely discussed and debated. The purpose of this arti-

119. K. Clark, The Pathos of Power (1974); Marcuse, Repressive Tolerance, in
article is not to discuss or debate these issues, but to point out that, with rare exception, Blacks play no meaningful role in either the discussions and debates or in the institutions which are the subject of these discussions and debates. The practical effect of this dynamic of institution-building—institution-criticizing—institution-changing or modification (this dialectical process) is that "objective reality" is almost always defined by non-Blacks. Both institutions which affect Blacks directly—largely public institutions such as governmentally supported agencies which operate school systems, welfare programs, sanitation services, etc.—as well as those which have both a direct and indirect effect—business and commercial establishments, non-profit institutions (churches, foundations, universities, hospitals, etc.) almost never have the benefit (or anguish) of having to include the "Black perspective" among their organizing and operating principles. Consequently, American society has never fully incorporated all competing interests in its organizing principles. This idea is much more eloquently expressed by Harold Cruse in The Crisis of the Negro Intellectual:

On the face of it, this dilemma rests on the fact that America, which idealizes the rights of the individual above every-

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120. Although some progress has been made in both the public and private sectors, black participation usually involves a small number of blacks who in most instances represent a tiny percentage of the total participants. For example, it has been estimated that the nation's 1,000 largest corporations have 14,000 directors. Today there are approximately 72 black directors of "major" U.S. Corp. Ten years ago there were none. Black Enterprise (BE) September 1973, p. 17. "Although four of the top ten among the Fortune 500 industrial corporations have black directors, black representation is strongest on the boards of banks, life insurance firms and utilities, possibly because these boards are generally larger than in industry. Six of the ten leading life insurance companies and five of the ten leading banks have at least one black director. . . ." (BE, Sept. 1973, p. 24). Fourteen of the 72 are practicing lawyers associated with prestigious law firms primarily in Washington and New York (Black Enterprise, Sept. 1973, p. 28). There are 239 blacks in top level federal government jobs out of 11,000 positions (BE, Jan. 1974, p. 21 and 22). They are broken down as follows: 194 at super grade level (GS 16-17 & 18) of federal civil service and equivalent level of foreign service; 29 in appointive positions ($30,000 or over salaries); and 16 generals and admirals on active duty. There are approximately 10 blacks in agencies which are business and commercially oriented, e.g., black commissioner of FCC; 1 regional director of the FTC; 1 Governor of the Federal Reserve; Director of Registration and Reports for the SEC. While there may be 108 black mayors and 1,080 blacks in the city council, blacks only represent .0057% of the 522,000 elected officials throughout the country. (As of April 1, 1974, 2,911 blacks held elective office in 45 states and Washington, D.C.), N.Y. Times, April 23, 1974 p. 34.
thing else, is in reality, a nation dominated by the social power of groups, classes, in-groups and cliques—both ethnic and religious. The individual in America has few rights that are not backed up by the political, economic and social power of one group or another. Hence, the individual Negro has, proportionately, very few rights indeed because his ethnic group (whether or not he actually identifies with it) has very little political, economic or social power (beyond moral grounds) to wield. Thus it can be seen that those Negroes, and there are very many of them, who have accepted the full essence of the Great American Ideal of individualism are in serious trouble trying to function in America.\footnote{H. Cruse, The Crisis of the Negro Intellectual 7-8 (1967).}

But, how does the Black corporate lawyer "identify with" or "respond to the needs of Blacks or what is sometimes euphemistically referred to as the "Black community," when he or she advises clients or sits on corporate boards or plays golf at the country club. I would argue that his or her presence and participation in most of the roles traditionally performed by corporate lawyers provides the answer. In fact it is the most important justification for increasing their number.

Once Blacks are physically present and sharing in the process of decision-making and lawyering then it is no longer possible for whites to maintain whatever stereotypic image they have of "Black people." The presence of a fully qualified, highly thoughtful and articulate Black person on a corporate board, or in a courtroom, or complex negotiating session will necessarily have the effect of causing those who have stereotyped Blacks to reexamine their conceptualization and vice-versa. This cannot help but be beneficial to the entire society. Moreover, among thoughtful people it is inevitable that a certain amount of redefinition and reexamination of fundamental premises will take place.

