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Diversity and the Boardroom

Steven A. Ramirez*

There is a nascent movement afoot in corporate America. It has profound implications for how society and the law should approach America's increasing diversity. This article focuses upon this movement. This movement requires that old assumptions about the word "diversity," including its meaning, and most importantly its effects, be reconsidered. This article will show that the leaders of corporate America, its CEOs and board directors, are beginning to learn how to use a diverse workforce to enhance productivity; and that our legal system should foster this process.

The American business community is increasingly recognizing what other elements of our society apparently reject: that embracing diversity¹ is a source of

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¹ For purposes of this article, the phrase "embracing diversity" has the meaning ascribed to the phrase in mainstream business circles. At its most basic level diversity means only a mixture of individuals characterized by relevant differences; but, in the business culture it has come to mean much more in the context of managing diverse human resources with a view towards maximizing profits. See R. ROOSEVELT THOMAS, JR., REDEFINING DIVERSITY 5 (Amacom 1996). Specifically, embracing diversity means implementing organizational systems and practices to manage people so that the potential advantages of diversity are maximized and disadvantages are minimized. Implicit in this concept is the goal of maximizing the potential of all employees. While diversity management is thus inclusive of all groups, an essential part of embracing diversity is recognition that value can be unlocked by including traditionally excluded groups, especially given the multi-cultural business environment of the future. See Elaine K. Yakura, *EEO Law and Managing Diversity*, in MANAGING DIVERSITY 34-44 (Ellen Ernst Kossack & Sharon A. Lobel, eds., Blackwell Publishers Ltd. 1996). This article, like the business community, uses the terms "embracing diversity," "diversity management" and "diversity initiatives" as essentially synonymous ideas. Part II of this article gives detailed content to the meaning of "embracing diversity," by highlighting the best diversity practices emerging in corporate America. This detailed definition of the terms "embracing diversity," "diversity management" and "diversity initiatives," which is based in the business community, defined by well-stated best practices, and based upon empirical data as to its value, is an entirely different kind of "diversity" than the ill-defined diversity that has been discussed thus far in legal scholarship. See, e.g., Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 829 (1998) (stating that diversity has thus far been ill-defined in the legal arena and that "[i]f we would entertain any hope of defining diversity, we had better consult analogous areas of . . . non-legal knowledge. . .").

strategic strength that can enhance competitiveness.² Simply stated, the American business community is discovering that pursuing the opportunities inherent in American diversity enhances workforce productivity and thus increases profitability.³ While the empirical evidence in support of this intuitive conclusion is mounting, successful business leaders, having little patience for theoretical proof, are taking the initiative in seizing opportunities posed by diversity.⁴ This article addresses why and how business is beginning to embrace diversity with enthusiasm. The article demonstrates the benefits that business is starting to reap from appropriate diversity policies. The ultimate benefit is increased productivity and profitability arising from the insights and other meritorious contributions offered by a properly managed diverse workforce.

Finally, this article will suggest three improvements to the law governing the diversity initiatives undertaken in the business community. First, this article posits that the Securities and Exchange Commission should issue interpretive guidance to clarify the obligation of publicly held companies to disclose material information regarding the business impact of increasing diversity. Second, this article argues in favor of heightening management and board responsibility for diversity management under existing common law duty of loyalty principles, as well as through legislative action restricting director insulation from duty of care liability. Third, this article

² As one commentator has stated: "Without total acceptance of diversity and a business plan that completely integrates it into corporate strategic plans, a corporation cannot succeed in the global market." See JOHN P. FERNANDEZ, *THE DIVERSITY ADVANTAGE* 14-15 (Lexington Books 1993). Compare the compelling nature of these observations with the rejection of the value of diversity by the Fifth Circuit in *Hopwood v. Texas*, 78 F.3d 932, 944 (1996) (holding that the University of Texas Law School may not consider race in admissions process). For reasons that are not clear, there has been a failure of the legal academy to comprehend the import of merit-based and profit-driven diversity initiatives in the world of business. Thus far, no legal scholarship has focused upon these developments or the implications of these developments from a legal point of view. See, e.g., Jennifer L. Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997, 1016-18 (1998) (discussing business community's desire to embrace diversity and lack of desire to assist politically in abolishing affirmative action); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 882-886 (1993) (discussing economic benefits of diversity in the context of arguing that a Euro-centric vision of America must give way to a new vision of pluralism).

³ "Diversity in our company is itself a business imperative vital to our ongoing renewal and our competitiveness into the 21st century," states John A. Krol, Dupont's President and CEO. THE CONFERENCE BOARD, REPORT NO. 1195-97-CH, *MANAGING DIVERSITY FOR SUSTAINED COMPETITIVENESS* 5 (1997) (on file with author) [hereinafter CONFERENCE BOARD 1997].

⁴ Dupont's Krol has stated that "we have proof diversity improves our business performance." Krol was referring to a marketing initiative to sell a new drug with both Spanish and English instructions, at the behest of a Hispanic manager. According to Krol this seemingly mundane point ultimately led to millions in new business. *Id.* Forty-three percent of new hires at Dupont are minorities. Two of its directors are minorities, 10.4% of its officers and managers are minorities, and two of its top 24 paid officers are minorities. See Edward Robinson & Jonathan Hickman, *The Diversity Elite*, FORTUNE, July 19, 1999, at 62, 70.

proposes that the Equal Employment Opportunity Commission exercise its power to create a safe-harbor for these diversity initiatives. Each of these proposals would allow the business community to continue to act to rationalize its response to an increasingly diverse business environment, while at the same time serving to help our society resolve the tensions remaining as a result of our collective hangover from our nation's racist and bigoted history. Although this article focuses upon diversity in the business context, at bottom the message the business community is beginning to send must resonate through all aspects of American society into the 21st Century: diversity is valuable.⁵ Put bluntly, the law has thus far failed to comprehend that properly managed diversity can bring merit in a facially neutral fashion, not merely act as a justification for preferential admissions programs or other racial classifications.⁶

⁵ The thesis of this article is that business is discovering the economic imperatives of diversity management and that the law should facilitate this process. These imperatives arise from both profit incentives, as well as legal sanctions for failing to properly manage diversity. These imperatives are amplified by the prospects of globalization, labor shortages, and increased population diversity. Moreover, new evidence suggests that diverse workgroups are more innovative and productive. As such, while the thesis turns upon economic incentives, it does not turn upon economic theory, but instead is focused intensely upon the reality of the business environment facing corporate America. It is thus fundamentally distinct from speculative microeconomic theories suggesting that discrimination laws should be abolished. See Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215 (1998) (providing overview of recent and historic law and economic literature regarding discrimination). See also John J. Donahue III, *Discrimination in Employment*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 615-624 (Peter Newman, ed. 1998) (discussing limitations to the theory that the market will eliminate racism).

⁶ This lack of comprehension is somewhat understandable. In the classic affirmative action case of *University of California Regents v. Bakke*, 438 U.S. 265, 311-315 (1978), one basis offered for the Court's opinion allowing preferences was the "attainment of a diverse student body." The differences between affirmative action and diversity management are quite significant. First, affirmative action was essentially remedial in nature, while diversity, as practiced in the mainstream business community, is essentially merit-driven, in that an individual's contributions to a well-managed diverse workforce lead to profitable insights. See Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity From Affirmative Action in Law School Admissions*, 77 N.C.L. REV. 1479, 1480 (1999) ("[w]here diversity is desirable, it is because it makes the institution better."). Second, affirmative action, rightly or wrongly, was generally believed to entail lowering standards for persons of a given background, while diversity emphasizes that competitiveness imposes rigorous standards of performance and merit – namely productivity contribution. Third, affirmative action had a primary focus upon hiring decisions, while diversity recognizes that the hiring date is only the beginning of creating an environment that unleashes the potential of all employees. Fourth, diversity is inclusive of all group identities – including white males. See generally R. Roosevelt Thomas, *From Affirmative Action to Affirming Diversity*, HARV. BUS. REV., Mar.-Apr. 1990, at 107. See also *infra* note 11 and accompanying text; Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity"*, 1993 WIS. L. REV. 105 (assessing the concept of diversity as it has been used as a justification for affirmative action but failing to address diversity contributions as a dimension of merit). Since *Bakke*, the Court has not faced a case positing that diversity, when properly managed, is a dimension of merit, separate and apart from being a justification for preferential affirmative action. "Managing diversity, by contrast, is driven primarily by business trends and the quest of organizations to maximize economic performance. . . ."

The leading elements of the American business community are seizing the opportunities implicit in these changes.⁷ Unfortunately, other parts of the business community (like many parts of our society in general) seem ill-prepared to deal with these emerging realities. For example, in a recent survey of Fortune 500 companies, the Society of Human Resources Management found that only 75 percent had diversity programs in place.⁸ Moreover, these programs often fall short of sound

TAYLOR COX, JR. & RUBY L. BEALE, *DEVELOPING COMPETENCY TO MANAGE DIVERSITY* 17 (Berrett-Koehler Publishers, Inc. 1997).

⁷ Indeed, on a society-wide basis, America seems uniquely positioned to thrive in the new multi-cultural world arena because of its traditional multi-cultural heritage. See FERNANDEZ, *supra* note 2, at 11-15 (recounting social problems in America but concluding that America is positioned to "create the world's most competitive and dominant economic power" because of its diversity).

⁸ SOC'Y FOR HUM. RESOURCE MGMT., *SURVEY OF DIVERSITY PROGRAMS* 5 (1998) (on file with author) [hereinafter SHRM STUDY]. This number should be viewed with some caution. Only 178 of the Fortune 500 organizations surveyed responded. See *id.* at 3. Additionally, the diversity movement is so new that it is often confused with its ancestor, "affirmative action."

For example, a 1995 survey of corporate CEOs showed that 70% of the 140 respondents thought that affirmative action programs had favorable effects upon their business. See *Affirmative Action: A Course for the Future*, LOOKING AHEAD, Aug. 1996, at 17 (publication of the National Planning Association, citing Peter Robertson). According to the SHRM, however, 36% of the diversity programs implemented by Fortune 500 companies were adopted after 1995. See SHRM STUDY, *supra*, at 6. Consequently, this approval of "affirmative action" was expressed prior to widespread adoption of diversity programs, and may actually refer to diversity programs in various states of evolution. As will be shown, however, because diversity programs are a comprehensive means of assuring that any profits from "affirmative action" are maximized, it is logically sound to assume such CEOs would find similar benefits from diversity programs.

As will be explained, this paper avoids the use of the term "affirmative action" because its meaning is indeterminate. See *infra* notes 17, 19, 28, 19 and accompanying text. Professors Cox & Beale have cogently summarized the differences between affirmative action and diversity management in a comprehensive table:

	Affirmative Action	Diversity Management
Emphasizes post-entry treatment issues such as the ability to realize one's full potential	No	Yes
Recognizes and emphasizes the impact of culture differences between groups on employee experiences	No	Yes
Recognizes the need for change in the organizational culture	No	Yes
Emphasizes the business's economic reasons for having and managing diversity	No	Yes
Approaches diversity as an opportunity more than as a problem to be solved	No	Yes
Acknowledges a broad range of group identities and identity effects on employment	No	Yes

diversity policies; for example, few organizations link performance or compensation to diversity efforts.⁹ Worse, smaller business firms were even further behind, with only 36 percent of firms responding having adopted diversity programs.¹⁰ Moreover, important sectors of the economy, like the high tech industry associated with California's "Silicon Valley," seem to be badly lagging in managing diversity.¹¹ These results are even starker given that the evidence of the efficacy of such policies in helping firms achieve their objectives has been mounting. Moreover, the imposition and enforcement of appropriate policies can serve to greatly limit legal liability. In short, there are compelling business and legal reasons for implementing diversity policies, but it appears that large segments of corporate America have ignored the business case for embracing diversity.

This article will demonstrate that leading elements of corporate America are rapidly moving to embrace diversity.¹² Further, this article will articulate a number of

<p>Recognizes that managing diversity is a competency No COX & BEALE, <i>supra</i> note 6, at 17. It is important to note that diversity theory does not permit favored groups; instead all groups, including white males, are valued on the basis of their contributions to an institution's objectives, including any contributions arising from their profitable diversification of the workforce. This is discussed in greater detail in Part II of this article.</p>	<p>Yes</p>
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⁹ *Id.* at 4. "You ought to provide and demand measurement because it is something that CEOs understand-measurable results in performance." CONFERENCE BOARD 1997, *supra* note 3, at 7 (statement of former U.S. Secretary of Labor, Lynn Martin).

¹⁰ *Id.* at 5.

¹¹ Joel Dreyfuss, *Valley of Denial*, FORTUNE, July 19, 1999, at 60-61 ("For the second year in a row, Fortune's list of the best places for minorities to work has a glaring hole: Silicon Valley."). See also Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1006 (1997) (demonstrating continued exclusionary policies within the legal profession); Mike Frank & Tim Smart, *The Ugly Talk on the Texaco Tape*, BUS. WK., Nov. 18, 1996, at 58 (stating that experts on diversity think that Texaco's discrimination problems are emblematic of widespread racism within the oil industry).

¹² Recent reports from the world of business fully support a major premise of this article. Specifically, many companies are moving aggressively to embrace diversity, and the best diversity practitioners are posting statistics showing that they mean business about diversity. For example, at SBC Communications, 51% of new hires are minorities, as is 36.4% of its total work force and nearly 20% of its board. See Robinson & Hickman, *supra* note 4, at 62-70. At Public Service Company of New Mexico, 48% of new hires are minorities, 33% of its board members are minorities, and 47.3% of its workforce are minorities. These are not isolated examples, as the top 50 companies identified by Fortune Magazine as the "Diversity Elite" all post impressive statistics. *Id.* Still, outside of those companies that are the leading edge of the diversity movement, the situation is grim, and much more needs to be done.

In Northeast Ohio, for example, the Cleveland Plain Dealer surveyed the top 50 largest public companies in the region and found that only 5 of 497 executive officers in such companies were black, and only 38 were women or minorities. Sandra Livingston & Zach Schiller, *Glass Ceiling Cracks - But Barely Few Executives Are Minorities, Survey Shows*, CLEV. PLAIN DEALER, Oct. 3, 1999, at 15A (concluding that although upper echelons of corporate management have been penetrated by women and minorities, the glass ceiling still exists and is lower for minorities than women). The progress of women, in general, is equally

legal changes that would facilitate this process and also articulate the policy bases militating in favor of such changes. Part I summarizes the logic behind the business case for diversity and reviews the evidence showing the business benefits derived from the pursuit of diversity. Part II reviews the emerging best practices of corporate America regarding diversity management as a means of defining in detail what "embracing diversity" means. Part III will state the case for facilitating the business community's efforts to manage diversity obligations and suggest some means by which this can be achieved, with a focus on: clarifying disclosure obligations of public companies under the federal securities laws with respect to diversity risks and opportunities; expanding the duties of directors and officers to manage diversity proactively and with due care; and allowing companies sufficient latitude to pursue these initiatives within the security of a regulatory safe-harbor. The article concludes that the diversity practices of "leading edge" corporations are fundamentally appropriate. In all respects – legal, economic, and in terms of the public's long term interest -- the business community is acting progressively here. Thus, the legal system should not act as a reactionary force to these developments but should instead facilitate the efforts of the business community to unlock the value inherent in America's diversity.

I. The Business Case for Diversity

Two critical economic trends form the linchpin for the business case for diversity: demographics and globalization.¹³ First, the nation's population (and

disconcerting. Although corporate America now boasts four female CEOs among its top corporations, "[t]he truth is, when it comes to the uppermost echelons of power, the glass ceiling is still miles from the junk heap." Michelle Conlin & Wendy Zeller, *The CEO Still Wears Wingtips*, *BUS. WK.*, Nov. 22, 1999, at 82 (examining a November 1999 study released by Catalyst, a not-for-profit research organization). Thus, while it is true that the presence of women among senior managers at 500 large companies has increased 37% between 1995 and 1999, it is also true that only 11.9% of senior managers at such companies are women, up from only 8.7% in 1995. See *id.* It seems then that leading-edge companies are embracing diversity, and showing it is profitable, but that the forces of racism and sexism are very stubborn.

¹³ A third basis for the necessity of embracing diversity is seldom mentioned by the business experts that have stated the business case for diversity. Specifically, corporate America has, in general, operated based upon an assumption that only white males were qualified for corporate positions in general, and particularly senior management positions. This fact of pervasive discrimination has left corporate America in dire need of diverse perspectives. As Secretary of Labor, Robert Reich stated in 1995, "the glass ceiling is a concept that betrays America's most cherished principles. It is the unseen, yet unbreachable barrier that keeps minorities and women from rising to the upper rungs of the corporate ladder, regardless of their qualifications or achievements." *Id.* Title II of the Civil Rights Act of 1991 created the 21-member, bipartisan Federal Glass Ceiling Commission. See Pub. L. No. 102-166, § 202(b), 203(a), 105 Stat. 1071 (1991). The Commission consisted of Senators, Representatives, business leaders, and other political leaders, all appointed by President Bush. The Commission concluded: "The glass ceiling is a reality in corporate America." *Id.* at 9. The Commission's mandate was to study the barriers to the advancement of minorities and women

hence its labor, investor and consumer pools) is undergoing an historic change whereby the nation's minority populations are increasing rapidly, while the labor pool as a whole is stagnating.¹⁴ White males, therefore, constitute a decreasing percentage of key constituencies.¹⁵ Second, the business of America is increasingly integrated into the world economic system, meaning that American business must now deal with important constituencies (labor, investor and consumer pools) that are as multi-cultural as the world.¹⁶ By the year 2025, demographic experts project that the additional 72 million members of the U.S. population will include 32 million Latinos, 12 million African Americans and 7 million Asian Americans.¹⁷ This more diverse population pool will necessarily lead to a more diverse marketplace of consumers.¹⁸ Minority populations are growing in number, as well as in wealth.¹⁹

within corporate hierarchies, to issue a report on its findings and conclusions, and to make recommendations on ways to dismantle the glass ceiling. See also FEDERAL GLASS CEILING COMMISSION, *GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 6-7* (1995) (finding that a "glass ceiling" exists, operating to exclude women and minorities, and that it is detrimental to business) (citing ANN M. MORRISON, *THE NEW LEADERS: GUIDELINES ON LEADERSHIP DIVERSITY IN AMERICA 34-39* (1992) (suggesting that prejudice is the primary barrier to corporate advancement, manifesting itself in a prejudgment that someone "different," such as a female, is less able to do the job)) [hereinafter GLASS CEILING II].

