SYMPOSIUM ON CIVIC AND LEGAL EDUCATION: PANEL FIVE ETHICS, AND DIVERSITY IN THE LEGAL ACADEMY: Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers

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BIO:

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SUMMARY:

... Marshall attended Howard Law School, where, under the stewardship of Charles Hamilton Houston, he learned the skills that would eventually make him history's most effective advocate for the legal rights of blacks. ... The obligation thesis presupposes both the legitimacy of at least some race-based classifications and the existence of nonarbitrary criteria for both defining the "interests" of the black community and assessing whether corporate law practice represents a plausible mechanism for advancing those interests. ... Viewed from this perspective, the fact that many of the black students who came to law school as a result of these programs will spend a substantial portion of their professional lives serving the interests of corporate clients constitutes something of a missed opportunity. ... Nor am I arguing that it is wrong to encourage black law students to consider pursuing other careers where their talents may more directly benefit the black community. ... Such a stringent prohibition, of course, would substantially reduce the expected benefits to the black community if black corporate lawyers were to implement the obligation thesis. ... More importantly, by leaving out client service, the divided-self model fails to address one of the central tensions that gave rise to the obligation thesis in the first place: the fact that corporate clients sometimes pursue policies adverse to the interests of the black community. ...

TEXT:

[1981]

Introduction

The week of January 18, 1993, was filled with both hope and sorrow for black lawyers. At the beginning of the week, Martin Luther King's birthday was legally celebrated in every state for the first time since it was declared a national holiday. The next day, the first president in twelve years to endorse enthusiastically the use of law as an instrument for social change took the oath of office. By week's end, however, two of the most famous black lawyers of their respective generations had died. On January 20, Reginald F. Lewis, who came to national prominence when he engineered the billion-dollar leveraged buy-out of Beatrice, International, died at the age of 50. Five days later, Justice Thurgood Marshall, the guiding light of the modern civil rights movement and a tireless advocate for the rights of all Americans, died at the age of 84.

In life, these two men had a good deal in common. Both were natives of Baltimore and attended historically black colleges. n1 From there, however, their paths diverged significantly. Marshall attended Howard Law School, where, under the stewardship of Charles Hamilton Houston, he learned the skills that would eventually make him history's most effective advocate for the legal rights of blacks. n2 Almost forty years later, Lewis attended Harvard [1982] Law School, where he learned the skills that would propel him on his meteoric rise in the corporate world; first as an associate in a prestigious corporate law firm, then as the founder of his own Wall Street firm, and finally as chairman and chief executive officer of a multi-billion dollar corporation. n3
These differing paths mirror a general trend within the black bar. With few exceptions, the black lawyers of Thurgood Marshall's generation attended segregated schools and spent most of their careers providing services to black clients. n4 Some, like Marshall, were specifically trained to combat legal segregation and devoted the majority of their professional lives to this struggle. n5 But even those who were not full time civil rights lawyers participated indirectly in the struggle for racial justice by helping ordinary blacks gain access to a legal system that was at best recalcitrant and at worst hostile to their interests. n6

Reginald Lewis' generation of black lawyers typically have a different biography. Although born before Brown v. Board of Education, n7 these lawyers came of age during the civil rights movement. As a result, many were admitted to integrated colleges or law schools as part of the first wave of affirmative action programs. n8 And, as the years passed, a growing number of blacks who graduated from the top law schools were given the opportunity to pursue careers in the previously all-white world of corporate law practice. n9 [*1983]

Today's law students complete this transition. Born after Brown, and indeed after the death of Martin Luther King, virtually all of the current generation of black law students have had at least the opportunity of attending integrated schools. n10 Many have attended nothing else. And, while the doors to the inner sanctums of the corporate bar continue to creak open slowly and fitfully, a large percentage of black students attending the nation's elite law schools will, like their white counterparts, spend at least some of their careers in large corporate law firms or the legal departments of Fortune 500 corporations. n11

It is possible to view this transition from a number of perspectives. n12 On the occasion of Thurgood Marshall's death, however, it is appropriate to consider this phenomena from the standpoint of social justice. Specifically, what difference will it make to the long term struggle to end the legal, economic and political subjugation of blacks in the United States that a substantial number of the most talented and best educated black lawyers are likely to spend some or all of their careers in corporate law practice?

In this essay, I will argue that the answer to this question depends in part on what we teach in law school. My argument rests on three deceptively simple propositions. First, there is a significant risk that black lawyers who devote their professional energies to serving the needs of corporate clients [*1984] will often fail to reduce, and may in some instances reinforce, unjustified inequalities between blacks and whites. Second, one important strategy for minimizing this danger is for black corporate lawyers to recognize that they have moral obligations running to the black community that must be balanced against other legitimate professional duties and personal commitments when deciding on particular actions and, more generally, when constructing a morally acceptable life plan. I call this strategy the obligation thesis. Third, legal education should help black students develop the critical skills and obtain the empirical knowledge that they will need to define the scope of this race-based obligation and to reach coherent and morally defensible judgments about how this duty should be incorporated into their lives as corporate lawyers.

Something like the obligation thesis has been a standard part of the rhetoric of racial solidarity at least since DuBois and continues to be popular among today's black law students. n13 Advocates of this approach are always careful to stress the limited nature of their claim. The obligation thesis in no way diminishes the responsibility that whites have to work towards remedying the continuing harmful effects of past and present injustices against blacks. Nor should anyone believe that if all black lawyers adopted the obligation thesis (or all black professionals for that matter), the desperate problems of racism and poverty that have haunted the black community for so long would suddenly disappear or even be substantially abated. Nevertheless, black corporate lawyers do have strategic access to power, money, and influence. Standing in the shadow of Thurgood Marshall's towering legacy, many of today's black attorneys view the obligation thesis as a coherent way to reconcile their expanding opportunities with the black bar's historic connection to the struggle for racial justice.

Notwithstanding this pedigree, proponents of the obligation thesis must respond to three powerful critiques that expose the many complexities lurking behind the seemingly straightforward propositions outlined above. The first, which I will call the universalist challenge, asserts that any effort to define the moral obligations of "black" corporate lawyers to members of the "black community" is either premised on false claims of racial essentialism or places unjustified moral weight on the mere fact of racial identity. The second, which I call the political correctness challenge, asserts that even if one were to recognize the existence of such a race-based obligation, any attempt to give content to this duty will inevitably rest on contested political assertions about the "interests" of the black community and how best to serve them. Finally, those pushing what I call the educational neutrality [*1985] challenge, might assert that regardless of the merits of the obligation thesis, law schools should not be in the business of encouraging some of their students to adopt particular moral stances towards their professional role.
Each of these critiques is powerful and underscores important limitations on the arguments that can be used to support the obligation thesis and the role that law schools can legitimately play in encouraging black students to adopt this particular approach to lawyering. Nevertheless, there are good moral and empirical reasons for believing that the obligation thesis is as effective at mediating the inherent tension between the twin goals of equal opportunity and substantive justice as any of its plausible rivals. Even if this thesis is only one of several morally permissible options, law schools should provide the substantive knowledge and critical skills that the many black students who find the obligation thesis compelling will need to define the extent of their responsibility to the black community and to determine how this duty should be balanced against other legitimate demands and aspirations.

Moreover, the case for focusing attention on these issues is particularly strong in light of the connection between the obligation thesis as defined here and the law school's broader mission, not fully captured by the educational neutrality critique, to challenge students to evaluate their professional roles in light of the substantive demands of justice. Lawyers, particularly corporate lawyers, wield tremendous power in our society. Law schools need to do more to determine how this duty should be balanced against other legitimate demands and aspirations.

My argument is divided into two parts. Part I offers a preliminary defense of the obligation thesis against the twin critiques of universalism and political correctness. My goal here is the limited one of establishing that this thesis presents a coherent and morally attractive mechanism for black lawyers to mediate the potential tension between serving the needs of corporate clients and advancing the interests of the black community. Part II then argues that much of the prevailing discourse in legal education simultaneously undermines the legitimacy of this kind of race-conscious duty and fails to provide students with the tools needed to carry it out. Specifically, by stressing generality over context, procedural formality over normative argument, and a partisan over a purposivist conception of the lawyer's role, mainstream legal education encourages black students to view the obligation thesis as either incoherent or unprofessional. I conclude by arguing that law schools should devote more attention to the neglected sides of these dichotomies with the goal of enhancing the ability of all students to recognize and negotiate their competing responsibilities.

I. A Preliminary Defense of the Obligation Thesis

The obligation thesis presupposes both the legitimacy of at least some race-based classifications and the existence of nonarbitrary criteria for both defining the "interests" of the black community and assessing whether corporate law practice represents a plausible mechanism for advancing those interests. Here, I offer a tentative defense of both of these presuppositions. Part I.A. explores the potential conflict between serving the needs of corporate clients and ending the unjustified social, political, and economic subjugation of blacks in the United States. Although corporate interests are not always on the side of reinforcing existing inequalities, there are good reasons to suspect that corporate lawyers frequently fail to assist those who are struggling against unjustified oppression and may from time to time take actions that actually contribute to that oppression. Part I.B. defends the claim that black corporate lawyers have an affirmative obligation to work towards reducing these adverse effects against the universalist charge that imposing such an obligation is premised on false claims of racial essentialism or places morally unacceptable weight on the mere fact of racial identity. Finally, Part I.C. responds to the political correctness critique by arguing that supporters of this proposition underestimate the possibility of reaching defensible judgments about the content of the obligation thesis. Teaching black lawyers to identify and successfully negotiate these difficult conflicts should be an important goal of legal education.