Equally important, however, is the fact that most Americans who come from distinct ethnic and socio-economic backgrounds are influenced by those backgrounds and their views on many aspects of the human experience are reflected, at least to some extent, by that background. Consequently, Black Americans cannot help but bring something unique to the corporate board meeting, or governmental agency or any other institutional setting in which important
decisions are being made. This, of course, does not and should not imply that racial considerations are the sole issues of concern in most of these decisions. The point is more subtle. One who is born and raised in a predominantly ethnic community, subjected to dehumanizing restrictions upon his or her freedom of action, and made to believe that his or her opportunities are limited because of his or her skin color will undoubtedly view some human and institutional problems differently from one who is born into the security of a middle or upper middle class family and feels none of the disabilities associated with being an ethnic minority. The difference in perspective may well manifest itself in decisions totally unrelated to race such as whether to fire the chief executive officer; removal of a plant located in a particular community; or the amount of corporate income which should be disbursed as charitable contributions. Conversely one would certainly expect these differences in perspective—which is not necessarily synonymous with difference in results—to manifest themselves with respect to issues relating to company investments in South Africa, implementation of affirmative action programs for minorities and women, job training programs for unskilled workers and the hiring of persons with criminal records, etc.

While it is undoubtedly true that Black corporate lawyers are at present incapable of adequately representing the “Black community” in their various roles, the task is impossible by definition because of the absence, at anything but a rhetorical level, of anything called “the Black community.” There are certainly problems which are still encountered by most Black people in this society because of the residual effects of racism and discrimination but this is hardly enough to constitute a “community” consisting of some 22 million people. There are common objectives which are shared by large numbers of Black people, such as obtaining decent jobs, housing, quality schooling for children, etc., however, these objectives are also shared by millions of non-Blacks in the society. In other words, while the use of the term “Black community” is helpful in describing a group of people in our society who have the common characteristic of skin pigmentation and perhaps other discernable biological traits it is certainly not terribly meaningful in the context of devising programs or policies which will have the effect of benefiting all Blacks irrespective of the substantially heterogenous nature of Black Americans in today’s society.
It is suggested that historically Blacks have been close to unanimous in their opinion that the stigma associated with their blackness should be removed thus enabling them to freely pursue whatever life styles and career options they choose. The Black business lawyer who is performing at the highest level of professional proficiency and also identifying with and helping to solve social problems encountered by particular groups of Black people because of particular circumstances represents a partial fulfillment of these aspirations.

The Black men and women who somehow become a part of the decision-making process of the major institutions in this society have the unenviable task of fulfilling the responsibility owed the institution while at the same time attempting to restructure certain social configurations which their background and life experience has led them to feel are major causes of the inequities experienced by certain individuals.

In one sense race has little to do with this constant struggle to perform productively and efficiently in a professional capacity while attempting to effectuate social reform. Perhaps the peculiar and unique history of the Black American accentuates the problem and makes it appear more poignant. But to deny that the black professional can operate in the world of business, commanding the respect and admiration of his or her peers, and also feel strongly about racial injustice in areas outside the scope of his professional duties, and work to eliminate this injustice is as unfounded as the most bigoted white person's view on the inferiority of Blacks. This idea is not new; it has been constantly reiterated by Black American scholars, perhaps most poetically by W.E.B. DuBois:

One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.122

There are, of course, many alternative means by which social policy can be influenced and shaped. This article suggests that the role of the lawyer certainly must be considered strongly in any analysis of the ways in which social policy is shaped and defined.123

While the exact manner in which corporations and other business enterprises affect our lives is far from clear, no one would doubt for a moment that the effect is enormous. The effect is even greater when the symbiotic relationship between large corporations and government is examined. Business lawyers and government lawyers working in those agencies regulating business have some influence over the decisions of the businesses which they either represent or regulate.

While it is true that Blacks have made tremendous strides in the past two or three decades and indeed are in positions where they can make and influence policy decisions on a limited scale; own an increasing number of businesses; are being admitted to law and other professional schools in increasing numbers; are being recruited by major law firms and corporations; and are being elected and appointed to governmental positions in increasing numbers, all of these gains may indeed prove to be marginal unless Blacks are also empowered to exert far more influence at the decision-making level.