¹⁴ The expected shortage of working age people will be a world-wide issue early next century. "Today the ratio of working taxpayers to non-working pensioners in the developed world is 3:1. By 2030, absent reform, this ratio will fall to 1.5:1" Peter G. Peterson, *Gray Dawn: The Global Aging Crisis*, FOREIGN AFF., Jan.-Feb. 1999, at 44.

Plummeting birthrates have corresponded with the rise of the knowledge-based economy, which demands more and more white-collar workers. Between 1998 and 2010, the number of managerial jobs will rise by 21%, according to Development Dimensions International, while the number of people between 35 and 50 will fall by 5%. Already, the median age of the U.S. workforce is nearly 40, up from 34.9 in 1979. Even with productivity gains and immigration, there won't be enough people to meet the demand. Jennifer Reingold & Diane Brady, *Brain Drain*, BUS. WK., Sept. 20, 1999, at 112, 114.

¹⁵ "By the year 2040, one-half of the U.S. population will be African-American, Hispanic/Latino American, Native American and/or Asian-American. Women will fill 65 percent of the new jobs created during the 1990s; by the year 2000, nearly one-half of civilian workers will be female." FERNANDEZ, *supra* note 2, at 11. When this article refers to "traditionally excluded groups," it is referring, primarily, to the foregoing groups. However, diversity theory is broad enough to cover virtually any group. Thus, this article argues that homosexuals should not be unfairly excluded from the workforce and posits that white males may, in appropriate circumstances, add diversity to a given organization.

¹⁶ "The strategic imperative to create a synergistic organizational culture that transcends any single national culture may be particularly acute for [multinational enterprises] facing competitive environments in which there are strong, simultaneous pressures for global integration and national responsiveness. Here, competitive advantage hinges on successfully managing cultural diversity across product and labor markets." Gary W. Florkowski, *Managing Diversity within Multinational Firms for Competitive Advantage in MANAGING DIVERSITY* at 337, 339 (Ellen Ernst Kossek & Sharon A. Lobel, eds., Blackwell Publishers Ltd. 1996).

¹⁷ See U. S. BUREAU OF THE CENSUS, *POPULATION PROJECTIONS BY AGE, SEX, RACE AND HISPANIC ORIGIN, 1995-2050* (1996).

This wave of diverse market entrants will also be more highly educated than their parents. From 1973 to 1996, the percentage of Latinos awarded B.A. degrees grew from 6.1 to 13.4 percent for women, and from 6.6 to 12 percent for men.²⁰ For African Americans the increase was from approximately 7.2 to 17.7 percent.²¹ Because these populations will expand most markedly in the key 18-24 year old range, college enrollment is expected to rise 23 percent for African Americans and 73 percent for Latinos from 1995 to 2015.²² Gender diversity is also on the upswing: by the year 2005 women will constitute 48 percent of the nation's workforce.²³ Women too are attending and graduating college at dramatically higher rates.²⁴ This increased population diversity will have an enormous impact upon the business environment: for example, people of color now constitute 25 percent of the nation's consumer base.²⁵

While the size and wealth of minority populations are increasing, the population as a whole, on a global basis, is rapidly aging.²⁶ This global aging will test the developed economies of the world in many ways – including creating unprecedented labor shortages and diminishing labor pools.²⁷ America's increasing diversity will save it from many of the economic disruptions implicit in global aging. Non-Hispanic whites will contribute only one-quarter of the nation's population growth over the next decade.²⁸ From 2030 to 2050, the non-Hispanic white population will be contracting, and all population growth will be occurring in non-white

¹⁸ According to the first vice president and senior director of Merrill Lynch, Inc., “[o]ur clients, our shareholders are demanding more and more that our employees look like them.” Peter Truell, *The Black Investor, Playing Catch-Up*, N.Y. TIMES, Aug. 23, 1998, § 3, at 1, 8.

¹⁹ See U.S. BUREAU OF THE CENSUS, *supra* note 17, at 2. See also Fortune Mag. & Soc’y for Hum. Resources Mgmt., *Competitive Practices for A Diverse Workforce*, FORTUNE, July 6, 1998, at 51, 53 (stating that minorities are achieving the “American Dream” at three times the rate of non-minorities and now account for \$1.5 trillion in economic activity) [hereinafter Fortune & SHRM Study].

²⁰ See Anthony P. Carnevale, *Diversity in Higher Education: Why Corporate America Cares*, 3 ASS’N. AM. COLLEGES U. DIVERSITY DIG. 1, 6 (1999).

²¹ See *id.*

²² See *id.*

²³ See THOMAS, *supra* note 1, at 119.

²⁴ See Rodger Doyle, *By the Numbers: Men, Women and College*, SCI. AM., Oct. 1, 1999, at 40 (stating that women are earning 55% of all college degrees awarded in U.S.).

²⁵ See Jacqueline A. Gilbert, Bette Ann Stead & John M. Ivancevich, *Diversity Management: A New Organizational Paradigm*, 21 J. BUS. ETHICS 61, 65 (1999) (“People of color in the U.S. now buy more as a group than any of our international trading partners. African Americans, Asians, and Hispanics are expected to reach 25% of the nation's consumer base and are forecasted to have annual spending power of \$650B by the year 2000.”). Obviously, no business could afford to ignore any such colossal market segment. This is why diversity initiatives are a “crucial element in organizational survival.” *Id.* at 64.

²⁶ See PETER G. PETERSON, GRAY DAWN 183-84 (1999) (discussing economic implications of workforce contraction and possibility of “chronic” recession).

²⁷ See *id.*

²⁸ See U.S. BUREAU OF THE CENSUS, *supra* note 17, at 1.

populations.²⁹ This creates a business imperative: corporations that can tap an expanded labor pool, in the coming tight labor markets, will have an advantage over those that have limited access to diverse workers.³⁰

At the same time, world trade is booming. International trade grew about 10 percent in 1994, the highest level of trade growth in over two decades, far outpacing economic growth generally.³¹ Such astounding trade growth has continued since 1994, peaking in 1997 at 10.5%.³² International trade accounts for a higher percentage of total economic activity each year.³³ The United States is the world trade leader. It accounts for one-sixth of the world's imports and one-eighth of the world's exports.³⁴ These trends crystalize the business imperatives to eliminate unfair discrimination and to tap all the talent available in the nation's labor pool.³⁵ Corporate America is responding to these trends, increasingly, with a variety of diversity initiatives.³⁶ These programs include diversity training, creation of affinity groups, mentoring

²⁹ See *id.*

³⁰ See generally WILLIAM B. JOHNSTON AND ARNOLD H. PACKER, *WORKFORCE 2000: WORK AND WORKERS FOR THE 21ST CENTURY* 95-96 (1987) (stating that changing demographics will have profound effect on workplace).

³¹ See WORLD TRADE ORGANIZATION, *ANNUAL REPORT BY THE DIRECTOR-GENERAL OVERVIEW OF DEVELOPMENTS IN INTERNATIONAL TRADE AND THE TRADING SYSTEM I* (1996).

³² See World Trade Organization, *World Trade Growth Slower in 1998 After Unusually Strong Growth in 1997* 2 (last modified Apr. 16, 1999) <<http://www.wto.org/wto/intltrad/internat.htm>>.

³³ See *id.* at 2 (stating that since 1990 trade has grown at a rate that is at least double the rate of economic growth, each and every year.)

³⁴ See *id.* at 7.

³⁵ Virtually all commentators agree that unfair discrimination is economically inefficient. Compare John J. Donohue, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) (arguing that Title VII accelerates rate at which inefficient racial discriminators are driven from the market) with Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987) (questioning whether Title VII is effective at driving out discriminators at increased rate). Economic theory alone, for now, is insufficient to give us any assurance that discrimination will be punished by the market. This is discussed, *infra*, in Part II. As Richard Delgado has pointed out, economic theory is premised upon an inadequate understanding of human conduct and motives. See Delgado, *supra* note 5, at 231-242. I also think that when reality conflicts with theory, one should accept reality and question theory. On the issue of discrimination, the reality is that the economic theory is not working. Indeed, this paper shows that Title VII, for example, has played a crucial role in awakening corporate America to the hazards of condoning bigotry, most notably in the context of the Texaco fiasco. See *also infra* notes 120-129 and accompanying text.

It is noteworthy that arguments that it is economically desirable to end discrimination have been made for decades. See, e.g., H. REP. NO. 88-914 (part 2), at 26 (1963) (discussing "Civil Rights Act of 1963" and stating that the "failure of our society to extend job opportunities to the Negro is an economic waste."). One could reasonably ask whether anything has changed in 35 years in terms of economic incentives. The short answer is that both the profits from eliminating unfair discrimination as well as penalties for tolerating discrimination have increased. The stakes are growing and traditionally excluded groups have achieved critical mass.

³⁶ See SHRM STUDY, *supra* note 8, at 6 (stating that only 36% of the 75% of the Fortune 500 companies with programs have had them for more than five years).

programs, and assistance with career development.³⁷ These programs most often target women, African Americans, and Hispanics, although many companies also target Native Americans, disabled Americans and Asian Americans.³⁸ Many organizations with diversity programs have staff dedicated to such initiatives.³⁹ The most progressive companies now recognize that embracing diversity goes beyond (but no doubt includes) bringing increased numbers of women and minorities into an organization; it requires fostering an environment of sensitivity and tolerance for differences.⁴⁰ Under such circumstances diversity can be a powerful way to increase organizational effectiveness.⁴¹ On a very pragmatic level, globalization and demographic developments create a compelling justification for corporate America to embrace diversity.⁴² Business can use diversity initiatives to eliminate racial hostility and to ensure that all workers enjoy an environment that is conducive to maximizing employee potential.⁴³ This will give companies embracing diversity a competitive advantage in the escalating "war for talent."⁴⁴ This kind of environment will attract

³⁷ See *id.* at 8-10.

³⁸ See *id.* at 9.

³⁹ See *id.* at 5.

⁴⁰ More specifically, diversity scholars have articulated three levels of diversity integration in a given organization:

In monolithic organizations, the extent of commitment to affirmative action is the existence of an affirmative action plan. In plural organizations, minorities may be more aggressively recruited and promoted, but are ultimately expected to assimilate into the dominant culture. Plural organizations espouse affirmative action to the exclusion of initiatives which promote true employee integration. The multicultural organization presents the ideal, a place in which differences are appreciated and used to gain competitive advantage. Multicultural organizations are suggested to promote both attitudinal and structural integration of minorities and to effectively manage corporate diversity.

Gilbert, Stead, & Ivancevich, *supra* note 25, at 65.

⁴¹ See David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.-Oct. 1996, at 79.

⁴² The blinders of a Euro-centric view of America limit our vision and viability in the international economic community. There are simply too many cultural differences that have to be considered for the United States to be effective globally. The economy increasingly demands expertise in more than American or Euro-centric ways and customs.

Hing, *supra* note 2, at 882.

⁴³ See Thomas, *supra* note 6 at 107, 112 ("Managing diversity . . . means enabling every member of your work force to perform to his or her potential. It means getting from your employees . . . everything they have to give.")

⁴⁴ "We are in a war for talent. And the only way you can meet your business imperatives is to have all people as part of your talent pool - here in the United States and around the world." Geoffrey Colvin, *The 50 Best Companies for Asians, Blacks, and Hispanics*, FORTUNE, July 19, 1999, at 52-57 (statement of Lucent Technologies CEO Rich McGinn). Thirty percent of Lucent's new hires are minorities. Nine of its 25 top paid officers are minorities, 19.5% of its officers and managers are minorities, and 1 of 9 directors are minorities. See Robinson & Hickman, *supra* note 4 at 63. See also Rachel Emma Silverman, *On Wall Street, A New Push to Recruit Gay Students*, WALL ST. J., Feb. 9, 2000, at B1 (reporting that the securities

all members of the contracting labor pool.⁴⁵ Diversity initiatives will provide corporate America with the insights needed to achieve maximum market penetration in more diverse domestic and inherently diverse global markets.⁴⁶ Diversity sparks productivity gains by fostering innovation and catalytic thinking about ways to do business in a more diverse business environment.⁴⁷ Finally, embracing diversity will insulate companies from potential legal quagmires.⁴⁸ Increasingly, this is the most progressive and sophisticated thinking in leading edge firms and influential business

industry is facing an “unusually tight” labor market, and has for the first time focused recruiting efforts on gay and lesbian business students).

⁴⁵ See *id.*

⁴⁶ For example, from Los Angeles comes the story of an auto dealership with a highly diverse sales staff, including mostly minority and immigrant managers, being able to leverage diversity into huge sales to a diverse population, catapulting the dealership to the top of the California market. See Peter Y. Hong, *Diversity Driven by the Dollar*, L.A. TIMES, May 26, 1998, at A1 (recounting how a polyglot sales force helped Longo Toyota become the top dealership in the state and a multi-cultural model at the same time). See also Colvin, *supra* note 44, at 54 (“The idea that many minority customers are highly aware of a company’s minority friendliness is more important than many executives think.”) (quoting George Ramirez, Senior Vice President, Union Bank of California); Kenneth Labich & Joyce E. Davis, *Making Diversity Pay*, FORTUNE, Sept. 9, 1996, at 177 (“Many of [our] customers demand health care workers [who are non-judgmental] – and we have to make sure we provide them . . . With the customer base changing so rapidly, we are talking more and more about a diversity imperative within our company.”) (statement of Barbara Stern, Vice President, Harvard Pilgrim Health Care); *supra* note 4 and accompanying text; Robinson & Hickman, *supra* note 4, at 66 (stating that 56 percent of Union Bank’s new hires are minorities, 35.9 percent of its officials and managers are minorities, and 7 of its 17 directors are minorities).

⁴⁷ As one prominent CEO has stated, in explaining why his company needs more diversity: “If everybody in the company is the same, you’ll have a lot fewer arguments and a lot worse answers.” Colvin, *supra* note 44, at 54 (statement of Bell Atlantic CEO Ivan Seidenberg). Thirty percent of Bell Atlantic’s new hires are minorities, 5 of its 25 top paid officers are minorities, 19.2% of its officers and managers are minorities, and 4 of its 22 directors are minorities. See Robinson & Hickman, *supra* note 4, at 66.

⁴⁸ There’s also the threat of loss. CEOs don’t much like talking about this answer to the why question – it isn’t the message they want to send – but the effect is strong and undeniable. They’ve watched the horror stories and in some cases been part of them. A number of companies in the 50 best got religion at gunpoint. Advantica (No. 6) is the parent of Denny’s, which paid \$54 million in 1994 to settle a series of discrimination suits. Shoney’s (No. 39) paid \$134 million to settle similar charges in 1993. Bell Atlantic (No. 28) and AMR (No. 23) are defendants in current lawsuits. Both companies stress that the suits’ allegations are unproven, and both plan to defend.

Colvin, *supra* note 44, at 59.

organizations.⁴⁹ In short, those firms that excel at managing diversity will outperform diversity laggards.⁵⁰

Leading professional business associations have studied diversity management in great detail. For example, the Society for Human Resource Management ("SHRM")⁵¹ conducted one of the most far ranging surveys on the state of diversity initiatives in corporate America in 1998. According to this survey top executives at 8 of 10 Fortune 500 companies found diversity management to be an important part of business.⁵² The SHRM has shown that embracing diversity can help firms create an attractive place for talented employees of all backgrounds to work.⁵³ This will assist companies in recruiting efforts and help companies avoid unnecessarily high, and costly, turnover rates.⁵⁴ The Society has concluded that

⁴⁹ Today managers are voicing a second notion as well. A more diverse workforce, they say, will increase organizational effectiveness. It will lift morale, bring greater access to new segments of the marketplace, and enhance productivity. In short, they claim, diversity will be good for business.

Thomas & Ely, *supra* note 41, at 79.

⁵⁰ See Taylor Cox, Jr. & Carol Smolinski, *Managing Diversity and Glass Ceiling Initiatives as National Economic Imperatives* i-ii (Jan. 1994) (University of Michigan, School of Business, Working Paper No. 9410-01) (on file with author) (undertaking extensive review of literature regarding diversity management programs and finding that companies able to successfully manage diversity can achieve greater human resource efficiencies, increased marketing effectiveness, greater creativity and innovation, and will, therefore, achieve better financial performance).

⁵¹ SHRM is a professional association composed of human resource managers. It exists to provide applied research and educational programs to help human resource professionals and their employers prepare for the future. The Society is the world's largest human resource management association and serves over 100,000 professionals. As such, the Society is a leading voice of corporate America on human resource issues. See SHRM STUDY, *supra* note 8, at 3.

⁵² *Id.* at 7.

⁵³ For example, in the joint Fortune and SHRM report, a case study focused on the efforts of a large financial institution, TIAA-CREF. TIAA-CREF diversity initiatives have emphasized creating a "respectful workplace" and placing value on the different perspectives that diverse employees bring to business problems. As a result of these efforts, TIAA-CREF has been named as one of the top 100 places for working women to work, one of the top 75 companies for Hispanics, and one of the top 100 places to work by Computer-World Magazine. Fortune & SHRM Study, *supra* note 19, at 516. Certainly, being so attractive, to so many segments of the labor pool, is bound to cut labor costs and increase quality of employees, resulting in a competitive advantage. TIAA-CREF has six minority directors (out of a total of 31), 43% of its new hires are minorities, and 16.3% of its officers and managers are minorities. See Robinson & Hickman, *supra* note 4, at 64.