A. The Paradox of Opportunity: Corporate Law Practice and the Struggle for Racial Justice

At one level, the growing number of blacks entering corporate law practice reflects the success of the integrationist policies championed by Thurgood Marshall. Free from many of the legal and educational barriers that excluded them in the past, the current generation of black lawyers is simply following that part of the civil rights credo that demands that blacks have the same opportunity as whites to pursue careers according to their interests and talents. Viewed from this perspective, the agenda for the black bar - and indeed for the profession as a whole - should be to continue to pressure corporate law firms and clients to open up their doors and their wallets to black lawyers.

There are, however, other potentially more troubling implications. Black Americans continue to lag behind whites in virtually every category connected with material wealth or social and political power. Although the reasons for this continued inequality are multiple and complex, there can be no serious doubt that racial prejudice, both in the past and in the present, is a substantial contributing cause. This cruel reality is felt hardest by the millions of blacks who survive
under economic conditions little better than those that existed under Jim Crow. But the problems are not confined to the so-called underclass. In his massive study of the state of the races, Andrew Hacker consistently found that even when adjusting for education and experience, blacks still suffer from the unconscious stereotypes and hidden prejudices produced by three hundred years of overt and covert racism. n17 Indeed, even those blacks at the highest income levels are not completely protected from the debilitating effects of race prejudice. n18

Those who designed the first wave of affirmative action programs that brought bright young black students like Reginald Lewis to Harvard Law School believed that one way to address these pervasive inequalities was to increase the number of black lawyers. At the time these programs were instituted, there were no more than a handful of black lawyers in most areas of [*1988] the United States. n19 Given the relative poverty of many black communities and the unwillingness of many white lawyers to serve even those black clients who could afford legal services, most blacks had relatively little access to lawyers. n20 For many early affirmative action proponents, this pervasive legal need was the primary justification for making special efforts to increase the number of black lawyers. n21

Viewed from this perspective, the fact that many of the black students who came to law school as a result of these programs will spend a substantial portion of their professional lives serving the interests of corporate clients constitutes something of a missed opportunity. Although, as I argue below, the vision underlying early affirmative action efforts was far too narrow, n22 the need they were designed to address remains. As of 1990, only 3 percent of the nation's one million lawyers were black. n23 And despite the increases in government funded legal services for the poor, available evidence continues to indicate that blacks have less access to legal services than whites. n24 By definition, blacks who represent large corporations will at best play only an indirect role in closing this gap. n25

The true cost of the transition to corporate practice, however, may be more than simply missed opportunity. Law is both an absolute good that facilitates the autonomy of those with access to the legal system and a relative means of entrenching economic, social, and political power over others. n26 Corporations have traditionally taken full advantage of both of these aspects of the law. Thus, corporations employ a disproportionate share of the total number of lawyers, who in turn help these powerful actors plan future projects, develop strategies for obtaining maximum advantage from existing rules, lobby government officials for favorable rule changes, and defeat claims brought against them by others. n27 Taken together, these [*1989] sophisticated repeat users of legal services are often able to manipulate legal rules to their advantage. n28

The fact that corporations use lawyers to perpetuate their absolute and relative power has two important implications for the present inquiry. First, by solidifying corporate power, corporate lawyers help to entrench the current overall distribution of wealth and power in American society. n29 Most blacks, however, are at or near the bottom of this distribution. n30 Moreover, this position is unjustified given the link to past and present racial practices. Black lawyers who assist corporations in achieving their objectives may in fact perpetuate the status quo and thereby indirectly participate in the subjugation of the black community.

Consider, for example, a recent case involving one of America's most prestigious corporate law firms. According to published accounts, lawyers from New York's Cravath, Swaine & Moore repeatedly advised a Florida real estate developer that its high pressure/high risk sales tactics directed at "ethnic" markets of recent immigrants were lawful. n31 In other words, powerful actors are entitled to exploit the relative lack of resources and sophistication of less powerful actors in pursuit of higher profits. Based on this advice, and the firm's willingness to reiterate its position to regulators and other enforcement officials, the developer was able to continue selling $34,000 homes for $70,000 for more than six years, resulting in hundreds of millions of dollars in profits and, not coincidentally, tens of millions of dollars in legal fees to Cravath. n32 Although the developer was ultimately criminally prosecuted for its actions, enforcement officials have yet to fault Cravath for advising its client to take advantage of its market power. n33

Of course not everything corporate lawyers do presents such a stark case of transferring wealth from the bottom to the top of the economic hierarchy. n34 Some projects may actually benefit those at the bottom, for example through job creation or community development, while others involve re [*1990] shuffling resources from one group of powerful actors to another. n35 Nevertheless, the basic truth remains: Corporate lawyers are paid - and paid handsomely - to promote the economic and political interests of their powerful clients. It is likely, therefore, that they will frequently be called on to resist public and private efforts to destabilize existing power relationships.

Moreover, on a growing number of issues, the practices of certain large corporations and the interests of either individual blacks or the articulated concerns of the black community will be directly opposed. For example, employment discrimination litigation often pits large corporate employers against one or more blacks who assert that they have been denied employment benefits on the basis of race. A similar story is emerging with respect to many
environmental and consumer issues. n36 In these and other areas where particular blacks are challenging a given
corporate practice, a black lawyer who works to sustain that practice may directly impede the cause of racial justice. n37

Taken together, these characteristics of corporate law practice suggest that there is a danger that black lawyers who
choose to work in this area will fail to contribute to the struggle to end the unjustified inequalities between blacks and
whites, and may indirectly or directly help perpetuate them. Given this danger, one can view the trend towards corporate
law practice as a threat to the vision, so eloquently captured by the life of Thurgood Marshall, of the black lawyer as a
champion for the interests of the black community.

At this point, some might assert that in light of this danger, blacks should avoid corporate law practice altogether.
This argument, however, ignores the potential social justice benefits of having at least some black corporate lawyers.
The claim that blacks should not be corporate lawyers must overcome a heavy presumption against closing off
opportunity on the basis of race. Denying black lawyers access to careers in corporate law practice would effectively
close off whole fields of law to black women and men who [*1991] might otherwise find this work personally
challenging or rewarding. n38 Moreover, since corporate law jobs sit at the top of both the income and the status
hierarchies of the profession, discouraging black lawyers from pursuing careers in this area would reintroduce a
significant disparity between the incomes of black and white lawyers at a time when the position of the black middle
class appears to be more tenuous than ever. n39

Furthermore, consequentialist arguments about the negative effects that black corporate lawyers will inevitably
impose on the black community frequently ignore the beneficial externalities that might flow from establishing a black
presence within the corporate bar. Five such benefits seem plausible. First, if nothing else, the presence of blacks within
these elite ranks undermines the stereotype of black intellectual inferiority. It therefore becomes somewhat more
difficult to justify policies and practices that retard black achievement on the express or implicit assumption that blacks
are inherently unqualified to perform the work. Second, as a corollary to the first point, the achievements of black
corporate lawyers might inspire other young black women and men to strive harder to become successful in their own
right. Indeed, in addition to being passive role models, black corporate lawyers might work actively to open up
additional opportunities for blacks, in law or elsewhere. Third, corporate law practice gives black lawyers access to
money and other resources that can be directed toward projects to benefit the black community. n40 Fourth, in addition
to offering material rewards, corporate law practice traditionally has been a stepping stone to politics and political
influence. As a result, black corporate lawyers may be able to translate their private power into public power in ways
that benefit the black community. n41 Finally, the very fact that corporations have such power to impose costs on the
black community underscores the benefits that could accrue if black lawyers are able to persuade corporations to act in
ways that [*1992] are less harmful (and perhaps even beneficial) to the black community. n42

Taken together, these arguments cast considerable doubt on the cost/benefit calculation underlying the assertion
that blacks should avoid corporate law practice. To the extent that the struggle for racial justice in the 1990s and beyond
is aimed at achieving economic parity, it seems dangerously wrongheaded to foreclose opportunities that can improve
the lives of particular blacks and provide access to the places where many of the most important decisions affecting the
economic well-being of the black community will be made.

This is not to suggest that corporate law practice is the best arena for pursuing the cause of racial justice. n43 Nor
am I arguing that it is wrong to encourage black law students to consider pursuing other careers where their talents may
more directly benefit the black community. Moreover, there may be powerful agent-centered reasons for particular
black lawyers to avoid corporate law practice. Even if one were to scrupulously pursue the full range of options
discussed below, a black corporate lawyer may find herself indirectly contributing to maintaining the status quo in a
manner that she finds personally intolerable. n44 Nevertheless, the claim that all black lawyers should avoid all forms
of corporate law practice is not plausible even from a purely social justice perspective.

We are left, therefore, with a paradox. On the one hand, a primary goal of the civil rights movement was to ensure
that blacks have an equal opportunity to participate in every aspect of the mainstream economy. Precisely because these
new opportunities are located in the mainstream, however, they will often be closely linked with the very structures that
have contributed to the oppression of blacks in the first instance. As a result, the more blacks take advantage of these
new opportunities, the more they may find themselves separated from, and perhaps even opposed to, the demands of
other blacks for substantive justice.

The obligation thesis offers one potential way out of this paradox. By positing that successful blacks have a duty to
consider the interests of other blacks when performing their new roles, proponents of this thesis seek to ensure that the
progress of individual blacks will not unduly impede the advancement of the black community as a whole. However, before examining whether this approach provides a workable means of accomplishing this goal, it is first necessary to confront the universalist challenge that the "paradox of opportunity" is premised on either empirically or morally false claims about the significance of racial identity.