However, it is difficult, if not impossible to consider the question of increasing the number of Black business and commercial attorneys without examining the entire structure of American business and its relationship to government. If there are not similar efforts made to increase the number of Black corporate managers and high level governmental officials then the process of increasing the number of minority business lawyers becomes much more difficult. Obviously, these issues go well beyond the scope of this article and would require separate treatment. The purpose of raising them is merely to give some indication of the scope and complexity of the problem.

**Reasons for Rectifying Underrepresentation**

Some people would argue that while there are few Blacks who practice business and commercial law any efforts to increase their numbers should be subordinated to other pressing issues relating

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126. Smigel, *supra* note 8, at 5.
to the status of Blacks in America. There are serious problems, both legal and non-legal, which must be resolved if Blacks are not to lose much that has been gained during the past few decades. Shouldn’t one give more attention to some or all of these problems than to the problem of increasing the number of Black business and commercial attorneys?

I am not certain that the question can be answered dispositionally. Perhaps a simultaneous commitment to all of these problems including the one which is the subject of this article, is the optimal solution. Admittedly it is much harder to generate concern about the sparsity of Black corporate lawyers than the high incidence of illegitimacy of Black children, or the inferior nature of housing which many low-income Blacks are forced to occupy, or the lack of consumer choice in the ghetto. My purpose, however, is to show the desirability of increasing the number of Black business and commercial lawyers. Of course Blacks caught in the throes of poverty and despair will not directly benefit from this increased representation in the immediate future. Some benefits will be derived but they will certainly not be sufficient to alter the basic condition of most poor Blacks.

In addition to causing the restructuring of the normative perceptions of Blacks by many whites, the Black business lawyer can also be instrumental in providing other benefits to society.

One of the easiest benefits to discern is that which is immediate and personal, i.e., monetary. The economic benefits which inure to the successful Black corporate or commercial law practitioner will, in large part, enable him or her to overcome or at least ameliorate the residual effects of racial discrimination. It will allow him or her to provide a modicum of security for his or her family and may even allow him or her to begin to participate in the process of wealth accumulation which may permit his or her children and children’s children to be assured of some freedom from economic deprivation.

While this may appear to be selfish and highly individualistic the history of other ethnic groups in this country shows that their

127. Some of the problems are inferior schools, defacto segregation, unemployment, inferior housing, high illiteracy rates, declining black admissions to law and other professional schools, high mortality rates for blacks taking bar examinations and legal services for the poor.
assimilation into the mainstream has been much more individualistic than group orientated:

The traditional American idea of success confirms the hold which exit has had on the national imagination. Success—or, what amounts to the same thing, upward social mobility—has long been conceived in terms of evolutionary individualism. The successful individual who starts out at a low rung of the social ladder, necessarily leaves his own group behind as he rises; he 'passes' into or is 'accepted' by, the next higher group. He takes his immediate family along, but hardly anyone else. Success is in fact symbolized and consecrated by a succession of physical moves out of the poor quarters in which he was brought up into ever better neighborhoods. He may later finance some charitable activities designed to succor the poor or the deserving of the group and neighborhood to which he belonged. But if an entire ethnic or religious minority group acquires a higher social status, this occurs essentially as the cumulative result of numerous, individual, uncoordinated success stories and physical moves of this kind rather than because of concerted group efforts.128

The idea of individual achievement has always been a source of discontent among some Blacks. The limited opportunity for Blacks to attain individual achievement and success in the overall society has led many Blacks to shift the "cost" of maintaining a middle-class status to less fortunate Blacks within the segregated "Black community."

. . . behind the walls of racial segregation, where they enjoy a sheltered and relatively secure position in relation to the lower economic classes, they look with misgivings upon a world where they must compete with whites for a position in the economic order and struggle for status. Hence much of their racial pride is bound up with their desire to monopolize the Negro market. They prefer the over evaluation of their achievements and position behind the walls of segregation to a democratic order that would result in economic and social devaluation for themselves.129

This does not imply that all Blacks who obtained middle-class status either exploited Blacks in segregated communities or even depended upon Blacks, economically, for the maintenance of their

middle-class status. However, sufficient numbers of middle-class Blacks were forced by rigid patterns of segregation to operate primarily in Black communities so that both actual exploitation of Blacks by some black professionals as well as the perceptions thereof resulted in justified criticism.