⁵⁴ Professors Taylor Cox and Stacey Blake have illustrated the kinds of costs companies can expect to absorb from high turnover rates:

[L]et us assume an organization has 10,000 employees in which 35 percent of personnel are either women or racioethnic minorities. Let us also assume a white male turnover rate of ten percent. Using the previous data on differential turnover rates for women and racioethnic minorities of roughly double the rate for white males, we can assume a loss of 350 additional employees from the former groups. If we further assume that half of the

companies that foster a diverse workforce enjoy a competitive advantage that has a direct, positive impact on a business organization's bottom line.⁵⁵ Consequently, the "most enlightened companies" are seeking to exploit opportunities presented by the new workforce, to increase productivity, creativity, and innovation, as a means of attaining a competitive advantage in the 21st Century.⁵⁶ Human resource professionals and top executives at America's most successful corporations are therefore convinced that diversity adds value to their business.

The Conference Board⁵⁷ has sponsored a series of reports exploring the utility of diversity in achieving greater business performance. The Board has specifically refused to endorse the pursuit of diversity for its own sake; instead, the Board endorses value-driven diversity management.⁵⁸ Although the Board has recognized that measuring the benefits of diversity can be very difficult,⁵⁹ it concluded, as early as 1995, that businesses should recognize that diversity can be used to enhance the bottom line or can have negative consequences for companies that choose to ignore diversity issues.⁶⁰ "Leading edge companies" are executing diversity strategies

turnover rate difference can be eliminated with better management, and that total turnover cost averages \$20,000 per employee, the potential annual cost savings is \$3.5 million.

Taylor Cox & Stacey Blake, *Managing Cultural Diversity: Implications for Organizational Competitiveness*, 5 ACAD. OF MGMT. EXEC. 45, 48 (1991).

⁵⁵ See SHRM STUDY, *supra* note 8, at 10.

⁵⁶ Fortune & SHRM Study, *supra* note 19, at 54.

⁵⁷ The Conference Board was founded in 1916 for the purpose of improving the business enterprise system and enhancing the contribution of business to society. "The Conference Board strives to be the leading global business membership organization that enables senior executives from all industries to explore and exchange ideas of impact on business policy and practices." THE CONFERENCE BOARD, REPORT NO. 1130-95-RR, DIVERSITY: BUSINESS RATIONALE AND STRATEGIES 2 (1995) (on file with author) [hereinafter CONFERENCE BOARD 1995].

⁵⁸ See *id.* at 7 ("As with any business function, program or initiative, diversity initiatives must prove to be essential components of business operations and meet the standards of good business practice.").

⁵⁹ Making the business case – linking diversity to the bottom line or profitability of an organization – is easier said than done for several reasons:

1. There is currently little proof or supporting research of the effects of corporate diversity initiatives on bottom-line measures, especially productivity;
2. few diversity initiatives have been implemented with specific bottom-line measures of effectiveness;
3. programs are too new to measure and assess impact;
4. the business linkages are not always direct, and measuring indirect effects is always difficult;
5. there are misconceptions that Affirmative Action compliance equals diversity;
6. businesses are not creating effective diversity strategies; and
7. often more than one program is launched at the same time in a company, which makes it difficult to separate variables.

Id. at 11.

⁶⁰ See *id.* at 8.

based upon business imperatives notwithstanding the lack of certain evidence showing benefits.⁶¹ The Conference Board reflects the beliefs of the nation's business leaders that embracing diversity is profitable.⁶² More recently, the Conference Board researched diversity at the board level of corporate America.⁶³ In this study, the Conference Board concluded that board diversity can enhance shareholder value.⁶⁴ In sum, "leading companies are integrating diversity into corporate objectives with the belief that a diverse workforce can help generate new ideas and help companies be more responsive to diverse markets."⁶⁵

⁶¹ *Id.* at 10. In its 1995 Report, the Conference Board articulated the ways in which diversity can help business performance, including potential increases in market shares, increased global competitiveness, enhanced recruiting, and increased employee productivity. Experience has also demonstrated that companies that ignore diversity issues can pay a hefty price. Consumers can boycott products, employees can initiate costly and distracting litigation, companies can suffer a barrage of negative publicity, and shareholders can initiate suits for losses suffered by the company. *See id.* at 11-23. In 1997 the Conference Board revisited the issue of diversity, at a meeting dedicated solely to diversity. Here, 30 speakers addressed 400 executives interested in learning how diversity is working for peers. Participants agreed that "diversity programs help to ensure the creation, management, valuing, and leveraging of a diversified workforce that will lead to organizational effectiveness and sustained competitiveness." Because of the difficulty of proving the effect of diversity initiatives, the 1997 Report, like the 1995 Report, relies extensively upon a growing dialogue among business elites that diversity is profitable. CONFERENCE BOARD 1997, *supra* note 3, at 5, 7.

⁶² For example, the 1995 Report relied upon a survey of fifty-three business organizations and interviews with 35 diversity professionals as well as a review of business literature addressing diversity. *See* CONFERENCE BOARD 1995, *supra* note 57, at 7. The 1995 Report is laced with anecdotal evidence of diversity successes:

Bank of Montreal has created organization-wide measures with noted improvements in aboriginal (minority) business, customer satisfaction, and employee commitment—all which significantly impact the bottom line. 3M, an organization where innovation has been a key to their success, has witnessed an increase in the number of women and people of color contributing to patents. Similarly, FMC's initiatives have helped reduce absenteeism, and Silicon Graphics has penetrated markets outside the United States while improving the promotion and retention numbers for women and Asians.

CONFERENCE BOARD 1995, *supra* note 57, at 8.

⁶³ *See* CAROLYN KAY BRANCATO & V. JEANNE PATTERSON, REP. NO. 1230-99-RR, BOARD DIVERSITY IN U.S. CORPORATIONS, (1999) (on file with author) [hereinafter CONFERENCE BOARD 1999].

⁶⁴ *See id.* at 3. Again, participants in the Conference Board's research working groups "immediately rejected diversity for its own sake; . . . [instead, the participants revealed consensus that diversity must] enhanc[e] shareholder value." *Id.* at 7. "[H]aving a diverse board is a strategic imperative at Sara Lee . . . the diversity of our board has been a major source of the confidence we needed to reach beyond our experience for new and potent opportunities. I do not believe a more homogenous board with a narrower range of backgrounds would have been as supportive, or as constructively critical. . . ." CONFERENCE BOARD 1999, *supra* note 63, at 7 (statement of Sara Lee CEO, John Bryan). Sara Lee's workforce is 34.9% minorities. Two of its 20 board members are minorities, and 15.8% of its officers and managers are minorities. *See also* Robinson & Hickman, *The Diversity Elite*, (visited Nov. 14, 1999) <<http://www.pathfinder.com/fortune/diversity/lis5.html>> (revised rankings).

⁶⁵ *Id.* at 5 (statement of Conference Board Acting President and CEO Jack V. Wirts).

The conclusions of the Conference Board and Society for Human Resource Management have support in a study undertaken by the American Management Association.⁶⁶ The study included a survey of over 1,000 managers and executives and evaluated the impact of diversity upon corporate performance objectives such as productivity and net operating profits. The study concluded that diversity in senior management consistently correlates to superior corporate performance.⁶⁷ More specifically, the study found that firms having diverse senior management teams achieved better financial performance than firms that responded negatively to the survey regarding the presence of diversity.⁶⁸ Thus, the study indicates that diverse work groups are more productive work groups.⁶⁹

The recent psychological evidence in support of this finding is powerful. Empirical research on the diversity of small working groups directly supports the value of ethnic diversity.⁷⁰ Heterogeneous working groups offer more creative solutions to problems than homogenous working groups.⁷¹ They also show greater inclination for critical thinking and are likely to avoid problems associated with "group think," where members mindlessly conform to group precepts.⁷² Ethnicity provides the necessary heterogeneous perspective sufficient to trigger "kaleidoscope thinking" by providing a variety of perspectives, and to combat "group-think."⁷³ This

⁶⁶ Am. Mgmt. Ass'n, *1998 AMA Survey Senior Management Teams: Profiles and Performance* (visited Nov. 5, 1999) <<http://www.amanet.org/research/pdfs/senior.pdf>>.

⁶⁷ *See id.* at 1.

⁶⁸ *See id.* at 7. The statistical cliché, that correlation is not causation, applies here.

⁶⁹ Whether it's in the lab or in the marketplace, competitive advantage in a business like ours rests on innovation. To succeed, we must bring together talented and committed people with diverse perspectives – people who can challenge one another's thinking, people who collectively approach problems from multiple points of view.

Raymond v. Gilmartin, *Diversity and Competitive Advantage at Merck*, HARV. BUS. REV., Jan.-Feb. 1999, at 146.

⁷⁰ *See* Poppy Laretta McLeod, Sharon Alisa Lobel & Taylor H. Cox, Jr., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RES. 248, 252 (1996) (finding that ethnically diverse workgroups, including Asian, African and Hispanic Americans, produced higher quality ideas than all-Anglo groups).

⁷¹ *See id.* at 256-57 ("The ideas produced by the heterogenous groups were judged as significantly more feasible . . . and more effective, . . . than the ideas produced by the homogeneous groups.").

⁷² *See* IRVING L. JANIS, VICTIMS OF GROUPTHINK 192 (1972) (undertaking intensive case studies of "groupthink" and finding: "Groups of individuals showing a preponderance of certain personality and social attributes may prove to be the ones that succumb most readily to groupthink.").

⁷³ *See* McLeod, Lobel, & Cox, *supra* note 70, at 250.

Lack of disparity in social background and ideology among the members of a cohesive group makes it easier for them to concur on whatever proposals are put forth by the leader to deal with the policy problems they are confronting. This structural fault decreases the likelihood of disparate views being presented and productively debated within the group. When there is a moderate (but not extreme) degree of heterogeneity in social background

is consistent with data showing that people of different ethnic backgrounds hold distinct “world views” and that Hispanic, Asian, African and Native Americans have not been so assimilated that these unique views have been lost.⁷⁴ This is the difference that drives the value of diversity.⁷⁵ In sum, the findings based upon feedback directly from managers are consistent with a wide variety of studies examining the impact of diversity upon group action.⁷⁶ What these managers are saying is thus backed up by scientific evidence: managers that can manage diversity well will be more productive than those who are unable to cope with increasing diversity.⁷⁷

One area where this value is unleashed is the ability to exploit diversity to achieve greater market penetration.⁷⁸ Obviously, if there are different “world views”

and ideology among the members, they are more likely to engage in *constructive multiple advocacy*, which means that the group will devote their deliberations to exploring the pros and cons of two or more alternatives, rather than focusing on just one available option and gravitating toward a premature consensus.

IRVING L. JANIS, *GROUPTHINK* 250 (2d ed. 1982) (undertaking further intensive case studies and finding that group heterogeneity can stem “grouphink”).

⁷⁴ See TAYLOR COX, JR., *CULTURAL DIVERSITY IN ORGANIZATIONS* 27-36 (1993) (reviewing nine studies of Hispanic Americans, Asian Americans and African Americans and finding strong ethnic identities retained by each group as a result of fundamental life experiences; and concluding that therefore these traditionally under-represented groups offer employers value). Of course, recognizing that these groups in general retain distinct perspectives is far different from positing that members within groups have uniform perspectives. Much more work needs to be done to give specific and empirical content to the diverse views offered by individuals within traditionally excluded groups. Presumably, over time knowledge in this area will increase as diversity initiatives become more common.

⁷⁵ See Susan E. Jackson, *Team Composition in Organizational Settings: Issues in Managing an Increasingly Diverse Workforce*, in *GROUP PROCESS AND PRODUCTIVITY* 138, 138-73 (S. Worchel, W. Wood & J. Simpson, eds. 1992) (suggesting that ethnic diversity is related to organizational creativity and flexibility).

⁷⁶ Such research shows, for example, that diverse groups are more flexible, innovative and creative. See ANTHONY P. CARNEVALE & SUSAN C. STONE, *THE AMERICAN MOSAIC* 60-61 (1995) (reviewing and collecting empirical data regarding the benefits of diversity in decision making processes); Charlan Jeanne Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 *PSYCHOL. REV.* 23, 28 (1986) (“Those exposed to minority viewpoints . . . are in fact stimulated to think in more divergent ways. They are more original, they use a greater variety of strategies, they detect novel solutions, and importantly, they detect correct solutions.”); Harry C. Triandis, Eleanor Hall & Robert B. Ewen, *Member Homogeneity and Dyadic Creativity*, 18 *HUM. REL.* 33, 52 (1965) (finding that heterogeneous groups are more creative).

⁷⁷ As one manager has stated: “If you don’t have empathy and aren’t able to communicate in diversity, are uncomfortable around a multicultural workforce, or if you are not confident enough to give an opportunity to someone who has a heavy accent or is different, you’ll be a miserable failure as a manager.” *The World Comes to the American Workplace*, *WASH. POST*, Mar. 20, 1999, at A1.

⁷⁸ Indeed, Professors McLoed, Lobel, and Cox conducted an experimental study of ethnic diversity in the context of small groups that was specifically focused on a marketing task. The working groups were asked to generate ideas on how to increase tourism in the United States. McLoed, Lobel and Cox, *supra* note 70, at 254. Their ideas were then judged, blindly, by tourist industry experts, based upon feasibility and effectiveness. See *id.* at 255.

among traditionally excluded cultures, then there are real insights that can be provided by a diverse workforce.⁷⁹ Indeed, researchers theorize that cultural background and ethnic identification play a major role in consumer behavior.⁸⁰ Thus, leading business academicians argue that the insights and sensitivities brought by people from varying ethnic backgrounds help companies reach a wider variety of markets.⁸¹ They note that “people with similar frames of mind, similar values and principles have a strong basis for communication and communication is the art of sales.”⁸² It is not, however, just a matter of communication. “What minority consumers respond to most eagerly is a level of respect that too often is missing in their transactions with mainstream businesses.”⁸³ Economists have similarly found that “individuals with similar characteristics communicate at lower cost.” Therefore, “efficiency and competition dictate matching employees and customers.” In other words, it is the invisible hand driven by the need for efficient communication between customer and employee that often drives hiring decisions.⁸⁴ It is not, however, just a matter of communication. “What minority consumers respond to most eagerly is a level of respect that too often is missing in their transactions with mainstream businesses.”⁸⁵ It is noteworthy, however, that the business case for diversity does not rest on morphological features and racial affinity, but rather cultural insights and understanding.⁸⁶

Ethnically diverse workgroups, including African, Hispanic and Asian Americans scored higher than all-Anglo groups. See also *id.* at 252, 256-57.

⁷⁹ See Cox & Blake, *supra* note 54, at 56 (1991) (arguing that insights and sensitivities brought by people from varying ethnic backgrounds helps achieve greater market penetration).

⁸⁰ See, e.g., Thomas C. O'Guinn et al., *The Cultivation of Consumer Norms*, 16 *ADVANCES IN CONSUMER RES.* 779 (1989) (“Cultivation theory assumes that different demographic groups . . . will have had different life experiences which will lead to different perception of social reality”).

⁸¹ See COX & SMOLINSKI, *supra* note 50, at 26-28.

⁸² *Id.* at 27 (quoting managers of insurance agency).

⁸³ *Id.* at 27-28 (quoting Miami Toyota dealer Richard Goldberg). See also Gilbert, Stead, & Ivancevich, *supra* note 25, at 65-66 (reviewing studies showing marketing and product design benefits arising from diverse workforce).

⁸⁴ Stacey Kole & Glenn MacDonald, *Economics, Demography and Communication* 3 (1999) (University of Rochester School of Business working paper) (on file with author). Kole and MacDonald focused on the ability of gender identification to act as a facilitator of efficient communication between customers and employees. Their study utilized employment data from 12 developed nations. This data evidenced sectoral employment patterns across the 12 economies consistent with this “communication-based theory of diversity.” *Id.* at 40. It appears that women are being drawn into product delivery positions (where communication skills have great value) rather than product production positions.

⁸⁵ COX & SMOLINSKI, *supra* note 50, at 27-28 (quoting Miami Toyota dealer Richard Goldberg).

⁸⁶ Indeed, indulging customers' bigoted attitudes by hiring people reflecting their preferences has always been illegal under Title VII. See, e.g., *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (holding that gender preferences of customers did not justify hiring only males).

All of this thinking on diversity in the professional literature is mirrored in the academic literature. For example, Professors Thomas and Ely undertook a six-year research effort examining diversity practices of business organizations, with a particular focus upon the practices of three business organizations.⁸⁷ They found that the best firms find ways to integrate, as opposed to assimilate, diversity into all aspects of their operations by promoting equal opportunity for all employees, acknowledging and valuing differences, and allowing such differences to unlock growth and learning.⁸⁸ Those companies that pursue such diversity can “unleash the powerful benefits” of diversity, including catalytic learning, creativity, flexibility and, ultimately, profitability.⁸⁹ In short, CEOs wishing to innovate successfully must “hire, work with, and promote people” unlike those currently dominating corporate America.⁹⁰

Empirical research testing the business case for diversity management has thus far provided strong support for all of its major premises.⁹¹ First, in a detailed

⁸⁷ Thomas & Ely, *supra* note 41, at 85.

⁸⁸ *See id.* *See also* Gilbert, Stead, & Ivancevich, *supra* note 25, at 66 (“We define diversity management as a complete organization cultural change designed to foster appreciation of demographic, ethnic, and individual differences.”).

⁸⁹ In support of what Professors Thomas and Ely identify as an emerging paradigm on how to best exploit the opportunities presented by diversity, they present a case study of a law firm, Dewey & Levin. This firm found that hiring female and minority attorneys not only increased access to previously under-exploited markets, but also brought a plethora of new perspectives that served to increase business opportunities and quality.

As one of the white principals [of the firm] explains, the demographic composition of Dewey & Levin “has affected the work in terms of expanding notions of what are [relevant] issues and taking on issues and framing them in creative ways that would have never been done [with an all-white staff]. It’s really changed the substance – and in that sense enhanced the quality – of our work.” Thomas and Ely conclude:

Dewey & Levin’s increased business success has reinforced its commitment to diversity. In addition, people of color at the firm uniformly report feeling respected, not simply “brought along as window dressing.” Many of the new attorneys say their perspectives are heard with a kind of openness and interest they have never experienced before in a work setting. Not surprisingly, the firm has had little difficulty attracting and retaining a competent and diverse professional staff.