B. The Challenge of Comprehensive Universalism

Those skeptical of the use of racial categories might raise two distinct (though closely related) objections to any project that seeks to assess the movement of some blacks into corporate law practice in terms of its likely effects on the justice claims of other blacks. The first, premised on a universal view of human nature, questions whether such a project rests on the false essentialist claim that all blacks share a substantive commitment to "civil rights work" as the only solution to their status as the "victims" of white oppression. The second questions the moral justification for separating the obligations that blacks allegedly owe to other blacks from the "comprehensive set of principles of justice that apply to all people regardless of their culture" or race.  

A full response to these comprehensive universalist objections to the obligation thesis is beyond the scope of this essay. Instead, I want to suggest that there are good grounds for believing that these objections do not falsify the obligation thesis as properly understood. If this thesis is a morally defensible mechanism for accommodating the competing interests at stake in the reorientation of the elite black bar towards corporate law, then the fact that legal education both discourages black students from taking this obligation seriously and fails to provide them with the tools necessary to implement such a strategy successfully is a serious indictment of the current system.

1. Moral duty versus racial essentialism.

The charge of racial "essentialism" is frequently leveled at anyone who attempts to use racial categories as a means of distributing social goods. The gist of this charge is that racial categories, regardless of their intended purpose, inevitably stereotype blacks, either as all sharing a distinctive viewpoint or ideology or as being victims who are incapable of helping themselves.  There is often merit to this charge. It is clear that many of the early proponents of affirmative action implicitly assumed that all black students would automatically be interested in civil rights work.  Although these assumptions have long since been purged from law school recruitment efforts, many black students continue to report that law firm interviewers "tend to reflect stereotypical beliefs about cultural backgrounds - for example, that minorities are disinterested in private or business practice and prefer to work in government or other public service."  Similarly, many black lawyers report that they are constantly called upon to defend themselves against the implicit charge that they can only succeed through "extra help programs" and "take a chance' hiring."  As I argue below, these continuing realities play an important role in defining the content of the obligation thesis.  They do not, however, counsel against its adoption because the obligation thesis does not assume that blacks have any essential interests or character traits. Nor does it portray all blacks as victims.

Although defenders of the obligation thesis sometimes talk in terms of the importance of bringing a "black perspective" to the inner sanctums of the American elite,  the argument need not depend upon any essentialist claims about the conduct of black professionals. At its core, the obligation thesis is a moral theory: Its ultimate goal is to establish what black lawyers ought to do, not what they inevitably will do because of who they are or where they come from. Indeed, one of the reasons black leaders have always stressed the obligation thesis - and one of the reasons I am pressing it here - is the serious danger that black professionals will not pay sufficient attention to their duties to the black community. In this respect, obligation theory is the opposite of essentialism.

Nor can this theory be accused of reinforcing the stereotype that all blacks are victims. While the economic and social deprivation of certain parts of the black community is part of the theory's justification, the obligation thesis expressly states that successful blacks can and should play an important role in ameliorating these problems. This thesis constitutes precisely the kind of self-help program that those who oppose racial preference on the ground that it "victimizes" all blacks ought to support.

Opponents of the obligation thesis might retort that this rejection of the essentialist/victimization line fails to acknowledge that the moral duty con templated by this approach is expressly racial in character.  Using race as a central element in a moral theory, these critics might go on to assert, is descriptively incoherent and normatively pernicious since racial identity is solely the product of racism. In order to respond to this objection, it is necessary to locate the obligation thesis within a general theory of moral justification.
2. The limited and limiting demands of universal morality.

From the perspective of comprehensive universalism, the obligation thesis must answer one fundamental question: What is the moral justification for focusing on the obligations blacks in corporate law firms allegedly owe to other blacks? For example, if it would be morally wrong (or at least morally troubling) for a black lawyer to assist a real estate developer to sell houses at double their market value by exploiting the ignorance of moderate income buyers, wouldn't it be equally wrong for a white lawyer to do so? Would the moral calculus be any different if the prospective homebuyers were all poor whites? Indeed, to the extent that race is relevant at all, shouldn't whites, as the perpetrators (or the descendants of the perpetrators) of racist oppression, have the greatest obligation to rectify the results of past injustices to blacks? Why should those few blacks who have finally managed to squeak past the unjust barricades of a hostile and racist world be required to carry the additional burden of worrying about whether their actions will "uplift the race?"

To answer these pointed questions, proponents of the obligation thesis must locate the duties we posit within our general moral framework, a framework that starts with the presumption that all men and women are moral equals. Contrary to the implicit criticism underlying the universalist challenge, however, recognizing a historically and contextually bounded obligation on the part of relatively advantaged members of a particular disadvantaged group to take account of the legitimate interests of other group members does not violate this moral consensus.

The universal respect and concern that we owe to each other as human beings stands as a constant check against excessive particularism in all of our specific relationships. Thus, the obligation thesis cannot possibly license black corporate lawyers to embezzle corporate funds even if they are willing to turn over their ill-gotten gains to needy blacks, any more than a parent is morally entitled to steal for the sake of a hungry child. But this does not mean that we are not morally permitted to place the interests of certain people ahead of those of others who might be equally in need. To the contrary, we are sometimes morally obligated to do so.

Certain relationships create special moral obligations. Parents have special obligations to care for their own children, just as citizens have obligations running to their own state. Indeed, it is just this kind of moral privileging that justifies the common claim that professionals - especially lawyers - are morally justified in placing the interests of their clients or patients ahead of other affected parties. But obligations to particular persons can also arise outside of any pre-existing relationship. For example, a person may have a moral duty to rescue a total stranger from drowning in a one-inch pool of water simply because he is in a position to do so at minimal cost to himself.

In each of these situations, the extent of a person's moral obligations to particular individuals or groups, as well as issues relating to how those obligations should be balanced against the interests of others who might be affected, turn on a careful consideration of the context in which all relevant parties find themselves. In the United States today, such all-things-considered judgments - especially in situations that involve blacks - must take account of the pervasive influence of race.

America was built on race. From the framework of our political order, to the origins of the capitalist enterprises that drive our economic system, to the mores and images that underlie our social and artistic lives, every contemporary American institution or practice traces at least part of its origins to the history of discrimination against blacks. This legacy has two important consequences for the present inquiry. First, despite all of our many differences, black Americans continue to be joined by an identifiable common culture that overlaps with, but is distinct from, mainstream American culture. This common culture is neither monolithic nor all encompassing. Like all cultures, it accommodates both dominant and dissenting viewpoints with respect to virtually every significant practice and tradition. Moreover, black Americans are, by definition, at least bi-cultural, with one foot firmly (albeit sometimes grudgingly) planted in ways of being and knowing that are uniquely American. There are also important and growing class divisions within the black community. These divisions are readily apparent in the living conditions, opportunities, and status of blacks clustered around the top and the bottom of the income scale. These objective differences have in turn spawned differing cultural "styles" and political beliefs. Finally, as the Anita Hill/Clarence Thomas debacle demonstrated, class differences are at least matched by those that run along gender lines.

Nevertheless, those who claim that class, or location, or politics, or even gender either already have or will soon destroy the bonds that link black Americans to an identifiable culture underestimate the centrality of race in the life of every American. Whether one compares the experiences and opportunities of similarly situated blacks and whites, or examines the manner in which many attitudes and practices cross class, gender, and geographical lines, there is
However, the black community can only advance if those who receive the benefits of the prior generation's struggle for advancement. No one has benefitted more from these efforts than black professionals. By the same token, Americans is the direct beneficiary of actions taken by prior generations of blacks in the name of collective linked to the elimination of racist attitudes toward the group as a whole. The current generation of black...
self-interest, black professionals must also recognize that they have already benefitted from the group-based struggles of others. Moral principles of fair play and reciprocity thus support a corresponding moral obligation to repay this debt by participating in actions that will further the cooperative scheme. n91 This obligation is strengthened by the historical evidence indicating that the participation of black professionals in this cooperative scheme will play a significant role in determining whether the unjustified oppression of blacks in the United States is ever brought to a close.

Finally, morality requires that individual blacks take account the unintended but nevertheless predictable consequences of their actions. Consider, for example, a black corporate lawyer who is asked to defend a company accused of discriminating against blacks in employment. No matter how much that lawyer protests that his race is irrelevant to the performance of his professional role, his very presence at the counsel table sends a message to the jurors (both black and white) about the merits of the discrimination claim. To the extent that this implicit message (i.e., a company that discriminated would not hire a black lawyer) helps the company defeat a valid claim of discrimination, n92 the black lawyer has helped inflict a moral wrong on the black plaintiffs.

At this point, opponents of the obligation thesis might raise one or more of the following six related objections to the moral arguments presented above. First, race consciousness is solely the product of race prejudice and therefore cannot give rise to any moral obligations on the part of those who are the victims of racist beliefs. Second, regardless of the current benefits of linking moral obligations to race, such thinking will inevitably perpetuate the power of these artificially created categories instead of helping to stamp them out. Third, even assuming that one should talk about race at all, it is whites, as the authors of this racist system, who have the sole responsibility for rectifying the situation. Fourth, moral obligations can only result from voluntary action, and the current generation of black lawyers neither asked [*2003] for the sacrifices of past generations nor volunteered to be put in a leadership role. Fifth, even if the past is relevant, it is impossible to recover any specific intent from the millions of discrete individuals who participated in the relevant prior struggles. Finally, race consciousness and group solidarity, even when justified, should be avoided because of the danger that they will slip into hatred and oppression.