While this phenomenon is not as true today it has been replaced by a new objection. The decade of the 60's produced some articulate and outspoken Blacks who advocated a form of racial solidarity among Blacks, the most popular rhetorical manifestation of which became known as "black power." The underlying tenants of this movement (or slogan) were that Blacks in America needed to develop a sense of solidarity and racial pride; that it was incumbent upon Blacks to demand—and take if necessary—control over institutions within their communities, to insist upon Black representation in all areas of public office where the constituency was Black or primarily Black and to work toward building economic institutions which were Black owned and controlled. The model presupposed a collective approach to social, economic and political advancement as opposed to individual advancement. Individual advancement was eschewed by these Blacks:

The goals of integrationists are middle-class goals, articulated primarily by a small group of Negroes with middle-class aspirations or status. Their kind of integration has meant that a few Blacks make it, leaving the Black community, sapping it of leadership potential know-how. As we noted in Chapter I, those token Negroes—absorbed into a white mass—are of no value to the remaining Black masses. They become meaningless show pieces for a conscience-soothed white society. Such people will state that they would prefer to be treated 'only as individuals, not as Negroes'; as they 'are not and should not be preoccupied with race.' This is a totally unrealistic position. In the first place, Black people have not suffered as individuals but as members of a group; therefore, their liberation lies in group action.

Paradoxically, most of these outspoken advocates of collective action have now moved—individually—into activities which pro-

131. Carmichael & Hamilton, supra note 130, at 53-54.
vide them with all of the benefits and security of that middle-class status which they so vigorously condemned.

Nevertheless it is indeed commendable that Blacks have now come to the realization that they have a responsibility to their less fortunate brothers and sisters. But there is nothing incompatible with pursuing a career as a business lawyer and assisting less fortunate Blacks.

The Black attorney who affiliates himself with a business law firm in a metropolitan area with a sizeable population has the potential for making substantial contributions to that area's Black population. While there is a direct cause and effect relationship which is easily discernable when the poverty lawyer prevents an eviction from occurring in a slum community or a criminal lawyer is responsible for the dismissal of a case against a Black person because of some official violation of constitutional process, the benefits which the corporate lawyer affiliated with a large law firm can bring about for the residents of Harlem or Bedford Stuyvesant are much more difficult to discern. The benefits from an increased number of Black business and commercial practitioners fall into two categories, direct and indirect, and become increasingly difficult to discern and measure as they move from one category to the other.

Direct benefits differ depending on the type of practice, the size of the law firm, and the geographical area in which it is located. An associate working for a large corporate law firm located in a major metropolitan area such as New York or Chicago probably cannot for the first few years of his practice be instrumental in providing many social benefits to any disadvantaged group in his role as a corporate attorney. If he is to become successful in this type of practice the first few years must be devoted almost exclusively to mastering the intricacies of the practice. However, a particularly cogent point, which is often overlooked by Blacks who shun large firm practice or criticize those who choose it, is that the skills acquired by the young associate are necessary and valuable for any lawyer to possess whether his client is a large corporation, a university, a small corporation, an individual or a community organization.

Even if most of the time of the young associate in the large firm is occupied with firm business he may still have an opportunity to engage in some public service work, e.g., bar association com-
mittees whose concerns are with problems of poverty, civil rights and liberties, education, welfare, etc.; working with a poverty law office on a volunteer or perhaps released time basis: accepting court-assigned cases from time to time; helping organizations in black communities with legal problems such as drafting and filing incorporation papers, helping to draft funding proposals and giving tax advice.