Thomas and Ely, *supra* note 41, 80-86.

⁹⁰ Dorothy Leonard & Susan Strauss, *Putting Your Company’s Whole Brain to Work*, HARV. BUS. REV., July-Aug. 1997, at 111, 116. Leonard & Strauss stress the positive energy that can be released by abrasive decision-making groups. They caution, however:

Abrasion is not creative unless managers make it so. Members of whole-brained teams don’t naturally understand one another, and they can easily come to dislike one another. Successful managers of richly diverse groups spend time from the outset getting members to acknowledge their differences—often through a joint exploration of the results of a diagnostic analysis—and devise guidelines for working together before attempting to act on the problem at hand.

Id. at 119.

⁹¹ Some diversity scholars have observed that “much of the pro-diversity literature is heavy on rhetoric and light on empirical findings.” Gilbert, Stead, & Ivancevich, *supra* note 25,

study of the effects of diversity management upon the stock price valuation of a firm, empirical data suggest that announcements that a firm has obtained diversity awards is associated with competitive advantage (as reflected by increased stock prices) and that announcements that a firm has been sanctioned for discrimination is associated with inability to achieve such advantage.⁹² Second, sound diversity management programs are associated with higher productivity and higher profitability.⁹³ Third, diversity management programs reduce stigmatization (compared to affirmative action programs), thereby contributing to the success of traditionally excluded groups of employees and providing a further competitive advantage.⁹⁴ Fourth, firms with diversity management policies are more creative, flexible and better problem solvers.⁹⁵ Finally, organizations perceived to be pursuing diversity management were more attractive employers to potential recruits (of all backgrounds) than those not having that perception; this implies yet another competitive cost advantage.⁹⁶ The business case for the value of diversity is also bolstered by evidence from other areas of society that increasingly are recognizing the importance of embracing diversity. Most recently, in the field of education the evidence is mounting that

at 71. While it is certainly true that scientific studies of this nascent movement are currently few in number, observation and experience are suggesting, increasingly, a link between successful diversity management and corporate performance. For example, the conduct of those corporations aggressively and profitably pursuing diversity provides a strong record of observation and experience of such a link, and this gives a kind of empirical basis to such a proposition. See *id.* at 65-66.

⁹² See Peter Wright et al., *Competitiveness through Management of Diversity: Effects on Stock Price Valuation*, 38 ACAD. MGMT. J. 272, 280-85 (1995) (finding that stock price response to diversity management or mismanagement announcement represents the capitalization of positive/negative information concerning business prospects); Janine S. Hiller & Stephen P. Ferris, *Separating Myth from Reality: An Economic Analysis of Voluntary Affirmative Action Programs*, 23 MEM. ST. L. REV. 773, 795 (1993) (finding that empirical data shows future profitability is enhanced by efforts to encourage the development of a diverse workforce).

⁹³ See Gilbert, Stead & Ivancevich, *supra* note 25, at 65-66 (summarizing "bottom line results" achieved at 11 companies "from effectively managing diversity"). See also COX & SMOLINSKI, *supra* note 50, at 37 ("Organizations which excel at leveraging diversity, including the hiring and advancement of women and members of racioethnic minority groups, and which provide an overall climate of equal opportunity to contribute should experience better financial performance.").

⁹⁴ See Jacqueline A. Gilbert & Bette Ann Stead, *Stigmatization Revisited: Does Diversity Management Make a Difference in Applicant Success?*, 24 GROUP & ORG. MGMT. 239, 252 (1999) ("With the majority of new hires in years to come being women and racial minorities, providing an active diversity management policy appears to shape a strong competitive edge.").

⁹⁵ See McLeod, Lobel & Cox, *supra* note 70, at 256-57 (concluding, based upon empirical studies, that heterogeneous work groups produce more effective and more feasible ideas than homogenous work groups). See also Cox & Blake, *supra* note 54, at 51 ("In sum, culturally diverse workforces create competitive advantage through better decisions.").

⁹⁶ See Margaret L. Williams & Tayla N. Bauer, *The Effect of a Managing Diversity Policy on Organizational Attractiveness*, 19 GROUP & ORG. MGMT. 295, 305-06 (1994) ("firms that have adopted policies and procedures concerning managing diversity may be able to enhance" their recruiting efforts).

pursuing diversity enhances the ability of educational institutions to achieve their institutional goals.⁹⁷ In an important study, the Civil Rights Project at Harvard University found that students graduating from elite law schools, such as the University of Michigan and Harvard Law School, “experienced powerful education experiences from interaction with students of other races.”⁹⁸ The study further concluded that exposure to diverse student bodies allowed white law students to better understand critical dimensions of their profession.⁹⁹ Seventy percent of the Harvard students and seventy three percent of Michigan students found that racial¹⁰⁰ diversity enhanced their educational experience.¹⁰¹

⁹⁷ Just as evidence from the world of education is important to assessing the value of diversity initiatives in the business world, evidence of the value of diversity in the business world must be heeded in the world of education. Our system of higher education is highly integrated into our business and economic systems. If our schools fail to produce diverse workers for our businesses, then our entire economy will suffer. See Carnevale, *supra* note 20, at 1, 6. (“So improving diversity on campus and in the workforce is not just a ‘nice’ social or political goal. It is a necessity – for both social and economic reasons – that must be conveyed to elected leaders and the public.”). Hopefully, courts will begin to understand this, and make more informed decisions regarding the value of diversity. See also *supra* note 2 and accompanying text; Univ. & Cmty. Coll. Sys. v. Farmer, 930 P.2d 730, 735 (Nev. 1997) (“The University demonstrated that it has a compelling interest in fostering a culturally and ethnically diverse faculty. A failure to attract minority faculty perpetuates the University’s white enclave and further limits student exposure to multicultural diversity.”).

⁹⁸ Gary Orfield & Dean Whitla, *The Civil Rights Project, Harvard University, Diversity and Legal Education* 29 (1999) (visited Oct. 16, 2000) <http://www.law.harvard.edu/groups/civil_rights/publications/law_survey.html>.

⁹⁹ See *id.* The study was based upon a Gallup poll survey of 1,820 students at the Harvard Law School and the University of Michigan Law School. The survey achieved an 81% response rate. Sixty-seven percent of the respondents were white. *Id.* at 10. Over 80% of the students thought diversity policies should be strengthened or maintained. *Id.* at 25. See also Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 58 OHIO ST. L.J. 732, 753 (1998) (“existing studies [of the impact of diversity] provide evidence that racial and ethnic diversity on college campuses promotes learning [and] increases understanding of racial groups and cultures.”).

¹⁰⁰ I try to avoid using the terms “race” or “racial,” except in direct quotes. Because so many people believe in the concept of “race,” I will use it when necessary, but I will not use it when it is avoidable. This is because “race” is a social construct and has no scientific basis. See Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 6 (1994) (“Despite the prevalent belief in biological races, overwhelming evidence proves that race is not biological.”). See also C. Loring Brace, *Region Does Not Mean “Race” – Reality Versus Convention in Forensic Anthropology*, 40 J. FORENSIC SCI. 171, 174 (1995) (“The term ‘race’ is a social construct.”); Kenneth R. Kennedy, *But Professor, Why Teach Racial Identification if Races Don’t Exist?*, 40 J. FORENSIC SCI. 797, 799 (1995) (equating belief in race based upon skin color to belief in Greek and Roman deities based upon existence of planets bearing their name); Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95, 96 (1990) (“Anyone who continues to believe in race as a physical attribute of individuals, despite the now commonplace disclaimers of biologists and geneticists, might as well also believe that Santa Claus, the Easter Bunny and the tooth fairy are real, and that the earth stands still while the sun moves.”). Because of this fact, I believe that thinking in terms of “race” creates artificial barriers between people. I acknowledge that, unfortunately, the race fiction matters too much in America; I do not acknowledge that there is a rational basis for this. See Clint Bolick, *Blacks and Whites on Common Ground*, 10 STAN. L. &

This is also consistent with the massive study of the efficacy of affirmative action and diversity initiatives at elite universities, undertaken by Derek Bok (former President of Harvard) and William G. Bowen (former President of Princeton).¹⁰² They found that “of the many thousands of former matriculants who responded to our survey, the vast majority believe that going to college with a diverse body of fellow students made a valuable contribution to their education and personal development.”¹⁰³ This suggests that diversity may have a catalytic effect. It seems reasonable to conclude that once business managers are exposed to diverse perspectives, they can be expected to think in more diverse ways.

Professors Bowen, Bok, and Burkhart offer other business lessons from the Bowen and Bok study. First, their study shows that the “myth of pure merit” – that recruiting is some kind of precise science that could, for example, be reduced to a mathematical formula – can hamstring businesses that fail to recognize where their skill gaps or institutional blind spots are located.¹⁰⁴ Recognizing the benefits of diversity empowers a company to approach hiring in a more eclectic fashion, including recognizing that a firm has too many individuals of a homogenous background and not enough individuals of different backgrounds.¹⁰⁵ Thus, if a company believes that persons of a given background likely will provide a keener understanding of the cultural demands of a given market segment and currently has

POL’Y REV. 155, 159 (1999) (arguing that policy should focus upon breaking down barriers to building individual merit and quoting Randall Kennedy: “The fact that race matters . . . does not mean that the salience and consequences of racial distinctions are good or that race must continue to matter in the future.”). See generally IAN F. HANEY LOPEZ, *WHITE BY LAW* 197-202 (1996) (reviewing social and legal construction of race).

¹⁰¹ See Lopez, *supra* note 100, at 14.

¹⁰² WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 241-255 (1998) (this study concluded that affirmative action was successful, and that over 80% of white graduates favor retaining or expanding the diversity policies of their alma mater). *Id.* at 251.

¹⁰³ *Id.* at 255.

¹⁰⁴ William G. Bowen, Derek Bok & Glenda Burkhart, *A Report Card on Diversity: Lessons for Business from Higher Education*, HARV. BUS. REV., Jan.-Feb. 1999, 139-142 (arguing that merit is about assembling a team by deciding which applicants individually and collectively will most contribute to the performance of the business).

¹⁰⁵ Bowen, Bok & Burkhart offer a simple example to illustrate this point: If you have an academic department with only men in it and think that it is important for the students and for the values that the institution represents that there be some women, then it makes sense to consider the fact that a particular candidate is a woman.

Considering candidate A because she is a woman doesn’t mean you’re going to appoint her for that reason alone. That would be ridiculous – just as ridiculous as admitting someone to college simply because he is black. *Id.* at 144. My own understanding of this dynamic is owed to Professor Charlene Smith of Washburn University School of Law, who repeatedly analogized diversity to a tossed salad. At some point, it dawned on me that if you add avocados to iceberg lettuce in order to build a better salad, you are hardly discriminating against the iceberg lettuce; after all, the lettuce is still rather fundamental to the whole notion of the salad.

no individuals of that background, it makes sense to consider benefits that may be reaped from increasing diversity even if that means being sensitive to gender or ethnicity.¹⁰⁶ Second, Bowen and Bok caution against applying more lenient performance standards to minority employees. "The lesson we draw from the data is that it is a disservice to compromise on standards."¹⁰⁷ Expecting less from minority hires benefits neither them nor the company, is likely to instill hostility toward diversity initiatives, and detracts from the value-driven basis for embracing diversity.¹⁰⁸ Setting high expectations is in itself important to maximizing the performance of all employees.¹⁰⁹

All of this evidence showing the value of diversity in terms of increased profitability is consistent with the actual market performance of those companies that aggressively embrace diversity. "A study of the Standard and Poors 500 by Covenant Investment Management found that businesses committed to promoting minority and women workers had an average annualized return on investment of 18.3 percent over a five-year period, compared with only 7.9 percent for those with the most shatter-proof glass ceilings."¹¹⁰ Similarly, each year Fortune magazine and the Council for Economic Priorities try to assess a company's overall diversity efforts.¹¹¹ The 50 companies chosen as the "Diversity Elite" for 1999 as "a group have performed terrifically, about matching the S&P 500 over the past year and beating it over the past three and five years."¹¹² The 1998 list also outperformed the S&P 500.¹¹³ On a macro

¹⁰⁶ See *id.* at 140, 148. See also Raymond V. Gilmartin, *Diversity and Competitive Advantage at Merck*, HARV. BUS. REV., Jan.-Feb. 1999, at 146. Merck CEO Gilmartin states:

To meet our financial goal of performing in the top-quartile of leading health care companies, we need people who can discover and develop important new medicines and market them effectively around the world. What policies and practices can help us assemble such people? Would anyone suggest seriously that pursuing workforce homogeneity would be a smart strategy? Of course not. A homogeneous workforce would inevitably exclude some superior individuals, and it would also preclude a keener understanding of the varied customer and cultural demands of the global market.

Id.

¹⁰⁷ Bowen, Bok & Burkhart, *supra* note 104, at 147.

¹⁰⁸ See *id.*

¹⁰⁹ See Gilbert & Stead, *supra* note 94, at 239 ("Empirical research has shown that women who perceived that they were hired as a result of affirmative action mandates suffered greater stress, experienced less job satisfaction, and selected less demanding work assignments"). The Gilbert & Stead study, on the other hand, "provides empirical evidence that an organization that adopts a diversity management policy will provide the necessary professional environment for women and racial minorities to succeed." *Id.* at 252.

¹¹⁰ FEDERAL GLASS CEILING COMMISSION, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 5 (1995) [hereinafter GLASS CEILING I].

¹¹¹ Edward Robinson & Jonathan Hickman, *The Diversity Elite*, FORTUNE, July 19, 1999, at 62-70. In order to determine which companies were the best in terms of diversity issues, the authors surveyed 1,200 U.S. companies. From the 137 responses, 50 companies were chosen as the top companies in dealing with diversity.

¹¹² Colvin, *supra* note 44, at 53.

¹¹³ See *id.*

scale, the U.S. economy also lends support to the value of diversity. For example, in 1986, Japan's Prime Minister Nakasone claimed that the United States could not hope to compete with Japan so long as its population has so many blacks and Hispanics.¹¹⁴ In fact, Japan has since experienced a series of economic setbacks, while the U.S. has enjoyed an unprecedented period of high growth and productivity gains.¹¹⁵ Indeed, the U.S. economy has rightfully been termed the envy of the world.¹¹⁶ The U.S. economy has scored this impressive growth at the same time that the diversity of its work force has rapidly increased.¹¹⁷ In sum, one of the world's most diverse economies is also one of its most successful.¹¹⁸

The conduct of business in a complex and dynamic environment often requires that best practices be adopted before definitive evidence of efficacy is available. This is one of the major reasons why business schools rely extensively upon case studies to develop best practices. It is fair to say that by 1999, the best available business literature was replete with case studies demonstrating the value of diversity.¹¹⁹ This is not to say that diversity always leads to enhanced organizational effectiveness. Indeed, an important study from 1996 shows that thinking about diversity in narrow terms, such as only focusing on increasing traditionally under-

¹¹⁴ See Bernard Wysocki, *Closed Society: Despite Global Role, Many Japanese Try to Avoid Foreigners*, WALL ST. J., Nov. 13, 1986, at Front Page ("Mr. Nakasone said Japan's racial homogeneity has helped it to become a more 'intelligent society' than the United States 'where there are blacks, Mexicans and Puerto Ricans and the level is still quite low'."). In terms of the effect of diversity upon economic performance, it is interesting to note that this report appeared to be a harbinger of trouble for Japan's economy. *Id.* (for all its talk of internationalization many Japanese still react to close contact with foreigners "with a mixture of fear and loathing.").

¹¹⁵ See *What's Your Problem: Japan Needs to Accept that Deflation Can be Worse than Inflation*, ECONOMIST, Sept. 25, 1999, at 526 (recounting Japan's economic difficulties during the 1990s and stating that its period of economic stagflation has occurred "[w]hile the American economy is currently running with the wind.").

¹¹⁶ "As the century draws to a close, the U.S. economy is the envy of the world. This country sets the standard for technology, and nowhere do creativity and innovation flourish more." Albert R. Hunt, *Americans Look to 21st Century with Optimism and Confidence*, WALL ST. J., Sept. 16, 1999, at A15. "Because of differences in statistical methodology, it's difficult to compare productivity across countries. But the growth rate of real gross domestic product per worker has clearly been falling in Japan and France during the 1990s, even while rising sharply during the same period in the U.S." Michael J. Mandel, *How Fast Can this Hot-Rod Go?*, BUS. WK., Nov. 29, 1999, at 40.

¹¹⁷ See CARNEVALE & STONE, *supra* note 76, at 20 ("In the past few decades . . . major demographic developments have made us more diverse than ever before.").

¹¹⁸ "The workforce of the United States is among the most gender and racioethnically diverse in the world." COX & SMOLINSKI, *supra* note 50, at 1. Japan's economic maladies certainly do not stem solely from its lack of diversity or its lack of a multi-cultural outlook. See Michael E. Porter & Hirotaka Taakeuchi, *Fixing What Really Ails Japan*, FOREIGN AFF., May-June 1999, at 66 (assessing Japan's problems and making no mention of diversity management practices). Some commentators have, however, recognized that Japan is weak in terms of its ability to exploit diversity. See also FERNANDEZ, *supra* note 2, at 33, 48.