A comprehensive defense of the moral foundations of the obligation thesis must fully explore each of these difficult issues. For present purposes, I simply want to argue that there are plausible grounds for rejecting all of these arguments as foundational critiques. n93 So long as a plausible account for recognizing some race specific obligations survives these objections, we should proceed with the task of further specifying their content. It is this task, as I argue below, that legal education currently impedes.

Moral wrongs do not always negate moral obligations. The race consciousness that gives rise to the interdependency between individual blacks and the black community is largely a function of racism. n94 Thus, when members of a jury assume that because the lawyer is black the company must not be guilty of race discrimination, they are engaging in the worst form of stereotyping. How can such grossly racist behavior by others affect the moral obligations of black lawyers?

The simple answer is that moral wrongs by one person do not necessarily abrogate the moral obligations of another. Both nation states and cultural subgroupings within those states are frequently formed in response to the wrongful actions of others. Although these wrongs do not in and of themselves create moral obligations in those who have been oppressed, n95 they frequently place members of an oppressed community in circumstances where legitimate obligations may arise. For example, recall the moral argument that one has a duty to save a person drowning in one inch pool of water. n96 Few would deny that if we changed the example to a political prisoner faced with saving a fellow prisoner under similar circumstances, there would still be a moral obligation to render assistance even if the first prisoner is in a position to do so only because of the wrongful conduct of his captors. Similarly, that an otherwise unobjectionable action - for example, publishing the name of a witness to a crime - is likely in a particular case to injure some identifiable individual, is relevant to judging the morality of the action even if the actual source of the injury is the wrongful conduct of some third party (e.g., a killer hired to eliminate all possible witnesses). In both these cases, the fact that racism or some other unjustifiable external force has placed a given individual in a position to either actively assist or refuse to harm another human being does not negate the resulting moral obligation. For the [*2004] reasons discussed in Part I.A. above, black corporate lawyers may often find themselves in this position. Thus, a black partner may find that none of her other partners are willing to provide real counseling to the black associates. n97 Or a black environmental lawyer may be asked to lobby the relevant government officials that his client is not obligated to clean up a chemical waste dump located in a predominately black neighborhood. The fact that racism may have played a major role in creating the situation does not automatically mean that the lawyer has no obligation to do what she or he can to ameliorate the problem. n98
The harm of perpetuating race consciousness must be balanced against the harm of ignoring reality. At this point, someone concerned about the moral wrong underlying race consciousness might assert that the prior response misses the point. The obligation thesis explicitly encourages racial thinking in a way that will make such thinking harder to transcend. For those who view the elimination of racial distinctions as the ultimate goal, this may seem like a significant step in the wrong direction. Imagine in the prisoner example that the warden had contrived the potential drowning and then put the second prisoner in a position to avert the tragedy with the express intent of breaking resistance within the prison. Now, the second prisoner must contemplate the very real possibility that if he pulls the first prisoner from the puddle he will have actively assisted the warden's wrongful scheme. Is it still so clear that the external moral wrong does not negate what would otherwise be a clear moral duty?

Once one poses the question in this fashion, it is clear that the answer depends in large part upon which is the greater harm - perpetuating oppression or failing to render needed assistance. In the prisoner hypothetical, it seems clear that latter harm would be greater, but it is easy to imagine other circumstances where this might not be the case. In the present context, the need for black professionals to contribute to the struggle against racist oppression is great. Moreover, the benefits of refusing to recognize any special responsibility to address this need seem at the present time speculative at best. It may be true that blacks focusing on race make it more likely that whites will do so as well. The opposite conclusion - that if blacks stop focusing on race whites will too - seems a good deal less plausible. Without this crucial link, however, it is hard to see how the benefits of inching somewhat closer to race-blindness outweigh the very real cost to the long-term group advancement that has in the past been the key for other groups to transcend discrimination and oppression. Nevertheless, the danger that race-consciousness may inadvertently perpetuate unjustified oppression stands as an important check on the content of the obligations actually imposed.

More than one person can be morally obligated. If any group has an obligation to rectify the wrongful treatment of blacks it is whites. After all, whites are the primary benefactors of racist oppression. Moreover, whites will often be in an even better position to render aid or prevent harm. Surely the warden in the prison hypothetical is in a much better position - and under a much stronger duty - to act morally than the fellow inmate. And yet, without denying the warden's separate responsibility, the prisoner may still have obligations.

As a preliminary matter, it may not always be true that the morally culpable party is in a better position to render assistance. The warden might be in his office at the time the man is drowning, or, in the present context, a white lawyer might be less likely to understand the unique problems of a black associate. Indeed, so long as there are some whites who hold stereotypical racial beliefs, other whites may be powerless to prevent the harm. Thus, a well meaning white judge may not be able to prevent a white juror from imputing attitudes or ideas to black attorneys.

More importantly, even assuming that whites could remedy many of the unjustified harms inflicted on blacks, it is perfectly clear that they have so far failed to do so. Once it becomes apparent that the real wrongdoer does not intend to act, this reality becomes a fact that all other parties must take into consideration in fashioning their own conduct. While this fact might counsel in favor of pressuring the wrongdoer to fulfill his or her own moral obligations, that is a matter of the content of the obligation of the innocent but well-positioned party. It is not an argument that there is no obligation at all.

Not all obligations are voluntary. Michael Walzer argues that only those obligations that are freely chosen carry moral weight. The notion is intuitively appealing. Morality is fundamentally a matter of choice. It is easy to see why someone who has promised to be loyal has a prima facie obligation to do so. But what about the many blacks who have made no such promise? To say that they are obligated because they have in fact benefitted from the sacrifice of other blacks simply restates the question, since many can plausibly claim that they neither requested the help nor were in a position to refuse the benefits.

As plausible as these arguments may sound, they ignore the extent to which racial identity - and the consequences of that identity - is not a voluntary choice in contemporary America. While those black lawyers who either choose to identify as members of the black community or voluntarily accept the benefits of affirmative action may incur additional obligations, even those who try to deny their racial identity cannot escape their history or their heritage. Given the dominance of race consciousness in the society at large, these lawyers cannot prevent their race from effecting the consequences of their actions. Moreover, the argument that the current generation of blacks neither "accepted" nor "requested" the benefits that they received from the collective struggle by other blacks fails to acknowledge the extent to which today's black professionals could not have existed without these efforts. The fact that...
there were virtually no black corporate lawyers prior to the 1950s is a stark testament to this fact. Under these circumstances, the question of whether the benefits were "voluntarily" accepted is beside the point: No rational person who wanted to be a corporate lawyer (or hold any other high-status job in society) would reject the net benefits of the civil rights struggle even if he or she had the opportunity to do so. n110 [*2007] Like clean air, a less racist and hostile environment is a "public good" that black corporate lawyers cannot do without. Basic principles of fair play, reciprocity, and gratitude counsel in favor of recognizing an obligation to repay this benefit with actions that support the continued production of the public good. n111

The obligation thesis is a plausible method of repaying the obligation to prior struggle. Even if one concedes that today's black professionals owe a debt to those who created the environment in which they are able to be corporate lawyers, one must still ask to whom is the debt owed and how is it to be repaid. Many of the blacks who participated in the civil rights movement are dead. Moreover, many blacks (both dead and living) did not participate, while many whites (both dead and living) did. To further complicate the matter, those blacks and whites who were active in the struggle held a variety of different views about the goals of the movement in general and what was expected from black professionals in particular. How can one define any specific obligations from such a mix of participants and intents?

As I argue below, the task of giving specific content to the obligation thesis is complicated by the multiple goals of the civil rights movement. What is not complicated, however, is attributing to the many diverse participants in the civil rights struggle a common belief in the existence of such an obligation. Whether one looks to the statements of black civil rights leaders, n112 the efforts of their white allies, n113 or simply observes that many of the blacks who risked their property and their lives to open the doors of opportunity for black professionals had no reasonable hope of ever taking advantage of those opportunities themselves, it is clear that most of these participants would view adherence to the obligation thesis as a proper method for black professionals to honor the sacrifices of other blacks on their behalf.

Not all particularism is racism. Many of history's worst atrocities have been committed in the name of group solidarity and advancement. n114 The obligation thesis, like other theories that link individuals to particular groups, facilitates such horrors by giving people a reason to value those on the inside more than outsiders. In the rush to promote the welfare of the group, there is always the danger that individual members will "suspend judgments about right and wrong." n115 [*2008]

One does not have to look far to see evidence of this danger. Regardless of the merits of their particular cases, the almost instinctive urge to close ranks behind Marion Barry, Mike Tyson, Harold Ford, Clarence Thomas, or any other prominent black figure who is seen as being under attack by whites highlights the tendency to suspend or even dismiss moral judgments on matters pertaining to race. n116 The proper response to this danger, however, is not to hide behind a false (or at least false for today) race-blindness any more than it is correct to indulge in the fantasy of an essential blackness. Instead, one can claim both solidarity and morality by continually subjecting group loyalties to ethical evaluation. It is to this project that I now turn.

C. Morality and Politics: Giving Content to the Obligation Thesis

Notwithstanding the theoretical challenges outlined above, the obligation thesis has enjoyed widespread support among black professionals and intellectuals of markedly different political stripes. n117 This consensus ought to be a source of both reassurance and concern for the advocates of this point of view. On the one hand, a broad consensus is a sign that the theoretical arguments supporting the existence of such an obligation are in line with common moral intuitions. n118 On the other, this agreement on the principle of obligation undoubtedly masks deep divisions as to its proper scope and application. n119 Although sharp conflict over instrumental strategies should not obscure the importance of a common commitment to a shared goal, n120 something more must be said about the content of the obligations if this thesis is to be anything other than a general call to arms for black corporate lawyers.