There are several reasons why acquiring the skills which are required to successfully practice law in a corporate law firm or corporate law department are important. First, the associate, acquires an expertise in a particular area of the law relating to business, finance or commerce. The firm for which the associate works, whether a large Wall Street type firm, or a smaller firm in Dayton, Ohio, is usually departmentalized into functional specialties to meet the needs of its clients. Eventually, the associate is assigned to or selects a particular specialty within the firm. Because of the significant role which government regulation plays in the life of most of the clients of the firm for which the associate works his need to be in contact with and have relationships with government officials increases as he becomes more specialized. It is also at the point of specialization that the associate has more frequent contact with the managers of clients and the managers and attorneys for other businesses with which the client is dealing.

The contacts which are made during these transactions are valuable and the good corporate attorney cultivates them not by attempting to procure special favors in future dealings with these persons but by attempting to establish a favorable impression, i.e., the government official or manager or attorney becomes impressed with the associate's technical competence and integrity.

When the Black associate is able to successfully master the specialty which he has chosen, amicably work with his peers and superiors and establish contacts with important persons within his specialty he enhances his chances for partnership in the firm.

But, even if the Black associate either decides not to remain with the firm or is not promoted to partnership his skills and contacts may still be utilized on behalf of many other organizations and constituencies.

Once the associate becomes a partner, his opportunity to exert
influence and effectuate change, within the firm, the legal profession and the general society is increased.

The perception of partners in business and commercial law firms as powerful and influential persons stems in part from the fact that they represent and advise large and powerful economic institutions in our society and that through their position on the board of directors of many of these corporations as well as their frequent consultation with corporate management they have an opportunity to participate in the business decisions and policy making of their clients.

When they give advice to clients it is usually given considerable weight in the decision-making calculus, and the client often seeks advice from these lawyers on non-legal as well as legal questions. In many instances the decision of the lawyer results in a new pattern of conduct of the particular business and perhaps the entire industry which has significant social ramifications.

The outcome of a bargaining contest between an eighteenth-century wheel manufacturer and his journey-man could hardly affect the general economy of the confederation; the outcome of a bargaining contest between General Motors and the United Automobile workers could carry implications national and international in scope.

However, the influence of the corporate lawyer vis a vis his clients is usually limited to specific issues which may have legal ramifications. He may have the power to prevent the client from acquiring another company because of anti-trust implications, but probably lacks the power to persuade the client to appoint a Black to the board of directors or to locate a subsidiary in the ghetto. There is a possibility that the lawyer may be able to extend his influence if his judgment and advice have been satisfactory in the past.

Another benefit of acquiring expertise in the field of business and commercial law is that many high level government positions with agencies or commissions which have some responsibility for regulating business and economic activities are held by either successful business lawyers or business persons.
However, it becomes difficult and even unwise for the chief executive at any level of government to appoint a Black to a regulatory agency which is responsible for administrating the national or state securities laws if there are no Black securities law "experts". Therefore one of the prerequisites for appointment of Blacks to business-related governmental agencies is the creation of a pool of qualified Blacks. There are, of course, several ways of developing this so-called expertise. A focused legal practice in one of these business-related areas is one of the best.

The limitations upon the influence of the high-level government administrator may be even more severe than they are on the business lawyer. Yet, the role of government as both a producer and consumer of goods and services and regulator of economic activities generates opportunities for administrators to exercise influence in decisions concerning these matters. For example, a Black Commissioner of the Securities and Exchange Commission concerned about the difficulties which Black businesses have in completing the registration process for a public offering has an opportunity to explore the bases of these difficulties and seek to ameliorate or eliminate some or all of them if they stem from S.E.C. regulations or personnel.

In summary, it appears that there are substantial benefits to be derived from the creation of more Black business and commercial lawyers. It is possible for Blacks to maintain a strong sense of ethnic identification and loyalty and succeed in business and commercial law, and it is also possible for them to help improve, both directly and indirectly, the condition of other Blacks.

Partial Solutions

While I happen to believe that "the formulation of a problem is often more essential than its solution," I find it difficult to conclude without making some comments about the future prospects for increasing the number of Black business and commercial lawyers.

There are definite indications that there is at the present time a demand for Black business and commercial lawyers, and that the supply of these lawyers is not sufficient to meet the demand. However, the creation of any technically complicated prod-

uct takes a long time, involves the expenditure of considerable sums of money and the dedication and imagination of skilled professionals.