¹¹⁹ See, e.g., Thomas & Ely, *supra* note 41, at 85-88 (using law firm of Dewey & Levin to illustrate potential for properly managed diversity).

represented groups, inhibits the effectiveness of diversity.¹²⁰ The point here is simply that the most innovative and sophisticated elements of the business community have concluded that embracing diversity, can, when properly managed, create “powerful” benefits.¹²¹ The evidence thus far strongly suggests that companies adept at managing diversity can do so in a manner that achieves greater profitability.¹²²

Some of the most persuasive evidence in favor of embracing diversity is the devastating losses suffered by those companies that have allowed sexism or racially hostile environments to fester within their businesses. The most notorious example of such a casualty is Texaco Oil Company, and the unfortunate Texaco shareholders during the time that the racism within Texaco came to light.¹²³ Texaco’s nightmare began in 1994, when African-American employees filed a class action lawsuit alleging pervasive racial discrimination.¹²⁴ The extent of Texaco’s discriminatory misconduct came to light in late 1996, when a senior executive released highly controversial tapes that appeared to contain racial slurs emblematic of a racially hostile environment.¹²⁵ Once allegations of Texaco’s misconduct surfaced, its shareholders suffered stunning losses, as its market capitalization plunged by \$1 billion.¹²⁶ Subsequent reports demonstrated that the tapes were not isolated circumstances of racial bigotry, but that instead such attitudes appeared to have permeated Texaco’s business culture.¹²⁷ Ultimately Texaco paid \$176 million, the largest amount ever paid in a racial discrimination suit, to settle the class action claims of over 1,400 African-American

¹²⁰ *Id.* at 80 (“Many attempts to increase diversity in the workplace have backfired.”).

¹²¹ *Id.*

¹²² There are many reports that companies often stumble in managing diversity. See, e.g., *What You Thought – Is there a Diversity Backlash*, WORKFORCE, June 1998, at 23 (finding that diversity initiatives often alienate employees, fail to stem discrimination and cause some level of backlash); Gillian Flynn, *The Harsh Reality of Diversity Programs*, WORKFORCE, Dec. 1998, at 27 (outlining asserted ways in which diversity programs can fail to achieve goals). However, these reports are more consistent with a nascent movement that is still in an experimental stage rather than contrary to the thesis of this article. This article merely posits that the business community is finding advantages to pursuing diversity initiatives in a value driven, well-defined manner.

¹²³ See BARI-ELLEN ROBERTS, *ROBERTS V. TEXACO* 273 (1998) (stating that Texaco suffered from a “poisonous racial atmosphere that had enveloped Texaco for decades.”).

¹²⁴ See *id.* at 196.

¹²⁵ Originally those who heard the infamous Texaco tapes reported a series of racially derogatory remarks, including a specific use of a racial slur. *Id.* at 1. Texaco commissioned a special inquiry, and utilizing digital technology concluded the slur was not used. See Kurt Eichenwald, *Investigation Finds No Evidence of Slur on Texaco Tapes*, N.Y. TIMES, Nov. 11, 1996, at A1. Other audio experts concluded to the contrary, and participants to the conversations did not deny the use of racial slurs. See also ROBERTS, *supra* note 123, at 257.

¹²⁶ See Kenneth Labich, *No More Crude at Texaco*, FORTUNE, Sept. 6, 1999, at 205 (recounting “the crisis” at Texaco, and how Texaco is now becoming a model for diversity).

¹²⁷ See Kurt Eichenwald, *The Two Faces of Texaco*, N.Y. TIMES, Nov. 10, 1996, at 3-1 (quoting sources within Texaco alleging that supervisors used racial slurs and derogatory terms to refer to African Americans).

employees.¹²⁸ Texaco also suffered from a serious bout of negative publicity that caused investors to flee the company¹²⁹ and consumers to threaten boycotts.¹³⁰ Nor is Texaco alone among companies that have felt the sting of being caught engaging in blatant racism, as companies ranging from Denny's to Shoney's have paid multi-million dollar sums arising from discrimination charges.¹³¹ As our population gets more diverse, and globalization proceeds apace, our nation is certain to see more "Texacos," and the amount of damage to be absorbed by such firms for failing to remedy misconduct is sure to increase exponentially, as investors learn to avoid closed corporate cultures and consumers and labor markets react to patent racism.¹³²

In sum, the business world has built a powerful case that if cultural and ethnic diversity is properly managed it can lead to a variety of benefits ranging from improved recruitment and retention to more insightful marketing and superior group interaction. All of these benefits ultimately lead to increased profits. The case enjoys support from leading business professionals, trade groups and publications, as well as psychological studies and empirically-based business studies. The early returns indicate that businesses that are the most aggressive in moving to diversify their workforces are out-performing the companies that are laggards. The next section of this article will explore in detail the practices these companies are employing in connection with their diversity initiatives.

II. Best Diversity Practices

Certainly, diversity, although a powerful tool, is not a magical sure-fire road to enhanced profitability. Managing diversity is as important as bringing diversity to a business.¹³³ Many corporations, most notably Texaco, have suffered dire consequences from an inability to manage diversity.¹³⁴ These instances, however, do not detract from the central thesis of this article that businesses are using diversity as

¹²⁸ See ROBERTS, *supra* note 123, at 276.

¹²⁹ See Peter Fritsch, *Fund Trustee Rebukes Texaco for Racist Remarks*, WALL ST. J., Nov. 6, 1996, at A5 (stating that fund was considering selling because of discrimination and its impact on performance).

¹³⁰ See Allanna Sullivan & Peter Fritsch, *Texaco Chairman Meets Advocates for Civil Rights*, WALL ST. J., Nov. 13, 1996, at B3 (discussing planned boycotts and picketing of Texaco stations).

¹³¹ See Colvin, *supra* note 44, at 59 (Denny's paid \$54 million and Shoney's paid \$134 million). Recently, Cracker Barrel restaurants have come under fire. The company appears hostile to diversity. In 1991, it determined that only heterosexuals could be employed in its restaurants. Now, in 1999, it is charged with segregating its African American employees into low paying jobs. See also Sheila M. Poole, *Cracker Barrel Accused of Race Bias*, ATLANTA J. CONST., Oct. 5, 1999, at E1.

¹³² See *supra* notes 17-20, 23-25 and accompanying text.

¹³³ See *supra* notes 41, 119-22 and accompanying text.

¹³⁴ See *supra* notes 123-32 and accompanying text.

a competitive advantage in order to maximize profits, and that the legal system should accommodate, encourage and respond positively to this new paradigm of viewing diversity as a strength. Instead, these instances highlight the need for policies that assure that business organizations truly embrace diversity rather than pursue policies of tokenism or tacit exclusion. The point is that diversity must be properly managed.¹³⁵ The EEOC has studied the “best practices” of the business community in the area of diversity management and has released a task force report that defines and summarizes the “best practices” that the leading firms have adopted.¹³⁶ Combined with the empirical evidence in support of diversity management and the work of other diversity management scholars, a fairly clear picture has developed illuminating proper diversity management practices. In sum, a “best practice” breaks down artificial barriers to hiring and promotion, embraces fairness to all employees and comports with law.¹³⁷ These diversity practices are also what distinguishes naked racial preferences from the business imperative of managing a diverse workforce in an increasingly diverse business environment. Thus, the following best practices both define and identify the kind of diversity initiatives that are the focus of this article.

A. Make Diversity a Board-Level or Senior Management Issue

Diversity, as envisaged within the business community, transcends all business segments, from marketing to human resources.¹³⁸ Finance departments must consider the impact diversity may have upon the firm's cost of capital.¹³⁹ Legal departments must consider how best to protect the corporation from legal exposure arising from potential diversity mismanagement.¹⁴⁰ Virtually every corporate stakeholder has an interest in diversity management. In short, diversity is so important to all corporate functions and constituencies, it is a compelling issue for

¹³⁵ A study focusing upon “unmanaged” diversity, for example, found that in an increasingly diverse environment, white males had increased levels of detachment to their organizations. See COX & BEALE, *supra* note 6, at 23-25 (citing Anne Tsui, Terri Eagan & Charles O'Reilly, III, *Being Different: Relational Demography and Organizational Attachment*, 37 ADM. SCI. Q. 549) (1992)). Additionally, unmanaged, increased diversity can impede the efficiency of intra-organization communications. COX & BEALE, *supra* note 6, at 42. Still, empirical findings show that study participants rated their organizations significantly more positively under a scenario of proactive diversity management than those participants who were not aware of a diversity management policy. See also Williams & Bauer, *supra* note 96, at 305-306. Thus, diversity management policies must permeate the entire business organization.

¹³⁶ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BEST PRACTICES OF PRIVATE SECTOR EMPLOYERS (1997) [hereinafter EEOC REPORT].

¹³⁷ *Id.* at 3-8.

¹³⁸ See Gilbert, Stead, & Ivancevich, *supra* note 25, at 66 (“Based upon the preceding literature review, we define diversity management as a complete organizational cultural change designed to foster appreciation of demographic, ethnic, and individual differences.”).

¹³⁹ *Supra* notes 18, 92, and 129 and accompanying text.

¹⁴⁰ See *supra* notes 44, 48, 123-132 and accompanying text.

board and senior management attention.¹⁴¹ At the very least, making diversity a board issue will assure a deliberative process for promulgating diversity policies that is at least capable of involving all firm sectors in the process, and producing written, carefully considered policies that may be disseminated to all employees. In a firm of any significant size, this process is now essentially a legal mandate.¹⁴²

"Before diversity can be valued and properly managed in any organization, the leadership must be committed to it."¹⁴³ Consequently, all business experts agree that diversity initiatives cannot succeed without, at least, the involvement of senior management.¹⁴⁴ The Glass Ceiling Commission undertook extensive investigation into the best practices of corporate America in managing diversity. One of its findings was that change must come from the top.¹⁴⁵ Thus, the Commission recommended that the board of directors, as well as corporate CEOs, set company-wide diversity policies and actively promote their diversity initiatives.¹⁴⁶ Similarly, the EEOC found that "the CEO must be firmly behind" diversity initiatives and the only means to ensure CEO commitment is for the board of directors to insist upon it—only the board holds this authority.¹⁴⁷ In fact, the Texaco directors were literally blind-sided by the explosion of bad publicity and the extent of Texaco's exposure.¹⁴⁸ Corporate directors have thus learned that they must ask "tough questions" about diversity management and demonstrate the importance of this issue.¹⁴⁹

¹⁴¹ See CARNEVALE & STONE, *supra* note 76, at 89-110 (explaining that managing diversity is a comprehensive approach to modifying corporate cultures and must therefore come from top management). See also GLASS CEILING II, *supra* note 13, at E3 (recommending company-wide policies with CEO support).

¹⁴² See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (holding that employer's anti-harassment policies may insulate employer from liability for hostile environment claims under Title VII).

¹⁴³ CARNEVALE & STONE, *supra* note 76, at 97.

¹⁴⁴ See, e.g., Gilbert, Stead & Ivancevich, *supra* note 25, at 67-68 (articulating key role for "CEO initiation and continuation" in implementing successful diversity initiatives); Thomas & Ely, *supra* note 41, at 86-87 (stating that organizational leadership plays key role in assuring that most effective diversity paradigm is implemented); Lawrence M. Baytos, *Task Forces & Councils Foster Diversity Success*, HR MAG., Oct., 1995, at 95-99 (stating that new organization approaches required to support diversity initiatives include facilitating senior management involvement in diversity initiatives and communicating to work force that diversity issues will be taken seriously) (Baytos is President of Diversity Implementation Group a consulting group specializing in diversity management). See also SHRM STUDY, *supra* note 8, at 6 (only 18 percent of diversity staff members report directly to the CEO).

¹⁴⁵ GLASS CEILING I, *supra* note 110, at 19.

¹⁴⁶ See *id.*

¹⁴⁷ EEOC REPORT, *supra* note 136, at 268; See also Gilbert, Stead & Ivancevich, *supra* note 25, at 67-68 (providing case studies linking successful diversity management programs at Xerox, J.C. Penney, Denny's, Shoney's, and Fleet Financial Group to CEO "initiation and continuation").

¹⁴⁸ See Joann S. Lublin, *Management: Texaco Case Causes a Stir in Boardrooms*, WALL ST. J., Nov. 22, 1996, at B1.

¹⁴⁹ *Id.* Courts have long held directors liable when they vote in favor of policies that violate the Civil Rights Acts. See *Tillman v. Wheaton-Haven Recreation Ass'n.*, 517 F.2d 1141,

B. Eliminate Invidious Discrimination

At the dawn of the 21st Century, there can be little doubt that America in general, and corporate America in particular, suffers from pervasive racism and sexism.¹⁵⁰ For example, in 1991, the Urban Institute conducted a study of employment discrimination experienced by African Americans.¹⁵¹ The study paired equally qualified African-American and white males, and worked to match their dress, mannerisms and background. These pairs applied for 476 positions in such cosmopolitan areas as Chicago and Washington, D.C. In 20 percent of the applications, the white applicant fared better than the African-American applicant.¹⁵² Such patent discrimination is not limited to African Americans. The Urban Institute has established similar hiring bias against applicants who are Hispanic.¹⁵³ Studies involving a broad range of business decisions, from mortgage processing to small business lending, document pervasive discrimination based upon race, ethnicity and gender.¹⁵⁴ If corporate representatives discriminate in hiring and in granting mortgages, certainly discrimination can be expected in other contexts. Thus, the findings of the U.S. Department of Labor, Glass Ceiling Commission seem to furnish further compelling evidence of a pervasively discriminatory business environment. In its final report, issued in November of 1995, the Commission found that there was a "glass ceiling" that operated to stunt the advancement of women and minorities in

1142-46 (4th Cir. 1975) (citing *Peck v. Cooper*, 112 Ill. 192 (1884)). This follows from the corporate law principle that a director who actually votes in favor of tortious conduct is personally liable even though the act is performed in the name of the corporation. *Id.* at 1144.

¹⁵⁰ See generally FERNANDEZ, *supra* note 2, at 252-67 (summarizing evidence showing vestigial racism in corporate America); Deborah A. Ballam, *Affirmative Action: Purveyor of Preferential Treatment or Guarantor of Equal Opportunity?*, 18 BERKELEY J. EMP. & LAB. L. 1, 20 (summarizing studies regarding sex discrimination in the workplace and stating that "numerous studies also indicate that the prejudice/stereotyping/discrimination continuum operates in the employment context.").

¹⁵¹ MARGERY AUSTIN TURNER, URBAN INSTITUTE REPORT 91-9, MICHAEL FIX AND RAYMOND J. STRUYK, OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED 1-3 (1991).

¹⁵² See *id.* ("The hiring audit demonstrates that unequal treatment of black job seekers is entrenched and widespread, contradicting claims that hiring practices . . . favor blacks or are . . . colorblind."). See also Donahue, *supra* note 5, at 620 (evaluating all evidence on employment discrimination and finding "credence" to conclusion of wide-spread discriminatory attitudes). See also Michael Fix, George C. Galster & Raymond Struyk, *An Overview of Auditing for Discrimination* in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 1-43 (1993) (reviewing audit evidence of discrimination, controversies surrounding audits, and concluding that discrimination continues in America and "seriously limits" opportunities for minorities).

¹⁵³ HARRY CROSS, URBAN INSTITUTE REPORT 90-4, EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS 1-5 (1990).

¹⁵⁴ See Timothy Bates, *Unequal Access: Financial Institution Lending to Black and White Owned Small Business Start-ups*, 19 J. URB. AFF. 487-95 (1997); George Galster, *Use of Testers in Investigating Discrimination in Mortgage Lending* in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 316 (Michael Fix and Raymond Struyk, eds., 1993) (finding statistical evidence of "putative discrimination," particularly at certain suspect financial institutions).

American business organizations.¹⁵⁵ The Commission conducted exhaustive hearings and a detailed investigation into the problems faced by minorities and women in advancing in business. Its findings are disturbing to any person wanting to believe that America should be a meritocracy:

- i) 97 percent of senior managers in corporate America are white and 95 percent are male;
- ii) African-American men with professional degrees earn 21 percent less than white men with the same degrees;
- iii) 0.4 percent of managers are Hispanic, even though 8 percent of the population is Hispanic;
- iv) Asian Americans earn less than whites and receive fewer promotions, even with more education.¹⁵⁶

Additionally, disabled persons also seem to be subject to pervasive discrimination—as of 1992 only 35 percent of disabled persons participate in the workforce.¹⁵⁷ Finally, even as recently as 1998, women made only 62.7 percent of the salary of male employees, and such discrepancies prevailed even when compared with men of comparable levels of seniority, or performing comparable functions.¹⁵⁸ All of this demonstrates that too often corporate America is hobbling itself by failing to assess properly the talents of its labor pool.¹⁵⁹ While admittedly, the U.S. is far ahead of many of its competitors, much work remains undone.¹⁶⁰ Corporations must create cultures that have zero tolerance for invidious discrimination.¹⁶¹ In order to create

¹⁵⁵ GLASS CEILING II, *supra* note 13, at 9 (“The glass ceiling is a reality in corporate America.”).

¹⁵⁶ *See id.* at 9.

¹⁵⁷ CONFERENCE BOARD 1997, *supra* note 3, at 12.

¹⁵⁸ AMERICAN MANAGEMENT ASSOCIATION, COMPENSATION AND BENEFITS: A FOCUS ON GENDER I (1999).

¹⁵⁹ *See id.* at 10 (“To compete successfully at home and abroad, business must make full use of the resources embodied in our people . . . all of our people.”). *See also* Ian Ayers & Frederick E. Vars, *When does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1592-96 (1996) (reviewing empirical data and concluding that “underutilization of minority businesses is much more pronounced in the private sector than in government procurement”).

¹⁶⁰ *See supra* note 2 and accompanying text. *But see Welcome to the World: Making a Virtue of Diversity*, ECONOMIST (Canada Supp. 1999), July 24, 1999, at 9 (discussing Canadian efforts to embrace diversity).

¹⁶¹ *See* EEOC REPORT, *supra* note 136, at 265 (“Establish and enforce a zero tolerance harassment policy” and “[e]stablish and enforce an anti-discrimination policy.”). According to Jerry Kirby, human resources legal counsel for Proffitt’s, Inc., employers are well-advised to take a “zero tolerance position on harassment” and target instances “before the conduct even comes close to the harassment standard.” Matt Vega, *Employer Liability in Sexual Harassment Cases: Two New U. S. Supreme Court Decisions*, 60 ALA. LAW. 43, 46 (1999). It is not enough to conclude that racists will discriminate and businesses cannot be held responsible for the racist attitudes of racist employees. As one diversity expert has stated: “It’s the culture of the

such zero-tolerance cultures, policies prohibiting invidious discrimination must be enacted and enforced to a much greater extent than they have been in the past. Corporate America is doing a miserable job of eliminating pernicious discrimination. Corporate directors and officers must face the fact that, here, the job is not getting done.