Two questions lie at the heart of this task. First, what are the "interests" of the black community? Second, what are the morally acceptable strategies for "advancing" those interests? Both issues are certain to be controversial. To caricature the debate between Washington and DuBois, is the black community best served by programs that benefit the "talented tenth" or by those [*2009] that educate "ordinary" blacks in the basic skills of economic survival? When we focus on the second question, this time caricaturing the debate between today's black conservatives and liberals, do black professionals best serve their communities when they eschew "victim status" by demonstrating that they can excel according to the "standard" criteria or by using their professional skills to persuade their corporate clients to implement the traditional civil rights agenda?
It is at this point that the specter of enforced political orthodoxy looms large. Given the existence of profound disagreement over the best way to achieve racial progress, won't any attempt to judge whether a given black professional has fulfilled his or her obligation to the black community inevitably slide into political correctness or the tyranny of the black elite? If so, shouldn't this obligation be considered a matter of purely "personal" discretion, immune from review and criticism by others? n121 In this section, I will argue that this way of framing the question misperceives the purpose of the obligation thesis and underestimates the ability of rational argument to make progress in understanding how best to fulfill that purpose. At the outset, however, it is important to note that even if one fully accepts the political correctness critique, the project of educating future black corporate lawyers as to the justification for and implementation of the obligation thesis still remains. n122 Accepting for the moment that the content of a lawyer's obligation to the black community is purely a matter of personal choice, these actors must still be given the skills to make that choice intelligently. As I argue below, mainstream legal education currently fails adequately to perform this task.

1. Private choices and public debate.

The argument that obligations to the black community are "personal" and therefore not subject to review implicitly assumes one or more of the following three premises. First, one might contend that these obligations fall within a zone of privacy relating to matters which no other person has a legitimate right to inquire. Second, one could logically contend that the extent of one's duty to a community has to be personal because there are no meaningful standards for judging whether one method of discharging the obligation is superior to another. Finally, one might support a regime of private decisionmaking on the ground that any public evaluation is likely to be put to an improper purpose.

The first of these premises is clearly false. Once one accepts that black corporate lawyers have a moral obligation to advance the interests of the [*2010] black community - an obligation that is justified in part by the critical need that the black community has for the talents of its privileged members n123 - it is implausible as an a priori matter that the question of whether one has sufficiently discharged this duty cannot be inquired into by those to whom the duty is owed. n124

The second and third arguments, however, have more force. As the caricatures from the debates of the past and present underscore, there is considerable disagreement over the range of questions implicated by the obligation thesis. Moreover, some in the black community have responded to this disagreement with claims of black authenticity which, by effect or by design, have tended to stifle intellectual exchange. n125 But the proper response to these "ugly battles" is not, "for the sake of our people," to remove the debate over the content of racial obligations to the private sphere. n126 Such a move merely stifles debate further by turning every conceivable approach to aiding the black community into a matter of personal integrity. Ironically, this closing off of debate removes our best opportunity for making progress on what actions the obligation thesis actually licenses or requires. n127

Consider, for example, Stephen Carter's argument that the assertion that professional blacks should "represent their people" in the halls of power assumes that all black people share a common viewpoint which any particular black person must articulate if he or she is to be considered authentically "black." n128 This argument trades on a confusion between "representation" as "mirroring" or "standing in" for another and "representation" as "advocating the interest of another." n129 Arguments of the first kind rest in part on the assumption that certain "features or characteristics are relevant to action." n130 Arguments of the second kind do not. The obligation thesis contemplates (among other things) the second form of representation, not the first. Carter's argument, therefore, deflects attention from what should be [*2011] the real inquiry: Has the black official acted in a way that harms the black community? If he has, he is justly criticized - not because he is somehow not "black," but because he is wrong. n131

In order to reach this kind of critical judgment, however, one must have in mind a normative standard for determining what constitutes a "benefit" to the black community and some rational evidence for selecting certain policies or acts to attain that benefit. n132 Once again, proponents of a personal responsibility model assert that the task is impossible. This too is clearly false. Just because choosing between competing philosophies about how to advance the interests of the black community involves normative and empirical judgments does not mean that there are no standards by which such a choice can be made. Some actions cannot be justified on any plausible set of assumptions about interests or goals. Imagine a black lawyer who advocates legalizing lynching. In order to narrow the range further, however, we must recall the purposes for recognizing the obligation in the first instance.

2. The evaluative criteria: antiracism and the difference principle.
The obligation thesis rests on two features of contemporary American life: the legacy and continuing presence of racism and pervasive black poverty. Antiracism and efforts directed at those blacks with the least opportunities are therefore a natural starting point for any attempt to define the "interests" of the black community. The antiracism principle, which I borrow from Lawrence Blum, n133 is straightforward. Eliminating racism is a necessary condition to black flourishing. The focus on poor blacks builds on John Rawls' powerful intuition, often referred to as the difference principle, "that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate." n134

These broad principles begin to provide a framework for evaluating the claim that a given project is in the "interest" of the black community. For [*2012] example, consider the current efforts by the black bar to secure more corporate business for black lawyers. n135 From the perspective of the obligation thesis, these efforts might be defended on the antiracist claim that they are necessary to combat the unjustified refusal of corporations to give their work to minority attorneys. n136 At the same time, there is a question whether this initiative violates the difference principle. While redistributing corporate legal work to black attorneys will certainly advance the economic interests of black corporate lawyers, it may do nothing for the interests of poor blacks; indeed, to the extent that "race-matching" black attorneys with inner-city juries allows corporate interests to pursue their policies more effectively, n137 the program might exacerbate existing inequalities.

Of course, the advocates of these programs might tell a different story; that is, increasing the economic status of black lawyers will result in more spending in the black community which will in turn create jobs. My point simply is that to the extent that a black lawyer points to such a program as discharging his or her obligations to the black community, such benefits must be plausibly supported by reasonable arguments and evidence. n138

3. The need for further study.

Careful attention to the twin goals of antiracism and the difference principle can begin to narrow the range of permissible options under the obligation thesis. By themselves, however, they cannot provide a concrete blueprint for action. On the one hand, the range of potential actions that might satisfy these criteria is simply too great. On the other, they say nothing about how to balance legitimate considerations that counsel against doing everything one could to maximize the principles.

Consider, once again, the black lawyer asked to defend a company accused of race discrimination. What must he do to discharge his obligation to the black community? Must he refuse the case or perhaps even resign from the firm? Can he take the case so long as he has reasonable grounds to believe that the company did not in fact discriminate? Should he refrain from engaging in certain tactics (e.g., vigorously cross-examining the plaintiff) that he otherwise would be prepared to do? What happens if he vigorously defends the case but then makes a substantial contribution to a job retraining program catering primarily to a black clientele? Or can the law [*2013] yer discharge his entire obligation by being the best lawyer that he can be, thereby continuing to shatter racist stereotypes?

From a cursory glance at these options, it is apparent that there is no a priori method for choosing among them. Moreover, before one reached a definitive judgment, one would want to know a range of other information about the lawyer, the client, and the situation. What is needed, therefore, is a forum where black lawyers can investigate and debate the range of concrete alternatives for balancing their obligations to the black community against other legitimate professional obligations and personal commitments.

Law schools seem ideally situated to serve as this forum. There are, of course, limits to what can be accomplished in this setting. No matter what black students are taught in law school, their ability actually to follow the dictates of the obligation thesis will depend in large measure on whether they can circumvent the many structural features of corporate law practice that may stand in the way. n139 But this does not mean that the express and implicit messages that law schools convey about whether these structures are legitimate or illegitimate, natural or constructed, inevitable or changeable, will not affect how black law students understand and carry out their moral and professional obligations. Unfortunately, the current discourse in legal education undermines black students' ability to learn how to implement the obligation thesis successfully.

II. The Failure of Legal Education

Thurgood Marshall left no doubt about the central role accorded the obligation thesis when describing his own legal education. Summarizing the philosophy of Charles Hamilton Houston, Howard's Dean and Marshall's great
mentor, Marshall recalled that he "instilled in you the idea that the state, the school, the professors were giving you something for nothing, and that you had to give something back." n140 Houston himself was even more explicit, stating that "the Negro lawyer must be trained as a social engineer and group interpreter, due to the Negro's social and political condition. The Negro lawyer must be prepared to anticipate, guide, and interpret his group's advancement ...." n141 To accomplish this goal, Houston created a curriculum at Howard designed to give black students the "tools to construct a legal machinery that provides and protects the equal rights of all Americans." n142

In the post Brown era, a law school curriculum that specifically channels all black students into "civil rights work" is no longer necessary or desirable. Nevertheless, the gist of Houston's point remains. As blacks move into those segments of the legal profession from which they have previously been excluded, the task of sorting through competing responsibilities to clients, careers, and community is more difficult today than ever before. While law schools may no longer be in the business of exclusively training black "social engineers," they should give black students the tools to lead lives that are consistent with both professional success and the demands of justice. Unfortunately, contemporary legal education does not adequately prepare black students to perform this difficult balancing act.