While the short-term prospects for significantly increasing the quantity of these lawyers is not particularly hopeful, the long-term prospects appear to be reasonably good. The "production" stage has only recently begun.

Law schools have become responsive to the need to produce more Black law students; business law firms have made some efforts to recruit Blacks; the demand for Black lawyers to represent Black businesses has increased significantly; and more Black law graduates are accepting legal jobs with business-related governmental agencies. If all of these activities are continued, and optimally accelerated, we will begin to see the emergence of increasing numbers of Black business and commercial lawyers.

While some steps can be taken to encourage Black law students to become business and commercial lawyers and to encourage those who have chosen this specialty to continue to pursue it, the most important short-term strategy is to keep the pressure on law schools to continue to accept Black students and hopefully to increase the number of those accepted.

We can be encouraged by the increase in the enrollment of Black students in law school over the past ten years, however, there is also reason for concern over the failure rates for these Black law students and the failure rates of Blacks who take bar examinations.

136. For example foundations could give grants to primarily black law schools to enable them to expand their business-commercial law offering, to bring successful business lawyers to the schools for lectures, seminars, etc., and to create clinical experiences for students in business law areas.

137. Bar Associations could be much more aggressive in encouraging black business lawyers to become members of the business law sections; young black business lawyers could be appointed to special projects which are undertaken by business law sections; up to date statistical information showing the location and advancement of black business lawyers could be published on a regular basis.

138. See Parker and Ruud & White, supra note 22.

139. In July 1973, 823 law graduates, including 200 blacks took the bar exam in the District of Columbia; 551 passed but less than 20 were black; in 1972 none of the approximately 40 blacks who took the Georgia bar passed, and it is reported that in Ohio between 75 and 88 percent of the whites pass the bar exam whereas only 27 to 43 percent of the blacks do. New York Times, Sun., April 8, 1974, p. 48. In 1972 only 20% of the blacks who took the Alabama bar exam passed while 70% of the whites passed. The same statistics prevailed for Virginia. And in 1971 it
Few would deny that some of the causes for these discouraging phenomena are attributed to defects in law school admissions processes, the failure to understand and cope with special problems encountered by Black law students in white law schools, and the design and administration of bar examinations. These are problems which must be confronted by legal academics, leaders of bar associations, and directors and sponsors of programs designed to increase the number of minority law students.

The importance of the admissions and qualifying process for Blacks lies in the inescapable conclusion that as the number of Black lawyers increases the number of Black business and commercial lawyers may increase.

It is also important for law schools to intensify their effort to hire Black faculty members. Black law professors can be instrumental in helping Black law students overcome some of the difficulties encountered during their tenure in law school. Their presence will also have an impact on non-minority students some of whom have never been exposed to Blacks in positions of leadership and authority.

Finally, increasing the number of Black law professors will also mean that some of them may teach and publish in the business and commercial law areas. Perhaps some will become interested in the legal problems of minority businesses and community economic development and produce useful and helpful scholarly articles and books on these subjects.

In summary, the result of social events during the past two decades has been that Blacks are beginning to have access to and are taking advantage of those procedures which must be followed in order to become successful business practitioners. The "pipeline" is beginning to be filled with bright, energetic and secure black students. Our task is to take whatever steps are necessary to assure that the "pipeline" remains full.

was reported that while 63 percent of the black and Mexican-American graduates of Boalt and UCLA law schools failed the California bar exam, only 15% of non-minorities failed. See Clark, “The Bar Examination: Hurdle or Help,” in Minority Opportunities in Law for Blacks, Puerto Ricans & Chicanos 179-181 (C. Clark ed. 1974).

140. The Council on Legal Education Opportunities (CLEO) and the Earl Warren Legal Training Program are examples of this type of program. See also, C. Clark, supra note 139, 195-204.
CONCLUSION

It has been shown that at least one important segment of American life, the corporate and commercial practice of law, has been affected only marginally by the great civil rights victories over the past twenty years. Unless ameliorative steps are taken in the immediate future our children and children's children will continue to find themselves, as Black Americans, in the process of "becoming" instead of "Being."