More aggressive policies are clearly mandated. Managers indulging in personal racist bigotry or other forms of unlawful discrimination must be subject to dismissal. Employees generally, but particularly supervisors, must be punished for the use of racial slurs or racial epithets.¹⁶² Prospective employees should be subject to inquiries designed to uncover those that are patently racist or sexist.¹⁶³ Obviously, draconian investigative and hiring practices could be counterproductive. Corporate America, however, simply cannot afford to hire or retain racial extremists and sexist bigots. From a legal point of view, employees of this nature can expose firms to legal liability and unlimited monetary losses.¹⁶⁴

Suggestions for improvement also include corporate self-testing and self-auditing. Corporations themselves would ferret out corporate representatives indulging in baseless discrimination. This technique is frequently used to test quality management in order to uncover invidious discrimination in a variety of other contexts and would certainly carry a large deterrent effect.¹⁶⁵ There is no reason to believe that external testing is likely to cease, as many government regulators and civil rights experts are calling for expanded testing, in all areas in which discrimination is occurring, from employment to housing.¹⁶⁶ A corporation is far better served by uncovering employees that discriminate than by having outsiders

organization that perpetrates bias, not just individuals." Fortune & SHRM Study, *supra* note 19, at 53.

¹⁶² At least one major corporation recognizes the need to stem inappropriate conduct before it can lead to harassment or discrimination claims. The New York Times recently terminated 22 workers and reprimanded 20 more in connection with the circulation of e-mails that contained "sexual images" and "jokes." The company said the e-mails were "offensive" and that the terminations were necessary to maintain an "harassment-free workplace." Ann Carrns, *Prying Times: Those Bawdy E-mails Were Good for a Laugh—Until the Ax Fell*, WALL ST. J., Feb. 4, 2000, at A1. The Times claimed that the employees were not exercising free speech because harassment is not protected speech. Moreover, the Times had clear policies proscribing such conduct. *Id.*

¹⁶³ *See id.*

¹⁶⁴ *See supra* notes 44, 48, 123, 128 and accompanying text.

¹⁶⁵ *See* A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 1-5 (Michael Fix and Austin Turner eds., 1998) (stating that evidence of discrimination from statistical aggregates such as employment, along with regression analysis, has been strong; but, the clearest, most direct and powerful evidence of discrimination comes from paired testing).

¹⁶⁶ *See* Roderic V. D. Boggs, *The Future of Civil Rights Testing: Current Trends and New Directions*, in A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 113, 120-21 (Michael Fix & Austin Turner eds., 1998) (reviewing new testing initiatives).

find discrimination.¹⁶⁷ Those found to be engaging in unfounded racial discrimination must face harsh sanctions, such as dismissal, in order to create sufficient deterrent effect. These steps could, in combination, prove a powerful tool for stemming discrimination.

Another means for ferreting out discrimination or harassment is assuring that employees have an effective means of reporting misconduct. Multiple channels of redress should be available so that an employee is not just relegated to communicating problems through their immediate supervisor, who may have incentives for discouraging complaints or may even be the offending party.¹⁶⁸ Here, too, it seems that women should be able to assert problems to other women of authority and minorities to other minorities. Perhaps nothing is more stressful to an employee than reporting a supervisor for inappropriate, even outrageous, conduct. Thus, the person representing the corporation must demonstrate extraordinary sensitivity and discretion.¹⁶⁹ Some companies have even gone so far as to create toll-free, 24-hour hotlines to field harassment complaints.¹⁷⁰ Again, an effective grievance procedure is a precondition to obtaining the maximum degree of legal protection available in this area.¹⁷¹

The elimination of all forms of bigotry and harassment in the workforce is fundamental to the establishment of a fair work environment necessary to maximize the productivity of all workers in a diverse environment.¹⁷² As such, effective programs in this area are indicative of initiatives designed to stem invidious discrimination and unlock the maximum potential of all employees.

¹⁶⁷ See *supra* notes 44, 48, 123, 128 and accompanying text.

¹⁶⁸ See *Vega*, *supra* note 161, at 46. See also EEOC REPORT, *supra* note 136, at 266-67 (highlighting need for fair and effective grievance procedures free from retaliation).

¹⁶⁹ See *Fesel v. Masonic Home of Delaware, Inc.*, 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979) (holding that in health-care context involving "intimate care" may justify discrimination based upon sex).

¹⁷⁰ Health South has instituted such a hotline. Group Vice-President of Human Resources at Health South, Brad Hale, cautions that a hotline cannot be the sole means of fielding complaints, as personal contact is eliminated and anonymous calls are facilitated. See *Vega*, *supra* note 161, at 46.

¹⁷¹ See *Ramirez*, *infra* note 224.

¹⁷² See EEOC REPORT, *supra* note 136, at 261 (diversity initiatives should include all employees, including white males, and should not cause or result in unfairness). In fact, diversity theory recognizes that white males also contribute to a diversity within a workforce. For example, Xerox is considered a "trailblazer in [diversity] initiatives" and is ranked number 20 in *Fortune's* "Diversity Elite," with 39% of its new hires being minorities. See *Robinson & Hickman*, *supra* note 4, at 64. Still, when Xerox discovered a dearth of white males at the entry level salesperson position, it adjusted its recruitment to hire more white males. See *Gilbert, Stead, & Ivancevich*, *supra* note 25, at 71. "Diversity management is a voluntary organizational program designed to create greater inclusion of all individuals. . . ." *Id.* at 61.

C. Encourage the Positive Use of Diversity

Once the business case for diversity is properly understood, the methods for encouraging the positive uses of diversity are easily comprehended. Human resource managers should be reaching out to attract qualified applicants in ways that ensure the corporation is drawing from the largest labor pool possible. The Human Resources Department could be expected to be more successful in this effort with the benefit of women and minorities, who could provide insight into reaching the full extent of the expanded labor pool, and in demonstrating to women and minority candidates that the corporation holds fair opportunities for such candidates.¹⁷³ As the EEOC has observed, companies must “develop a vision of what your company will look like when you have achieved full diversity. . . .”¹⁷⁴ This means that employers must communicate and reinforce the means by which diversity is a business asset and think about how diversity fits with the business needs of a given position.¹⁷⁵ Diversity management is about matching people with jobs, and it has been since its earliest incarnations. One dimension of this process includes consideration of the benefits of cultural and ethnic diversity for the organization.¹⁷⁶ For instance, any firm that sells a product that is disproportionately marketed to populations of color, or to women, ought to assure that all facets of product development and marketing take advantage of the perspectives offered by traditionally excluded groups. Simply stated, diversity management should be integral to a firm’s business plan.¹⁷⁷

Procter & Gamble provides a compelling example. Beginning in 1996, the firm, a worldwide consumer marketing behemoth successfully peddling brands from Tide to Crest, publicly called for greater diversity in its marketing efforts.¹⁷⁸ “For Procter & Gamble and other marketers, diversity has gone from beyond the stage of regulatory compliance or window dressing to become a matter of brand survival” in

¹⁷³ See EEOC REPORT, *supra* note 136, at 262-63 (outlining best practices for expanding applicant pool and the role of excluded groups in that process). Certainly, one method of demonstrating that a corporation is a place that values diversity is to have the needs of a diverse workforce reflected in the benefits a corporation extends to its employees. For example, the securities industry, facing a very competitive labor market, has moved beyond mere outreach programs to structuring benefits in a way that is attractive to a maximum number of candidates. See Silverman, *supra* note 44, at B1 (reporting that major financial companies are increasingly offering gay employees benefits for their domestic partners).

¹⁷⁴ EEOC REPORT, *supra* note 136, at 260.

¹⁷⁵ See *id.* at 259-64. “The management commitment must be clearly and continually communicated throughout the organization and preferably outside as well. A key element in that communication should be the concept that in a diverse nation and in a diverse world, having a diverse workforce is a necessary asset for continued success into the 21st century.” *Id.* at 268.

¹⁷⁶ See, e.g., DAVID JAMIESON & JULIE O’MARA, *MANAGING WORKFORCE 2000: GAINING THE DIVERSITY ADVANTAGE* 7 (1991) (identifying four strategies underlying diversity initiatives: matching people and jobs, managing and rewarding performance, informing and involving people, and supporting lifestyle and life needs).

¹⁷⁷ See GLASS CEILING II, *supra* note 13, at E4.

¹⁷⁸ See Jack Neff, *Diversity*, *ADVERTISING AGE*, Feb. 16, 1998, at S1.

today's "melting pot" consumer markets.¹⁷⁹ According to Senior Vice President for Advertising, Robert Wehling: "When we started getting more diverse . . . we started getting richer marketing plans, because they came up with things that white males were simply not going to come up with . . .'"¹⁸⁰ "Over the last five years, 41% of Procter & Gamble's new management hires have been women and 27% minority members."¹⁸¹ Indeed, the entire advertising industry is becoming more attuned to the ideas of market fragmentation – the idea that unique cultural perspectives can help advertisers reach unique market sectors.¹⁸²

Marketing is only the tip of the iceberg in terms of the potential benefits of embracing diversity. Given the strong empirical basis that supports the increased effectiveness and innovation of working groups, this is an area of nearly unlimited reach in terms of reaping the rewards of diversity.¹⁸³ Working groups permeate corporate America, meaning that the business world must be teeming with opportunities for leveraging diversity.

Encouraging the positive use of diversity also means that managers should be evaluated based in part upon their facility in managing diversity.¹⁸⁴ Each manager should be evaluated on such elements as finding opportunities to exploit diversity, ensuring that minorities and women are evaluated fairly, taking steps to help diverse workers become comfortable in the working unit, utilizing all personnel in a fashion that maximizes their productivity, and maintaining a discrimination-free work environment.¹⁸⁵ This requires some system of measurement.¹⁸⁶ Measurement

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See, e.g., Steven M. Kates, *Making the Ad Perfectly Clear: Marketing "Normality" to the Gay Men's Community?*, 28 J. ADVERTISING, Spring 1999, at 25 (arguing that queer theory is a potentially powerful source for productive marketing practices).

¹⁸³ See *supra* notes 64-77 and accompanying text.

¹⁸⁴ The SHRM found that only about half of all organizations with diversity programs had a method in place for measuring the effectiveness of the programs. SHRM STUDY, *supra* note 8, at 4. The most common indicia of success were retention statistics, promotion statistics and hiring statistics. See *id.* Measurable management objectives might include criteria such as demonstrated commitment to diversity through recruitment, interviewing, job assignments, and mentoring for women and minorities and people with disabilities; modeling of desired behavior; and active involvement in diversity education. See CONFERENCE BOARD 1995, *supra* note 57, at 8.

¹⁸⁵ See EEOC REPORT, *supra* note 136, at 260-65 (stating that best practices link diversity performance to manager compensation and promotion). Currently only about 42% of Fortune 500 companies with diversity programs link diversity management to compensation. See SHRM STUDY, *supra* note 8, at 8. Diversity theory posits that businesses can only maximize workforce productivity if all employees are placed in a comfortable environment. This requires positive steps to remove the burdens of hostile environments for all employees. See, e.g., COX & BEALE, *supra* note 6, at 131 (citing HOMOPHOBIA: HOW WE ALL PAY THE PRICE (Warren J. Blumenfeld, ed., 1992) (discussing diversion of energy required to conceal sexual orientation)).

initiatives can cut both ways, as managers who are inundated with reporting requirements, diversity training sessions and the need to compile data may come to resent diversity issues.¹⁸⁷ Nevertheless, in the business community, "if you can't measure it, forget it."¹⁸⁸ Human resource managers are in the process, therefore, of designing measurement systems that allow "the cost efficiency and effectiveness" of diversity management to be scrutinized and assessed.¹⁸⁹ Ultimately, measurement mechanisms will permit diversity management to rise or fall on its own merits.¹⁹⁰ More importantly, however, accurate measurement of the success of a manager's diversity initiatives also provides an objective basis for linking diversity efforts to compensation; only by making diversity a compensation issue can corporations assure that the issue is taken seriously.¹⁹¹

D. Diversify Senior Management and the Board

More and more institutional shareholders are insisting that the corporations in which they hold shares positively address the issue of diversity, especially by pursuing diverse senior management and boards.¹⁹² These shareholders have determined that diversity pays. This shareholder conviction is supported by the American Management Association survey of performance of senior management

¹⁸⁶ See *id.* at 261 (stating that "[s]elf-analysis," monitoring and assessment are "key" to implementing diversity initiatives).

¹⁸⁷ See Jonathan Stuts & Randy Massengale, *Measuring Diversity, Initiatives*, HR MAGAZINE, December, 1997, at 86 (stating that HR professionals are trying to find ways to quantify diversity progress with a focus on the "bottom-line") (Stutz and Massengale are senior diversity managers at Microsoft Corporation).

¹⁸⁸ *Id.* at 90 (quoting Professors Joseph Tiffen and Ernest McCormick of Purdue University's Industrial Psychology Department).

¹⁸⁹ *Id.* at 86-90. Microsoft, for example, has developed a diversity index that is based upon existing EEOC reporting requirements for federal contractors. See *generally* Exec. Order No. 11,246, 30 F.R. 12319 (1965) (requiring "affirmative action" by all federal contractors to eliminate discrimination). This lessens administrative burdens and provides concrete baselines for assessing the success of diversity initiatives.

¹⁹⁰ Measurement can also act to refine diversity theory. Over time experience may give management a means of accurately assessing the sources of the greatest diversity contributions. Maintaining records and attempting to measure performance gains will allow management to make intelligent hiring decisions based upon actual experience. See Bowen, Bok & Burkhart, *supra* note 104, at 144 (arguing that diverse workforces allow institutions to broaden the base of skills available to achieve institutional objectives). In the end diversity theory extends only as far as the actual payoffs that proper diversity management yields. Thus, measurement can only enhance the operation of diversity theory not threaten its viability.

¹⁹¹ See EEOC REPORT, *supra* note 136, at 265 (stating that Equal Opportunity, including diversity, must be a performance standard that is tied to managers' compensation).

¹⁹² For example, TIAA-CREF, one of the nation's largest institutional shareholders, has issued a "Policy Statement on Corporate Governance" that emphasizes, among other things, the desirability of diverse corporate boards. WILLIAM L. CARY & MELVIN ARON EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 253 (7th ed. 1995). See also *supra* note 129.

teams.¹⁹³ However, the Association concluded that “it is not the predominance of any one group, but rather the participation” of numerous diverse members that seemed to lead to superior performance.¹⁹⁴ This suggests that numbers alone are less important than actually encouraging diverse members to voice their ideas and perspectives and valuing input from diverse sources.¹⁹⁵ The Association correlated superior senior management performance to diversified teams, in terms of gender, age, ethnicity and experience.¹⁹⁶

Moreover, it appears likely that boards dominated by white males fail to deal aggressively with diversity issues.¹⁹⁷ Women and minorities are simply far more attuned to these issues, and therefore can help boards address these issues in a balanced and serious fashion.¹⁹⁸ Given the crucial role that senior management support plays in the success of diversity initiatives, it is similarly important that senior management “walk the talk.”¹⁹⁹ At the very least, this means that when senior management evaluates middle management on diversity competency, that senior management have a track record that shows real commitment to diversity. Stated otherwise, if diversity management comes from the top, then the top must diversify.²⁰⁰ Those companies maintaining homogenous senior management and boards therefore appear unlikely to be embracing diversity in a way designed to maximize the benefits of a diverse workforce.

E. Demonstrate Diversity Successes

For the same reasons that senior management support is necessary to successful diversity management, it is imperative that all workforce members be educated regarding the power of diversity.²⁰¹ CEOs who have struggled to make diversity initiatives succeed typically cite the perception that diversity initiatives do

¹⁹³ American Management Association, *supra* note 66, at 1 (“[A] mixture of genders, ethnic backgrounds and ages in senior management teams — consistently correlates to superior corporate performance.”)

¹⁹⁴ *Id.* at 7.

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

¹⁹⁷ *See* Lublin, *supra* note 148, at B1.

¹⁹⁸ “‘You are going to take this [diversity] issue much more seriously if you have someone at the table who has a personal and social interest in making sure those issues are addressed,’ observes Dennis Carey, co-managing director of U.S. board services for recruiters SpencerStuart in Philadelphia.” *Id.*

¹⁹⁹ EEOC REPORT, *supra* note 136, at 260.

²⁰⁰ *See id.* at 260 (“Senior, middle and lower management must champion the cause of diversity and provide not only symbolic but actual leadership for its implementation.”).

²⁰¹ *See id.* at 261 (“Reinforce communication of the message that diversity is a business asset and a key element of business success.”).

not add value as a primary impediment to success.²⁰² This has two fundamental dimensions. First, management must ensure that the business basis for diversity be clearly broadcast throughout the company.²⁰³ Second, when diversity pays actual dividends, its benefits must be similarly broadcast.²⁰⁴ Empirical evidence suggests that when women and minorities are ushered into corporate America for business reasons resentment is mitigated. As the EEOC has found, business must “[c]ommunicate and [r]einforce the message that diversity is a business asset and a key element of business success” in order to pursue the profit opportunities posed by proper diversity management.²⁰⁵

F. Diversity Issues Only Begin at Hiring

One of the lessons from the affirmative action wars of past decades is that it makes little sense to hire broadly and inclusively, perhaps even preferentially, into an organizational culture that is manifestly tainted²⁰⁶ by a racist tradition.²⁰⁷ Embracing

²⁰² See CONFERENCE BOARD 1997, *supra* note 3, at 7 (“[T]he most important reason why diversity is not working at Dupont is because there are still people who not do believe it has value.”) (statement of Dupont CEO, John A. Krol).

²⁰³ How well an enterprise works – how productive and successful it is in a highly competitive global economy – depends on whether it has the best people and people who are comfortable working across lines of race, class, religion, and background. The days of insularity and parochialism are gone. Diversity is a business imperative because it affects competitiveness.

Executives must articulate clearly how diversity contributes specifically to what their organizations are trying to achieve.