In Part II.A., I argue that this failure is the result of three characteristics of the dominant approach to legal education. n143 First, the rhetoric of generality and neutrality employed in many law school classes simultaneously obscures important contextual distinctions and delegitimizes all race consciousness. Second, proceduralism and value skepticism disempower students from engaging in normative argument. Finally, law schools convey a narrow, cynical, and ultimately debilitating vision of the lawyer's professional role. Together, these three features of contemporary legal education discourage black students from pursuing the obligation thesis. In Part II.B., I offer some tentative thoughts about how legal education could avoid sending these unwarranted negative messages while at the same time providing those black students committed to the obligation thesis with the "tools" that they will need to pursue this strategy effectively. Finally, Part II.C. defends these reforms against the educational neutrality critique.

A. Moral Duties and Hired Guns

The obligation thesis calls on black lawyers to recognize when their actions will sometimes adversely affect the legitimate interests of the black community and to assign an appropriate weight to these consequences in deciding how to act in particular circumstances. Legal education, by privileging generality over context, procedure over substance, and partisanship over purposivism, makes both of these tasks more difficult.

1. Legal universalism: "perspectivelessness" and formal equality.

In Part I, I defended the obligation thesis against the expansive claims of moral universalism. n144 In law school, parallel claims of legal universalism threaten to undermine the coherence and legitimacy of the obligation thesis. Law schools teach that legal rules result from the neutral application of general principles, regardless of the particular context in which they arise. n145 As a result, students tend to view legal problems as divorced from their particular social and institutional context and to assume that formal rules can and must be applied "equally" to all citizens. n146

Claims of legal universalism undermine the obligation thesis in two respects. First, as Kimberle Crenshaw argues, many law school classes are characterized by a certain "perspectivelessness" in which the social, political, and institutional factors that frame a given legal issue are either left unexplored or treated as objective and unproblematic. n147 This mode of discourse tends to obscure the extent to which the social or institutional arrangements in question are often the result of contested (or contestable) political choices that shape what is considered relevant and important. n148 Moreover, because these choices have often been made by those in positions of power and influence, these "objective" accounts often leave out the experiences and concerns of black students. n149 Indeed, in light of the setting, it is remarkable the extent to which the unique perspectives of lawyers and clients (even "universal" lawyers and clients) are absent from the typical law school class discussion. n150

Perspectivelessness is inimical to the obligation thesis. In order to pursue this strategy effectively, black students must be able to recognize when the seemingly "neutral" actions of their clients are likely to adversely affect the interests of the black community and to determine what they can do as lawyers to ameliorate these harmful consequences. It is precisely this kind of discussion, however, that perspectivelessness is likely to suppress. n151

Second, when race is discussed, this conception of the law suggests that society's goal should be "to universalize institutional practices in order to efface the distortions of irrational factors like race, to make social life neutral ["2016]
to racial identity." n152 This ideology of colorblindness undermines the legitimacy of the obligation thesis. If black lawyers are morally obligated to protect the interests of the black community, the argument goes, then why aren't white lawyers under a similar duty to advance the interests of the white community? Since whites advancing the interests of other whites is the very definition of racism, the argument concludes, the obligation thesis is at best tactically inadvisable and at worst reverse racism. n153

2. Proceduralism and the "flight from substance." n154

Two aspects of legal education combine to discourage black law students from engaging in the substantive evaluation and criticism that is necessary to carry out the obligation thesis. First, law schools tend to emphasize procedural regularity over substantive results. Second, when substance is discussed, the relevant normative and empirical premises underlying particular conclusions are either assumed to be correct or treated as wholly arbitrary and contingent. Together, these two tendencies encourage students to develop a radically skeptical attitude toward even the possibility of engaging in normative argument.

From their first days in law school, students are taught that the process by which a particular decision is made is as, if not more, important than the substance of the decision itself. Plaintiffs lose just claims by failing to meet filing deadlines. Guilty criminal defendants are set free because the police put the wrong date on a search warrant. The obvious intent of the parties to enter into a binding agreement is frustrated by their failure to put their deal in writing. When applied to the obligation thesis, this fixation with process provides black students an easy and disabling alternative to reaching the merits of competing claims about what is in the interest of the black community.

Measured by the ordinary law school standards of procedural legitimacy, it is difficult for many black law students to justify their role as "representatives" of the interests of the black community. The obstacles seem insurmountable: The students were not elected; there is no way to poll the black community to determine their true desires, and even if there were, the range of views is likely to be large. In the absence of methods for sorting through these competing views, reaching a substantive decision seems arbitrary or tyrannical. Given the premium placed on using procedural rules to constrain legal decisionmakers from exercising power in just this fashion, it is [*2017] easy to see why a black student would be tempted to abandon the enterprise altogether.

Their reaction may be reinforced by the general view communicated in many law school courses that reason, facts, and principle cannot exercise any similarly constraining effect. When substantive questions are discussed in law schools they are often treated as either value neutral or nothing more than arbitrary value choices. n155 When value choices are ignored, students are led to equate normative argument with indoctrination and dogma. When those same choices are viewed as radically contingent, students fall into the trap of believing that any opinion is as plausible as any other. In either case, they leave with the firm impression that once substantive decisions are linked to values, they cannot be rationally discussed or empirically tested. Once imbued with this kind of radical skepticism, there is a real danger that black students will either slip into uncritically accepting the dubious claim that they are unlikely to face serious conflict between their roles as corporate lawyers and their commitment to the black community, or lose faith in their ability to defend (and therefore to act on) their own normative convictions. n156

3. The privilege of partisanship.

Law schools have a strangely ambivalent relationship with the profession they serve. On the one hand, law schools celebrate the principles of service, partisanship, and value neutrality that comprise the core of the traditional conception of professional morality. n157 On the other hand, professors deride these same principles as the attributes of a soulless mercenary who will do anything for money. n158 This characterization is applied with a particular [*2018] vengeance to those students going into corporate law practice. n159 Together these mirror images undermine the obligation thesis.

The traditional definition of the lawyer's role places service to the client above all other legal and moral values. Although lawyers are technically supposed to be both "advocates" and "officers of the court," the traditional model strongly implies that the limitations contained in the latter capacity are to be viewed from the partisan perspective of the former. n160 Moreover, whatever limitations on client service remain as a result of the lawyer's obligation to the system must be grounded in legal, as opposed to moral, values. A lawyer who denies her client a "legal" benefit on the basis of her own "personal morality" both infringes on the client's autonomy and arrogates to herself the role of judge and jury. n161 As a result, under the standard conception of zealous advocacy, a lawyer should pursue all arguably
legal avenues for obtaining the client's objectives. n162 If she does, the argument concludes, she is not morally accountable for either the means employed or the ends achieved. The system, not the individual lawyer, bears the moral responsibility for permitting clients to engage in legally permissible but morally questionable conduct. n163

This vision of the lawyer's role is fatal to the obligation thesis. If the duty to maximize the client's interest is taken to its logical extreme, black corporate lawyers would be precluded from taking any action that might be adverse to the interests of their powerful clients, regardless of whether that action were taken outside the normal bounds of client representation. n164 Such a stringent prohibition, of course, would substantially reduce the expected benefits to the black community if black corporate lawyers were to [*2019] implement the obligation thesis. n165 Even a more moderate reading of the duty of loyalty, however, confines a black lawyer's actions to improve the standing of the black community to areas outside of client representation. n166

The informal messages about the lawyer's role compound this problem. While the formal rules instruct lawyers to subjugate their personal morality to their professional one, the caricature of the "grubby, materialistic, and self-interested" lawyer so often deployed in law school classes bluntly lets the student know that even their newly acquired "professional" values are not to be taken seriously. n167 Not surprisingly, many students view their mandatory instruction in professional responsibility as "a joke" that has no real relevance to their future lives as lawyers. n168 This is particularly true with respect to those aspects of the "professional" model that instruct lawyers to act in ways that are likely to be contrary to their self-interest. As I argue below, some of these traditional features of lawyer professionalism, such as the duty to engage in law reform, the duty to provide legal counsel to those who cannot afford to pay for it, and the duty to counsel clients on both the legal and moral consequences of their conduct, are supportive of the model of lawyering contemplated by the obligation thesis. n169 By encouraging students to be cynical about the profession's commitment to these values, law schools exaggerate the tension between professionalism and solidarity. Black students are therefore likely to believe that choosing the former forecloses the latter.

B. Reforming Legal Education

Taken as a whole, these three features of contemporary legal education paint a portrait of a life in the law that is at best indifferent, and at worst hostile, to the obligation thesis. This portrait, however, is overdrawn in many important respects. In order to present a more accurate picture, law schools must give students the tools to make a contextual but nevertheless substantive evaluation of their lives as practicing lawyers. To accomplish this goal, law schools will have to rethink their approach to each of the issues discussed above. [*2020]

1. Confronting context.

Law schools can confront the submerged problems of perspectivelessness and illusory formal equality by continually paying attention to questions of context. At the most general level, law professors need to remind students that they are studying to be lawyers and not, for the most part, appellate judges or law professors. They must therefore continually be aware of the unique perspective that comes with this position and how that perspective can and should be influenced by the perspectives of other interested parties, such as clients, judges, and third parties. The perspective of lawyering - and not just "legal ethics" - must be taught pervasively throughout the curriculum. n170

Moreover, in order to guide students in the difficult choices contemplated by the obligation thesis, these discussions must pay far more attention to the structural aspects of ethical decisionmaking. Most discussions of lawyering implicitly envision a sole lawyer sitting down with an individual client who has engaged the lawyer's services in connection with a specific controversy. This model, however, neglects the reality of modern corporate law practice where both "lawyer" and "client" are likely to be large organizations, each with its own complex and contradictory set of identified and nascent interests and objectives. If black corporate lawyers are to influence the conduct of these powerful actors, they must understand how complex organizations process information and reach decisions. At present, these pragmatic institutional constraints and the skills necessary to deploy them to one's advantage are almost never discussed within the law school curriculum. n171

Finally, students must also be challenged to understand the central importance of structural factors such as race and class to many legal questions as well as the extent to which formal equality arguments may fail to capture this reality. Students should be encouraged to ask whether racial identity does or should play a role in our evaluation of legal texts or our understanding of legal problems. Moreover, in pursuing these questions, students should be directed to the ways in which all invocations of race consciousness are not in fact equal. Thus, the argument that the obligation thesis should
be rejected because it would automatically license either white or black racism ignores the fact that blacks helping blacks will have quite different effects than whites helping whites. To see these differences, however, one must descend from the level of abstract principles to examine the concrete realities of contemporary American life. In particular, a proper analysis of the moral validity of race conscious categories must account for the current disparity in the relative economic, social, and political power of blacks and whites. [*2021] Allowing whites to help whites reinforces this current inequitable distribution. Allowing blacks to help blacks has the opposite effect.

Moreover, in order to acknowledge this contextual difference, one need not abandon the idea of general principles or sanction black racism. n172 The moral legitimacy of the obligation thesis rests on the claim that directing black professionals to pay particular attention to the interests of the black community is a necessary step towards eradicating the unjustified hardship that this community has faced for more than three centuries. To the extent that this deprivation no longer exists, or the particular action taken by a black lawyer in the name of the obligation thesis actually has the effect of entrenching black domination over some other group, the special solicitude contemplated by the thesis would no longer apply. n173 But these conditions must be proven, not just assumed. In order to do so, however, one must make the kind of substantive arguments that are generally avoided in law school.

2. Embracing substance.

Law schools must do a better job of enabling students to identify and deploy normative arguments. In order to navigate the obligation thesis, black lawyers must be able to reach defensible substantive judgments about the content of their community-based commitments as well as how this obligation should be balanced against other competing concerns. The context specific discussions of the relationship between race and law outlined above should help facilitate the first of these tasks. The latter, however, will require law schools to broaden and clarify their teaching about the legitimate scope of professional, group, and personal obligations.

Law schools can begin this project by seeking to recapture those aspects of the traditional understanding of the lawyer's role that are currently ignored or ridiculed by the prevailing "hired gun" model of professionalism. [*2022] Two of these neglected features - law reform and moral dialogue - seem particularly worth retrieving.

A standard maxim of legal ethics is that when they are on their own time, lawyers should work to reform the legal system "without regard to the general interests or desires of clients." n174 While some have derisively referred to this duty as "schizoid lawyering," because it requires lawyers to divide their time between helping their clients "bend the legal framework" and urging legislatures and other decisionmakers to "bend it back" in order to make the system more fair and efficient, n175 the fact remains that this model expressly allows black corporate lawyers space to pursue their obligations to the black community free from professional criticism. Indeed, black lawyers may on average be more adept at applying this model than many of their white counterparts.

The black women and men who join the ranks of the corporate bar will often have a great deal of experience with the kind of cognitive dissonance that comes from shifting between two conflicting and sometimes competing moral worlds. One does not have to subscribe fully to DuBois' famous "double consciousness" theory to acknowledge that many successful blacks live in two worlds: one white and professional and the other black and political. n176 To the extent that this life training allows black corporate lawyers to avoid the gradual adoption of their client's perspectives and goals, n177 the "divided-self" model sanctioned by the traditional model of legal ethics offers a mechanism for these lawyers to carry out at least part of the obligation thesis. n178 Law schools should therefore highlight, rather than downgrade, this commitment to public service.

There remain, however, serious limitations on this strategy. Given the [*2023] increasingly heavy demands placed on corporate lawyers (particularly junior lawyers), a model for legal practice that confines the obligation thesis to the work lawyers do in their spare time severely limits its effectiveness. n179 More importantly, by leaving out client service, the divided-self model fails to address one of the central tensions that gave rise to the obligation thesis in the first place: the fact that corporate clients sometimes pursue policies adverse to the interests of the black community. To address these concerns, the obligation thesis must reach directly into the heart of the lawyer/client relationship.

Once again, the traditional model of legal ethics is not as unyielding as many law school ethics courses might lead one to believe. Virtually every prominent theorist concedes that it is permissible for lawyers to discuss the legal and moral consequences of a client's proposed course of conduct and to urge the client to choose an alternative route. n180 Yet, although this option is now expressly acknowledged in the professional codes, n181 few law students are instructed to take this opportunity seriously. The cynical caricature of the "hired gun" leads quickly to the conclusion
that clients are not interested in receiving moral advice from mercenaries. But this may not always be the case. As Robert Gordon argues, "many business executives want their lawyers to exercise political judgment, to serve as the "corporate conscience,'... and to follow the spirit as well as the letter of the law ....'" n182 Indeed, the model of the wise and independent corporate counselor is premised on corporate lawyers playing just this kind of role. n183 Law schools should promote the ability of their graduates to effectively counsel their clients on moral issues.

Once one retrieves these neglected aspects of professionalism, however, it is clear that more needs to be said about the proper scope of the other two spheres. Legal ethics courses tend to portray all ethical conflict as a clash [*2024] between the client's "legal rights" and the lawyer's "personal morality." n184 This dichotomy is false because it neglects both the "legal" values that may be opposed to the client's conduct and the connection between a lawyer's "personal" morality and group affiliation. Although law schools teach students to be suspicious of claims of group entitlement or loyalty, n185 there is rarely sufficient attention paid to either the positive or negative features of group affiliation to prepare students to assign these interests a proper role in ethical decisionmaking. n186 If black students are to understand both the virtues and the dangers of group affiliation, these issues must specifically be addressed.

Moreover, law schools must frankly examine the many pragmatic issues relating to a lawyer's unique career and life-style goals. Legal ethics courses routinely draw the specious dichotomy between "law" and "business," thereby seeking to purge any discussion of the commercial aspects of the practice of law. This attempt, of course, is self-defeating, since law students are keenly aware of the growing competitiveness of virtually every legal field. n187 Avoiding talking about these issues simply reinforces the view that what is going on in law school is irrelevant to law practice.

Instead, law schools must directly confront student fears about the consequences of ethical conduct. This is particularly true for black corporate lawyers, who must learn to balance the very real danger of being seen as less than a team player against their obligations to their community. For black lawyers, career advancement is a social justice issue in light of the continuing effects of racism. Those who are perceived as not being team players run the risk of reinforcing ugly stereotypes. Law schools owe their black students practical advice on how to negotiate the shoals of this dangerous dilemma.

3. Taking the long view.

Finally, legal ethics courses must encourage black corporate lawyers to see themselves as engaged in a life-long struggle to be morally responsible professionals. Most legal ethics courses are made up of a series of ethical snap-shots in which the object is either to choose the "right" answer or, more often, to come to the conclusion that there is no "right" answer. A moral life, however, is not simply the aggregation of a million separate experiences and decisions. A life well-lived is a life with a plan - even though [*2025] that plan will inevitably change over time. Along the way, one will have to make compromises. But even when those compromises are justified as necessary to reach a result that is morally correct, it is important to recognize that something has been lost all the same. There is, as others have argued, a "moral remainder" that continues to exercise some claim over our life plan as we move from one moral decision to the next. n188

Understanding the legitimate pull of the moral remainder is particularly important for black corporate lawyers. Given the tension between the goals of many corporations and the interests of the black community, this form of practice is fraught with moral conflict. Moreover, the vulnerable position in which many of these lawyers find themselves makes it unlikely that they will be able to risk their careers to ensure that the legitimate concerns of the black community are considered in every situation where they are present. The net result is that black corporate lawyers may frequently have to silently watch, or perhaps even actively defend conduct that undermines the cause of racial justice. But even if they are ultimately justified in doing so, the moral cost remains. The black community has a legitimate right to expect that this cost will eventually be repaid. In this context, regret is not enough: The obligation thesis requires actions as well as emotions.

C. Educational Neutrality and the Law School's Obligation to Social Justice

Finally, some might object that this entire project is misguided because it violates the law school's commitment to educational neutrality. For some, education to any norm constitutes a form of indoctrination. n189 For others, the objection is to changing the ethics curriculum to accommodate a particular group of students.
The short answer to these objections is that they are premised on the false claim that the current curriculum is neutral with respect to competing conceptions of the lawyer's role. As Carrie Menkle-Medow cogently argues: "Law teachers cannot avoid modeling some version of "the good lawyer"; thus, they cannot avoid teaching ethics." n190

More importantly, law schools cannot be neutral about the normative issues at stake in the obligation thesis. Although educational institutions should remain neutral among competing conceptions of the good life, law schools cannot be neutral as to a lawyer's obligation to participate in the struggle for social justice. Law is a public profession licensed by the state. Moreover, as Anthony D'Amato argues: "Justice is the only legitimate goal of the legal profession, and therefore the [*2026] only legitimate goal of law school study." n191

This is not to suggest that law schools should endorse one particular vision of how to achieve social justice through law. There are undoubtedly a range of plausible understandings of how legal institutions and practices might help correct existing inequalities and improve the life of all Americans. As Deborah Rhode argues, however, those who claim that promoting a justice-centered conception of the lawyer's role will either unduly politicize or completely eviscerate legal education "ignore the possibility of the proverbial middle ground." n192 The fact that many justice questions do not have objectively valid answers does not mean that "all answers are equally valid; some are more logical, consistent, coherent, respectful of evidence, and so forth." n193 Professors can encourage toleration and intellectual debate "without endorsing agnosticism." n194 Finally, providing black students the training they need will have the added benefit of reminding white students that they too have societal obligations that must be balanced against their other personal and professional commitments.