Bowen, Bok & Burkhart, *supra* note 104, at 141.

²⁰⁴ See EEOC REPORT, *supra* note 136, at 267 (“Consider special emphasis [on] contributions of various cultural and/or social heritages.”).

²⁰⁵ *Id.* at 261, 268 (management must communicate “that in a diverse nation and in a diverse world, having a diverse workforce is a necessary asset for continued success into the 21st century”).

²⁰⁶ [W]e also believe that the themes raised by this article do suggest an agenda for moving forward. First, we must recognize that race matters. It influences every individual’s experience within an organization. To the extent that the experience is negative, it hurts business. The time people invest in worrying about how to avoid or minimize their differences is time not used to produce results. Second, our efforts in the future must look beyond simply recruiting people of color into an organization. They must seek to create conditions that allow all people to contribute fully and benefit from their experiences. Finally, the article suggests that responsibility for change lies with both people of color and the white majority, but especially with those who occupy positions of leadership and authority regardless of race.

A business environment of true inclusion will require a quality of conversation within and across lines of race and hierarchy that is not present in many organizations today.

David A. Thomas and Suzy Wetlauffer, *A Question of Color: A Debate on Race in the U.S. Workplace*, HARV. BUS. REV., Sept.-Oct. 1997, at 118, 124-25.

diversity means creating a culture conducive to maximizing the productivity of all employees, and this task has little or nothing to do with hiring decisions.²⁰⁸ “Any business climate in which broadly different individuals may succeed will be a climate where the whole organization prospers.”²⁰⁹ Issues of gender or race necessarily infect the socialization process, the mentoring process and the grooming process. Too often, women and people of color are left out of these informal channels of success.²¹⁰

Certainly, managers should be evaluated on their success in creating an environment conducive to success for all employees. Some companies are taking steps to counter the phenomenon of women and people of color not receiving informal mentoring.²¹¹ For example, companies are establishing diversity networks or affinity groups for employees with traditionally excluded backgrounds, so that new hires can be assured of contact with successful employees with a similar background.²¹² Similarly, firms are establishing formalized mentoring programs for new hires who are not white males.²¹³

²⁰⁷ Indeed, this is another major distinction between diversity initiatives and affirmative action: affirmative action focuses primarily upon hiring decisions. See *supra* note 11 and accompanying text.

²⁰⁸ How do you change a culture? One of the participants at the Harvard Business Review roundtable provided an example:

Terrance D. Larson, CEO of Core States Financial Corporation of Philadelphia, [has] over the past eight years . . . invested millions of dollars in the company’s diversity culture-change initiatives. Every employee in the company participates in a three-day diversity-education and awareness-training program. The CEO’s direct reports attend additional seminars and classes. In addition, Larson released 30 line managers from their duties for nearly a year to commit 100% of their time to making CoreStates a more inclusive environment. Finally, Larson ties compensation to diversity goals.

Thomas & Wetlaufer, *supra* note 206, at 127.

²⁰⁹ James R. Houghton & Kenneth Labich, *Employees Must Reflect the Diverse World*, FORTUNE, Mar. 26, 1990, at 56 (statement of Corning CEO Houghton).

²¹⁰ In late 1997, the Harvard Business Review sponsored a roundtable discussion of race in the U.S. workplace. The roundtable participants consisted of ten senior managers of color from a wide cross-section of corporate America. Many of their observations were remarkably consistent: i) race still poses a major obstacle to success for people of color in Corporate America; ii) some of its pernicious effects are in the mentoring process and socialization process, whether the result of conscious racism or otherwise; and iii) diversity programs must transcend hiring decisions. See generally Thomas & Wetlaufer, *supra* note 206, at 118-132.

²¹¹ See Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1130 (1999) (arguing that most discrimination today is “unconscious disparate treatment”).

²¹² See EEOC REPORT, *supra* note 136, at 264, 267 (recommending mentoring and networking programs as well as diversity councils).

²¹³ At Polaroid, we have a group called the Diversity Network Alliance. The alliance is in all parts of the company and includes blacks, Hispanics, and gays, and it’s truly not a senior-management movement. It’s an initiative run by and for the people at every level of the organization. It’s everywhere, and it’s great.

Another thing is that people of color have a buddy-mentoring program for recent hires. They get to meet executives with a lot of influence

Diversity training is also important.²¹⁴ A corporation's ability to embrace diversity is almost necessarily hindered by its, and America's, racist past. The only way to change attitudes already entrenched in corporate America is through profound education.²¹⁵ Diversity training now is a far more sophisticated exercise than in the past. Managers need to learn new ways to unleash the creativity of all of their employees.²¹⁶ Many firms are forming diversity councils and diversity task forces, or similar working groups.²¹⁷ Such groups typically include directors, members of the board's executive committee, even the CEO, as well as more junior members capable of providing input from various levels within the firm.²¹⁸ These groups are charged with forming diversity strategies, undertaking programs to ensure success, overseeing diversity training initiatives, and working with affinity to groups to ensure that such initiatives are effective.²¹⁹ Fundamentally, however, diversity initiatives must permeate all aspects of company, from both a functional and hierarchical view.

These "best practices" are emblematic of value-driven and merit-based diversity initiatives. These initiatives are not naked racial preferences, but instead represent the most advanced thinking on diversity from the business community.²²⁰ These diversity management practices show that significant segments of the business community are pursuing a vigorous program of inclusion for all workers in an effort to exploit new profit opportunities in a fair and efficient manner and in an effort to assure that all elements of the workforce participate in these programs.²²¹ When implemented in accordance with these earmarks, these diversity initiatives can be

in the organization. But equally important, they have a chance on a regular basis to talk about their careers with people like them who have been there and know the ropes.

Thomas & Wetlaufer, *supra* note 206, at 126 (statement of John Jenkins, Vice President of Consumer Imaging, Polaroid Corporation).

²¹⁴ See EEOC REPORT, *supra* note 136, at 267. Diversity training has suffered some notable criticism. For example, charges of reinforcing stereotyping are common. "While acknowledging up-front that this risk is there, we should not let it block our efforts to promote education about intergroup differences." COX & BEALE, *supra* note 6, at 80. Thus, if cultural differences are approached in an informed manner, and through a process that appreciates the value of such differences, then the value of such differences can be extracted. *See id.*

²¹⁵ See GLASS CEILING II, *supra* note 13, at E4.

²¹⁶ See Teresa M. Amabile, *How to Kill Creativity*, HARV. BUS. REV., Sept.-Oct. 1998, at 77, 87 ("Fostering creativity often requires that managers radically change how they build and interact with work groups.").

²¹⁷ See Baytos, *supra* note 144, at 95.

²¹⁸ *See id.* at 96.

²¹⁹ *See id.*

²²⁰ Indeed, the most prestigious professional business organizations support merit-based diversity management. *See supra* notes 51-69 and accompanying text.

²²¹ Diversity initiatives do not allow for a favored race, gender, or group identity and are instead concerned with assuring that all available cultural insights and perspectives are exploited. *See supra* notes 1, 6, 8, 43, 53, 172 and accompanying text.

expected to unleash a substantial competitive advantage.²²² Real diversity management is thus fundamentally distinguishable from racial preferences implemented in the name of diversity with no real substance indicative of a value-based program. When supported by comprehensive and integrated practices, these diversity management techniques easily withstand scrutiny from the criticism leveled generally against “diversity.” For example, no critic can really call these initiatives, defined in such a detailed manner and supported by an extensive and growing body of empirical evidence, “shibboleth.”²²³

I have elsewhere addressed the likely critique of diversity in the context of articulating a policy approach to these initiatives under Title VII.²²⁴ Essentially, because these diversity initiatives are merit-based, facially neutral and culture-conscious, as opposed to race-conscious, there is no basis for rejecting cultural diversity as an individual dimension of merit. After all, it is the cultural insights and diversity that business really seeks, not morphological features.²²⁵ It is cultural insights that foster marketing effectiveness under diversity theory, not morphological features.²²⁶ Yet, any definition of “race” in America requires a central role for morphological features.²²⁷ Certainly, culture and race are bound together; but the value of a diverse workforce flows strictly from culture and not at all from “race.” Consequently, valuing cultural diversity is a means of creating opportunities for traditionally excluded groups, not on the basis of race or gender, but based upon real, not conjectural, cultural insights.²²⁸ This culture-based approach to our increasing diversity should therefore be fostered.

²²² See *supra* notes 66-69, 110-13 and accompanying text.

²²³ E.g., Lino Graglia, *Professor Loewy's "Diversity" Defense of Racial Preference: Defining Discrimination Away*, 77 N.C.L. REV. 1505, 1507 (1999) (“Possible arguments for advantaging some individuals on the basis of race—and therefore necessarily disadvantaging others—are few and unpromising . . . and ‘diversity’ has become the new shibboleth.”).

²²⁴ See Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. (forthcoming 2000) (manuscript on file with author) (demonstrating that there is no valid policy objection to embracing cultural diversity).

²²⁵ See *supra* notes 66-77 (demonstrating non-morphological diversity benefits in fostering “kaleidoscope” thinking and creativity) and notes 78-86 (demonstrating non-morphological diversity benefits in fostering more efficient communication between customers and producers).

²²⁶ See *id.*

²²⁷ Ramirez, *supra* note 224 (demonstrating centrality of morphological features to legal construction of race).

²²⁸ If the cultural benefits are merely conjectural, there is a danger that culture is being used as a proxy for illegal race discrimination. See *Rice v. Cayetano*, 528 U.S. 495, ___, 120 S. Ct. 1044, 1055-56 (2000) (holding that state had used “ancestry” as a “proxy for race” to mask action that had a “racial” purpose).

III. Facilitating the New Cultural Diversity

Given the undeniable demographic and economic trends taking hold in our society, it would seem to be in the public interest, as well as the interest of the business community, to facilitate the transition of corporate America from a bastion of apartheid power to the multi-cultural leader of the future.²²⁹ First, latent racism, sexism, and other forms of discrimination impose astounding costs upon our society, and any policy that results in the inclusion of traditionally oppressed minorities would serve to mitigate such costs.²³⁰ Second, although it is clear that leading companies are indeed embracing diversity, and redefining best corporate practices in this area, many elements of corporate America continue to resist embracing diversity.²³¹ Third, the U.S. government has determined as a matter of policy to pursue the opportunities implicit in globalization. If the U.S. intends to compete in the global arena, it must use all of its resources and the cultural insights of all of its diverse workforce to succeed in this new world economy.²³² Fourth, for the U.S. to turn its back upon the opportunities implicit in diversity would be tantamount to allowing nearly half of the population to be excluded from the economic success of the country, perpetuating gross inequities and inviting dangerous racial tensions.²³³ In short, the U.S. has little choice but to embrace diversity, and should pursue policies to encourage businesses to continue to use diversity initiatives to increase

²²⁹ Business leaders often stress a related reason for seeking diversity at all levels of their organizations. Ultimately, they say, corporations will not be healthy unless the society is healthy, and a healthy society in the twenty-first century will be one in which the most challenging, rewarding career possibilities are perceived to be, and truly are, open to all races and ethnic groups. How can you expect an effective, congenial workplace, asked one executive we interviewed, if the people of different races who work there are angry and polarized because the broader society isn't offering hope of progress?

Bowen, Bok & Burkhart, *supra* note 104, at 149.

²³⁰ For example, the U.S. Government spends over \$140 billion per year for programs to assist the disabled. This amount could be reduced if business did truly offer "reasonable accommodation" to these individuals. For unexplained reasons, women with disabilities appear to suffer disproportionate discrimination. Disabled women make only 65% of the earnings of disabled men, even though they are better educated than their male counterparts. See CONFERENCE BOARD 1997, *supra* note 3, at 12.

²³¹ See *supra* notes 12-14 and accompanying text.

²³² "The major premise of this paper is that because the U.S. workforce is more diverse than that of many competitor nations, a poor job of managing diversity creates a competitive disadvantage, while effectively managing diversity offers a competitive advantage." COX & SMOLINSKI, *supra* note 50, at 1.

²³³ See CORNEL WEST, RACE MATTERS 8, 11 (Vintage Ed. 1994) (1993) (stating that "there is no escape from our racial interdependence, yet enforced racial hierarchy dooms us as a nation to collective paranoia and hysteria—the unmaking of any democratic order" and that a solution requires recognition that our "best hope and power consist of ourselves and our common history" if we can "look to new frameworks and languages to understand our multilayered crisis and overcome our deep malaise.").

competitiveness.²³⁴ Focusing narrowly upon the regulatory context of corporations, this paper makes three specific proposals.

A. The Securities Laws & Diversity Issues

The fundamental role of securities law is to facilitate adequate disclosure of material information to investors. This article has already demonstrated that diversity can both affect profitability and influence stock prices.²³⁵ Moreover, those companies that fail to appropriately address diversity issues expose their shareholders to huge (and almost certainly undisclosed) risks.²³⁶ Yet, thus far, there has been precious little disclosure or regulatory insight on whether diversity risks and initiatives should be disclosed.²³⁷ This article argues in favor of such disclosure, particularly in light of all the evidence discussed in the first part of this article demonstrating the increasing importance of proper diversity management. The SEC should recognize the growing importance of diversity issues to the world of business and require disclosure of the risks of increased business diversity as well as the means by which companies are (or are not) addressing diversity challenges.

Essentially, publicly held corporations must disclose all material information regarding their corporations on a periodic basis.²³⁸ The best definition of materiality is from *TSC Industries, Inc. v. Northway*.²³⁹ The question of materiality, it is

²³⁴ Noted scholars are showing that much can be done to make America a truly "color blind" society, without resort to racial preferences. *E.g.*, Dorothy A. Brown, *Racial Equality in the Twenty-first Century: What's Tax Policy Got to do With It*, 21 U. ARK. LITTLE ROCK L.J. 759 (1999) (advocating elimination of deductibility of defense costs in discrimination cases as indirect subsidy of sexism and racism). Professor Brown's argument would support the premise of this article that steps should be taken to encourage business to move quickly to exploit the opportunities implicit in increasing diversity. *See also* Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 974 (1995) (offering a series of race-neutral proposals to empower minorities).

²³⁵ *See supra* notes 110-13 and accompanying text.

²³⁶ *See supra* notes 123-31 and accompanying text.

²³⁷ Of course, the SEC has long issued general statements regarding materiality. *See, e.g.*, SEC Comment on Timely Disclosure of Material Corporate Developments, Rel. Nos. 33-5092, 34-8995 (Oct. 28, 1970).

²³⁸ *See, e.g.*, 15 U.S.C. § 78m(a) (2) (1994) (requiring the filing of annual and quarterly reports for publicly held companies); 17 C.F.R. § 240.12b-20 (1999) (requiring full and truthful disclosure of material facts in periodic reports); 17 C.F.R. § 240.14a-9(a) (1999) (requiring full and truthful disclosure of material facts within proxy statements); SEC Financial Reporting Release No. 36, 6 FED. SEC. L. REP. (CCH) ¶ 73,193 (1989) (imposing disclosure obligation within required reports when known development is reasonably likely to have "material" effects on company's financial results). *See also* MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW § 10.07 (1996) ("The periodic reports that issuers are required to file under the Exchange Act are comprehensive, and one generally cannot omit material bad news without violating the securities laws."); LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 1854-1871 (1990) (providing overview of periodic disclosure requirements including analysis of gaps in timely disclosure of all material information).

²³⁹ 426 U.S. 438 (1976).

universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.²⁴⁰ Diversity is increasing in importance and is therefore more likely to be material with increasing frequency.²⁴¹ Diversity is most likely to impact publicly held companies because such companies typically have sufficient access to capital to consider exploiting international markets. Moreover, unlike sole proprietorships or small family businesses, publicly held companies are most likely to be faced with difficult labor markets in the future.²⁴² Such information suggests that diversity is often, if not always, a material issue facing publicly held companies. The materiality of the diversity issue has important consequences under the federal securities laws. Material facts must be disclosed truthfully and fully each time a publicly held company tries to sell securities to raise capital,²⁴³ each time a publicly held company files its periodic reports as required under securities laws, and with each annual proxy statement.²⁴⁴

The SEC, and certainly Congress, also has the power to deem diversity material in appropriate circumstances. Deeming diversity to be material would have the effect of requiring companies to disclose the risks of increasing diversity within their business environment and the means by which companies are addressing such risks. Recently, Congress and the SEC acted together to force companies to confront the problems arising from the so-called "Y2K" problem.²⁴⁵ The SEC, with Congressional prompting, issued interpretative releases that essentially highlighted the materiality of "Y2K" and mandated disclosure of problems in appropriate circumstances.²⁴⁶ The SEC had previously issued such interpretive guidance in other areas of broad business concern, such as the energy crisis of the 1970s.²⁴⁷ Interpretive guidelines bring attention to such issues and help to stem problems before they occur by encouraging proactive thinking and forcing companies to disclose potential problems. Certainly, the issues facing the U.S. regarding race present a compelling

²⁴⁰ See *id.* at 439 (stating that "the general standard of materiality . . . is: an omitted fact is material if there is a substantial likelihood that a reasonable investor would consider it important" in making an investment decision).

²⁴¹ See *supra* notes 8, 17, 19, 28, 29 and accompanying text.

²⁴² See *supra* notes 14-15 and accompanying text.

²⁴³ See 15 U.S.C. § 77k, 77m (1994) (requiring full and truthful disclosure of material facts in connection with a public offering of securities).

²⁴⁴ See *supra* note 238 and accompanying text.

²⁴⁵ See Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences, Rel. Nos. 33-7558, 34-40277 (July 29, 1998). See also Elliot J Weiss, *Disclosure and Corporate Accountability*, 34 BUS. LAW. 575, 575 (1979) ("One of the central themes of the system by which large corporations are governed is that corporate decision making is regulated through mandatory disclosure requirements rather than direct government intervention.").

²⁴⁶ FAQ About the Commission's Statement Regarding Y2K, Rel. Nos. 33-7609, 34-40649 (Nov. 9, 1998).

²⁴⁷ See Disclosure of the Impact of Possible Fuel Shortages on the Operation of Issuers Subject to the Registration and Reporting Provisions of the Federal Securities Laws, Rel. Nos. 33-5447, 34-10569 (Dec. 20, 1973).

case for similar treatment.²⁴⁸ Indeed, responsible commentators are raising, with increased frequency, the specter of a potential race war.²⁴⁹ One example of the astounding cost to society implied in the increasing diversity of the future is the enormous expense of high incarceration rates resulting from America's continued racial injustice.²⁵⁰ On a more specific basis, *Texaco* demonstrates the kinds of costs that shareholders must absorb, and the empirical data presented in Part I of this article suggest the kinds of profit opportunities that can be wasted.²⁵¹ If a company were to disclose, for example, that diversity is not material to the operations of the company, and that company were to be subject to a *Texaco*-type lawsuit, it could be subject to liability for failure to adequately disclose material facts. In other words, maintaining a "poisonous racial atmosphere" presents serious risks to shareholders and should be disclosed.²⁵² Consequently, companies would be forced to think carefully about the impact of diversity upon their business, and the best means to address such issues. With this information in the public domain, the market can act to reward those companies with superior diversity management plans, and punish those whose disclosures show lack of awareness of diversity-related issues. The market will then act to rationally assess the emphasis that diversity management deserves. Presumably, this process will ultimately create additional pressure for business to

²⁴⁸ Public policy concerns, without economic impact to the investing community, raise issues as to the extent of the power the SEC has been granted in its mandate to assure disclosure material information for the benefit of public investors. When the SEC asked in 1974 what areas of social concern should be the subject of additional disclosure obligations, the response included over 100 areas of concern. "Winnowing this list down to manageable size presents a formidable task, particularly in the absence of objective standards or legislated priorities." Weiss, *supra* note 245, at 600. The issue of diversity management implicates public policy concerns as well as economic impact to the investing community and thus does not implicate this issue of the SEC's power.

²⁴⁹ See, e.g., RICHARD DELGADO, *THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* 119-127 (1996) (theorizing race war ignited by right wing extremists); CARL T. ROWAN, *THE COMING RACE WAR IN AMERICA* 282 (1996) ("I must say honestly that I doubt there is any way to prevent bloody racial strife in America").

²⁵⁰ See ROWAN, *supra* note 249, at 193 ("Blacks now comprise 50.8 percent of the inmates in our prisons. One out of every eleven black adults is in jail or on probation or parole.").

²⁵¹ See *supra* notes 120-29 and accompanying text. Under these circumstances, with real economic stakes at issue for public investors, it would be appropriate for Congress or the SEC to require companies to address the projected impact of increased diversity upon their business and what steps, if any, the business is taking to address the issue. See, e.g., Weiss, *supra* note 245, at 598-99 (discussing SEC disclosure initiatives related to foreign corrupt practices and SEC arguments that such practices cast important light on the quality and integrity of management, as well as the nature of its business relationships). It is interesting to note that in the past the SEC has undertaken socially-oriented disclosure initiatives, with no evidence of impact upon stock prices: on the other hand, diversity measures, as previously mentioned do impact stock prices. See *id.* at 599 (stating that study has shown "little" stock price influence from foreign corrupt practices).

²⁵² ROBERTS, *supra* note 123.

continue to rationalize its response to America's increasing diversity, enhancing both the growth of our economy as well as opportunities for women and other excluded groups.²⁵³

B. Director Duties and Diversity

In the U.S., corporations are managed under the direction of the board of directors.²⁵⁴ If a corporation chooses to ignore diversity, or worse, to pursue racist policies, it is ultimately the responsibility of the board. The board has a duty to exercise ordinary care in overseeing the corporation. This duty, quite clearly, encompasses diversity management.²⁵⁵ If a corporation suffers losses as a result of reckless diversity mismanagement, it seems reasonable to impose liability upon the board.²⁵⁶ The business judgement rule can extend protection to directors in certain instances.²⁵⁷ However, the business judgement rule will not operate to protect directors from liability for failure to exercise judgement.²⁵⁸ This means that the board must make an informed and conscious decision with respect to a matter before members will enjoy the protection of the business judgment rule.²⁵⁹

Traditionally, directors who ignore a known risk would, in fact, be liable for damages resulting from ordinary negligence.²⁶⁰ In the 1980s, board directors were

²⁵³ Rationalization has thus far been the driving force of the diversity movement and there is no reason to believe that encouraging further rationalization will inhibit the opportunities available to traditionally excluded groups or the benefits to business. See *supra* notes 84-86 and accompanying text. On the contrary, demographic trends suggest this process is beginning, not peaking. See *supra* notes 13-34 and accompanying text.

²⁵⁴ See, e.g., DEL. GEN. CORP. LAW § 141(a).

²⁵⁵ See, e.g., *Kaplan v. Rand*, 192 F.3d 60 (2d Cir. 1999) (analyzing settlement of claims against directors of Texaco for breach of fiduciary duties in connection with their alleged failure to stem discriminatory employment practices). See also AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE § 4.01(a) (1994) (stating that directors must make inquiry when circumstances would alert a reasonable director of the need). See also *Tillman*, *supra* note 149.

²⁵⁶ Courts, particularly in Delaware, often impose liability for duty of care claims only upon some showing of culpability beyond mere negligence, stating the standard of liability in terms of recklessness or gross negligence. See *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985) (holding that under the business judgement rule directors may only be held liable for gross negligence).

²⁵⁷ See AMERICAN LAW INSTITUTE, *supra* note 255, at § 4.01(c).

²⁵⁸ See *id.* (comment c, stating that only a "conscious exercise of judgment" is protected).

²⁵⁹ E.g., *Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984) ("the business judgment rule operates only in the context of director action . . . has no role where directors have . . . failed to act"); *Casey v. Woodruff*, 49 N.Y.S. 2d 625, 643 (1944) ("When courts say that they will not interfere in matters of business judgement, it is presupposed that judgement—reasonable diligence—has in fact been exercised.").

²⁶⁰ See, e.g., ROBERT C. CLARK, CORPORATE LAW § 3.4 (1986) (stating that the business judgement rule should only protect judgements arrived at in a non-negligent manner); HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS § 242 (1983) (stating that business judgement rule presupposes a reasonable exercise of judgement).

able to use political influence in an environment of low issue-salience to achieve substantial insulation from monetary liability.²⁶¹ I have elsewhere argued that this insulation rests upon a weak policy basis.²⁶² Strong policy arguments can be made that such statutes should not protect boards with respect to the issue of diversity management. First, the Texaco fiasco shows how devastating diversity mismanagement can be to a corporation and its shareholders, and the increasing diversity of the business environment is only likely to amplify these negative consequences.²⁶³ Second, there is now a rich body of literature available to directors demonstrating how to manage diversity well, so that every director can be deemed to have constructive knowledge of the enormous stakes at issue with diversity management.²⁶⁴ Thus, diversity mismanagement or, worse, non-management, can only be termed reckless. State insulating statutes should include a carve-out for claims showing a failure to manage diversity adequately, for knowingly acquiescing in discrimination, or for losses resulting from failure to prevent discrimination. Diversity issues are simply too important to allow special interest influence to stand.²⁶⁵ State governments, or even federal action, should at minimum impose monetary liability for reckless misconduct in this area.

Moreover, boards tolerating sexism, racism, or other inappropriate discrimination, and boards that take an ostrich approach to diversity, can be deemed to have violated the duty of loyalty or be deemed to have undertaken acts not in "good faith."²⁶⁶ This duty requires that directors put the interests of their corporation

²⁶¹ See Alex Elson & Michael L. Shakman, *The ALI Principles of Corporate Governance: A Tainted Process and a Flawed Product*, 49 BUS. LAW. 1761, 1763-68 (1994) (noting that political lobbying caused ALI to restrict director and officer liability); James J. Hanks, *Evaluating Recent State Legislation on Director & Officer Liability Limitation and Indemnification*, 43 BUS. LAW. 1207 (1988) (analyzing state legislation from 40 jurisdictions which limit director liability). These statutes typically exonerate directors from liability for monetary damages for breaches of the duty of care if the articles of incorporation so provide. See, e.g., DEL. GEN. CORP. LAW § 102 (b) (7). Section 102(b) (7) provides that a corporation's articles of incorporation may include a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty of care as a director.

²⁶² See Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 570-74 (2000) (showing that directors have been able to exploit state competition for corporate charters to diminish their duties); Steven A. Ramirez, *The Chaos of 12 U.S.C. Section 1821(k): Congressional Subsidizing of Negligent Bank Directors & Officers?*, 65 FORDHAM L. REV. 625, 646 n.115 (1996) (reviewing transmogrification of business judgment rule).

²⁶³ See *supra* notes 17, 19, 120-29 and accompanying text.

²⁶⁴ See discussion *supra* Part II.

²⁶⁵ The experience of Texaco speaks loudly here. If a corporation can lose \$1 billion in market capitalization in a few short days then certainly directors must be cognizant of diversity issues. See *supra* notes 120-129 and accompanying text.

²⁶⁶ "Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 354, 361 (Del. 1993) (citing *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939)). A board's action is not in "good faith" within the meaning of insulating provisions authorized by §102(b)(7) if it is based on any human emotion [that] may cause director[s] to place [their] own interests, preferences

first, and not advance their personal interests at the expense of the corporation.²⁶⁷ Certainly, a director that avoids addressing diversity issues based upon uninformed racial hostility has indulged personal preferences at the expense of corporate interests.²⁶⁸ The effect of recognizing that naked unfair discrimination constitutes a violation of the duty of loyalty as an act not undertaken in good faith, is to place such misconduct squarely within an exception to those state statutes that insulate directors from liability for breaches of the duty of care.²⁶⁹

Essentially, the norms prevailing in board rooms must be changed. Professor Eisenberg recently demonstrated how important social norms are to the conduct of the board of directors in managing the corporation and the role of the law in shaping norms.²⁷⁰ For example, “[i]f a legal rule is adopted to ban smoking . . . many of the norm-compliers who previously had kept silent will now speak out.”²⁷¹ Thus, legal rules empower norm-compliers in their efforts to influence norm-violators.²⁷² A legal rule providing an incentive for boards to implement diversity policies could be expected to have this effect. In general, “[a]doption of a legal rule that is based on a social norm sends a message that the community regards the norm as especially important.”²⁷³ Diversity should be deemed “especially important,” and therefore, legal rules should be adopted to influence boardroom norms positively, so that boards will take action to unlock the value of a diverse workforce.

or appetites before the welfare of the corporation including “hatred, lust, envy, revenge . . . shame or pride.” *In re RJR Nabisco Inc. Shareholders Litig.*, 14 DEL. J. CORP. L. 1132, 1159 (Del. Ch. 1989).

²⁶⁷ See ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW § 9.01, 9.02 (1999) (stating that the duty of loyalty in the context of director liability “has not been defined with any precision”) (citing *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (stating that the fiduciary duty of loyalty requires “the exercise of the punctilio of an honor the most sensitive”)).

²⁶⁸ Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interests possessed by a director and not shared by the stockholders generally. PINTO & BRANSON, *supra* note 267.

²⁶⁹ See, e.g., DEL. GEN. CORP. LAW § 102 (b)(7)(i). Professors Pinto and Branson have stated that “most public companies have placed this provision in their articles.” PINTO & BRANSON, *supra* note 267, at 198. So it is quite important to place reckless racism within an exception to the insulating statutes. Intentional racism would always be within an exception. DEL. GEN. CORP. LAW § 102 (b)(7)(ii) (exception for conduct not “in good faith” or involving a “knowing violation of law”). See also *Gagliardi v. Trifoods Int’l, Inc.*, 683 A.2d 1049, 1052 n.4 (Del. Ch. 1996) (stating that directors acting with “improper motive” are not within insulating statute’s protection); *In re Caremark Int’l, Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (stating that “a sustained or systemic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish a lack of good faith. . .”).

²⁷⁰ See Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253 (1999).

²⁷¹ *Id.* at 1270.

²⁷² See *id.* at 1269.

²⁷³ *Id.*

C. Title VII Reform

I have concluded in another article that comprehensive diversity policies are a facially neutral means for a business to exercise judgment on how best to manage the realities of its diverse environment, and a culture-conscious means of exploiting cultural differences that can be a source of value.²⁷⁴ Thus, I contend that these initiatives should pass Title VII muster. Nevertheless, there is a risk that they will be found unlawful.²⁷⁵ Businesses are risk averse. Congress or the EEOC should act to minimize this risk by enacting safe-harbor legislation or interpretive guidelines, either as a matter of statutory law or regulatory action.²⁷⁶ As previously mentioned, the EEOC has already restated the best corporate practices in diversity management.²⁷⁷ The EEOC also has the power to grant employment practices a “safe-harbor” from liability, at least if it issues a written opinion.²⁷⁸ The EEOC has already issued such guidelines regarding the propriety of affirmative action.²⁷⁹

²⁷⁴ See Ramirez, *supra* note 224.

²⁷⁵ See Ramirez, *supra* note 224 (discussing cases addressing “diversity” in the context of Title VII). This risk is already being discussed in business law literature. Scott A. Holt, *Reverse Discrimination — Too Much of A Good Thing*, DEL. EMPLOY. L. LETTER, November, 1999 at 1 (discussing recent diversity decision and stating that “taken to an extreme, attempts to diversify your workforce may be viewed as reverse discrimination”).

²⁷⁶ Congress enacted Title VII pursuant to, *inter alia*, the interstate commerce clause of the Constitution. There is no question that the diversity management practices discussed herein (Part II) have profound implications upon the ability of our corporate sector to achieve maximum productivity across state lines and around the world. See discussion *supra* Part I. Consequently, the ability of Congress to enact facially-neutral laws to encourage the profit-maximizing use of diversity initiatives is very broad. See *United States v. Lopez*, 514 U.S. 549 (1995) (stating that Commerce Clause requires a “strong connection or identification with commercial concerns” if an act trammels upon traditional areas of state sovereignty); *Village of Arlington Heights v. Metro. Housing Dev.*, 429 U.S. 252 (1977) (holding that facially-neutral laws will withstand Equal Protection scrutiny so long as no proof of discriminatory intent). If Congress (directly or through the EEOC) were to act to encourage the nascent diversity management practices discussed herein it would entail a brazen act of judicial activism not seen since the 1930s to strike such legislative initiatives down.

With respect to the power of the EEOC to move forward to encourage the positive management of increasing diversity, it too seems to enjoy broad latitude. See 42 U.S.C. § 2000e-12 (1994) (granting EEOC power to immunize employment practices from liability if undertaken in good faith reliance on “any written interpretation or opinion” of the EEOC). The Supreme Court has generally given varying deference to EEOC guidelines. See Ramirez, *supra* note 224. The Court has only referred to section 2000e-12 once and indicated that it should be construed as a “very narrow” provision. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 423 n.17 (1975). Nevertheless, clearly the EEOC can do more with this power, and facilitating the increased use of diversity management policies presents an ideal policy basis for exercising such power.

²⁷⁷ See *supra* note 136 and accompanying text.

²⁷⁸ See 42 U.S.C. § 2000e-12 (1994).

²⁷⁹ See 29 C.F.R. § 1608 (1999). I have argued in a related article that diversity initiatives should be treated as at least as generously as “affirmative action” which is a more race-based remedy. Ramirez, *supra* note 224. I also argued that most diversity initiatives may well comply with the EEOC’s guidelines.

Such a safe-harbor should be made widely available with respect to employers who adhere to the standards that the EEOC has found to constitute "best practices" in diversity management initiatives.²⁸⁰ Enacting a safe-harbor in accordance with its prior best practices findings would assure that diversity initiatives would conform to best practices, that initiatives would be facially neutral, merit-based, and culture-conscious, and that such initiatives would act to stem unfair discrimination.²⁸¹ In addition, enacting a safe-harbor for diversity initiatives would encourage businesses without a discriminatory history to pursue the benefits of diversity.²⁸²

A safe-harbor would serve to greatly limit the risks discussed above and allow employers to enjoy the benefits of utilizing diversity as a competitive advantage.²⁸³ If the EEOC were to open up its immunizing powers for diversity programs, the utilization of such initiatives would certainly become more widespread. This would profoundly assist the business community, because it would light a beacon to a safe-harbor for specific practices that would enhance productivity and greatly reduce the threat of liability, while at the same time securing equal employment opportunity for traditionally excluded groups.

Conclusion

As the U.S. enters the 21st Century, it would be unthinkable for our society to reject the value of diversity. This paper demonstrates that diversity can be managed to enhance productivity and that the business community has taken the lead in this effort. With growing international trade, tightening labor markets, and a compelling need for dynamic business response, this is surely no time for corporate America to be hidebound by unnecessarily restrictive and narrow definitions of "merit." People offering views that are based upon unique experiences and perspectives bring value and merit to corporations to the extent there is a dearth of such persons and to the extent there is growing need for such diversity of views. This article states the extent to which corporate America should value persons of backgrounds that have traditionally been excluded from participation in corporate America. Corporate America has developed a strong case for exploiting the value of diversity, and has

²⁸⁰ EEOC REPORT, *supra* note 136.

²⁸¹ See discussion *supra* Parts I and II.

²⁸² See 29 C.F.R. § 1608.4 (1999).

²⁸³ Even if the EEOC would issue interpretive guidelines the degree of deference courts would accord such guidelines is "unsettled." See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia J., concurring). Presumably, if the EEOC issued interpretive guidelines in accordance with the Administrative Procedure Act they would be accorded *Chevron* deference and would be upheld if reasonable. See *Christensen v. Harris County*, 120 S. Ct. 1655, 1664-65 (2000) (stating that regulations are due deference but mere policy statements are not).

defined a set of best practices under which that value is likely to be unleashed. This article posits that these diversity management practices must cause a fundamental revision in the American perspective on diversity. Our society must realize that diversity is a source of strength. Consequently, our legal system should respond to the challenge of diversity in a progressive manner and seek to facilitate the use of diversity to generate value. This article proposes only that the legal system assist business in rationally addressing diversity; if this can be achieved, a positive step can be taken to free our society from its current racial gridlock, while at the same time enhancing our nation's productivity.