Conclusion

In a prophetic speech the night before he was assassinated, Martin Luther King defiantly declared that he could stare death in the face because "I've been to the mountaintop... And I've seen the promised land. I may not get there with you. But I want you to know tonight, that we, as a people will get to the promised land." n195 There can be no question that Thurgood Marshall, Charles Hamilton Houston, William Hastie, and the other visionary black lawyers of that generation walked the right path. As we mourn their passing, it is clear that the next generation of black leaders will in all probability walk a different one. Perhaps if we give these new black professionals a coherent and morally attractive reason to value their commitments to their community, they will not only find their way up the mountain, but finally help us to come down on the other side.

FOOTNOTES:


n6. See Richard L. Abel, American Lawyers 105 (1989) (reporting that a 1966 survey of black lawyers concluded that black private practitioners "served a clientele composed largely of individuals (87 percent) and almost entirely of blacks"); see also G. Franklin Edwards, The Negro Professional Class 133-34 (1959) (reporting that the primary reason that black lawyers went to law school was to be able to provide services to family members and other community residents who had lost property, suffered injustices, and had otherwise been denied the benefits and protections of the law); Harry T. Edwards, A New Role for the Black Law Graduate - A Reality or an Illusion?, 69 Mich. L. Rev. 1407, 1411 (1971) (describing most southern black lawyers as serving poor black clients in routine criminal, traffic, divorce, and personal injury matters and asserting that more black lawyers are needed "as a means to protect Black interests in a region where racial discrimination has traditionally reigned and the law has for years been but a tool of subjugation"). Even those black lawyers with outstanding traditional credentials were denied access to corporate law practice during this period. See Geraldine Segal, Blacks in the Law: Philadelphia and the Nation 77 (1983) (reporting that a black lawyer - undoubtedly William Coleman - who graduated magna cum laude from Harvard Law School, was nevertheless unable to secure employment with any white law firm in that city). Mr. Coleman was also a former Supreme Court law clerk and a native of Philadelphia.


n9. See Segal, supra note 6, at 79 (reporting that the number of blacks admitted to the Philadelphia bar entering corporate law firms or corporate legal departments rose from zero, for the cohort of students graduating from law school between 1890 and 1920, to 22.5% of the total of those who graduated by the mid-1970s).

n10. Although many public primary and secondary schools remain segregated in fact, the majority of black college students now attend integrated institutions. Reynolds Farley, Blacks and Whites: Narrowing the Gap? 198-99 (1984). This trend accelerates in law school, where Georgetown and Harvard graduate almost as many blacks as Howard and Texas Southern.

n11. It is important not to exaggerate this trend. Blacks still constitute less than 2% of the lawyers employed by the nation's largest corporate law firms. Report of the N.Y. State Judicial Commission on Minorities, Legal Profession, Nonjudicial Officers, Employees and Minority Contractors 27 (1991) hereinafter N.Y. Commission on Minorities (noting that in 1989, only 1.7% of the lawyers in the top corporate firms were black). Moreover, the percentage of black students attending the leading law schools from which corporate firms generally recruit "is considerably higher than the proportion of minorities among even the youngest cohorts of lawyers in firms." Robert L. Nelson, Partners with Power: The Social Transformation of the Large Law Firm 131 (1988). As a result, it seems unlikely that a majority of the black students at leading schools enter corporate law practice. Nevertheless, reports claiming that "the top black students from the Ivy League law schools ... get dozens of offers," while perhaps exaggerated, do underscore the fact that black law students from elite schools are going into corporate law practice in fairly significant numbers. Alexander Stille, Little Room at the Top for Blacks, Hispanics, Nat'l L.J., Dec. 23, 1985, at 1, 9. Stille goes on to report that 72% of Columbia's minority students took jobs in corporate law firms. Id.; see also Robert Granfield, Making Elite Lawyers: Visions of Law at Harvard and Beyond 47-50 (1992) (reporting that the overwhelming majority of Harvard Law School graduates enter corporate law practice). Although the attrition rates from these firms are significantly higher for black
lawyers than they are for their white counterparts, many of those who leave private firms go to work in corporate legal departments. See Fredrick H. Bates & Gregory C. Whitehead, Do Something Different: Making a Commitment to Minority Lawyers, A.B.A. J., Oct. 1990, at 78, 82 (noting the "extraordinarily high turnover rate for minority lawyers in large firms"); see also Robert I. Townsend, Chairman's Message: The Economics of Inclusion, ACCA Docket, Summer 1992, at 2 (urging corporate counsel to increase their efforts to hire minority attorneys).

n12. For example, from the perspective of social mobility, one might ask whether there continues to be a "glass ceiling" that prevents blacks from attaining high-status positions within the corporate bar? See Doreen Weisenhaus, White Males Dominate Firms: Still a Long Way to Go for Women, Minorities, Nat'l L.J., Feb. 8, 1988, at 1, 48 (reporting that more than one-half of the 250 largest law firms in 1987 had no black partners).

n13. See W.E. Burghardt DuBois, The Talented Tenth, in The Negro Problem: A Series of Articles By Representative American Negroes of To-Day 31, 33 (Mnemosyne Publishing, Inc. 1969) (1903) (arguing that the primary goal of education for blacks was to develop "the Best of this race that they may guide the Mass away from the contamination and death of the Worst, in their own and other races"). The continuing popularity of DuBois' basic idea, if not all of its elitist overtones, was evident throughout the recent career conference sponsored by the Harvard Black Law Students Association, aptly entitled "Many Paths, One Goal: Reconciling Various Strategies to Our Common Struggle."

n14. Again, it is important not to exaggerate the rate of progress. For example, even during the 1980s, when the nation's largest law firms experienced unprecedented growth in both size and profitability, the percentage of blacks barely increased. See Rita Henley Jensen, Minorities Didn't Share in Firm Growth, Nat'l L.J., Feb. 19, 1990, at 1 (reporting that the percentage of blacks in the nation's 250 largest law firms increased by less than one-half of 1% during the decade of the 1980s). By way of comparison, the percentage of women in large firms increased significantly during the same period. See Weisenhaus, supra note 12, at 1 (reporting that the percentage of women at large firms, though still inadequate, was significantly higher than the percentage of minorities); see also Kathleen Sylvester, Minorities in Firms: Women Gaining, Blacks Fall Back, Nat'l L.J., May 21, 1984, at 1. As these numbers suggest, there is ample evidence that black lawyers in corporate law firms face greater barriers to entry - and even more clearly to advancement - than their white contemporaries. See, e.g., 4 N.Y. Commission on Minorities, supra note 11, at 44-49 (describing the problems that minority litigators face in law firms); Steven Keeva, Unequal Partners: It's Tough at the Top for Minority Lawyers, A.B.A. J., Feb. 1993, at 50 (noting that the problems faced by minorities continue even when they become partners).


n16. Efforts along these lines have indeed become a major priority for national and state bar associations. For example, in 1988, the American Bar Association established the Minority Counsel Demonstration Program for the purpose of encouraging corporations to funnel more work to minority law firms. American Bar Association Committee on Opportunities for Minorities in the Profession, Year One: 1988-89 Minority Counsel Demonstration Program (1989). In addition, several state and local bar associations have launched efforts to increase minority representation in corporate law firms. See, e.g., Monica Bay, BASF Approves Voluntary Minority Quotas, The Recorder, June 15, 1989, at 2 (describing San Francisco bar association plans to increase the number of minorities in law firms, corporate legal departments, and government agencies to 15% by 1995 and 25% by the year 2000); Major Effort Launched to Increase Opportunity for Minority Lawyers, B. Rep., June/July 1992, at 1 (describing the D.C. Bar's efforts to increase the number of minority lawyers at major corporate law firms). I discuss these initiatives below. See notes 135-138 infra and accompanying text.
n17. Hacker speculates on why blacks, who constitute 10.1% of the total workforce, make up only 4.7% of waitstaffs, 3.6% of bartenders, and 2.5% of dental hygienists:

These are hardly elite occupations requiring sophisticated training. The suspicion arises that proprietors of restaurants and lounges may feel that their white clienteles do not want their food and drinks handled by black employees. Or it could stem from the belief that if a place has "too many' blacks on its staff, it will drop to a lower status... Perhaps most revealing of all is the small number of black dental hygienists. While white patients seem willing to be cared for by black nurses, they apparently draw the line at having black fingers in their mouths.


n18. See Cornell West, Race Matters, at x (1992) (describing the common frustration experienced by blacks at all income levels of trying to catch a cab in a white neighborhood). The feelings invoked by this kind of petty degradation are eloquently captured by Branford Marsalis' powerful saxophone solo in the aptly entitled "Brother Trying to Catch a Cab on the East Side Blues." Branford Marsalis, I Heard You Twice the First Time (Columbia Records 1992). This is not to suggest that there are no differences between blacks at the upper and lower ends of the income spectrum. I take up the significance of these differences below. See notes 66-68 infra and accompanying text.

n19. As late as 1970, one writer estimated that there were approximately 4200 black lawyers in the United States. See Tollett, supra note 4, at 337.

n20. See Ernest Gellhorn, The Law Schools and the Negro, 1968 Duke L.J. 1069, 1074 (noting that "even when the Negro has adequate funds, legal representation is not always available").

n21. See, e.g., Earl L. Carl, The Shortage of Negro Lawyers: Pluralistic Legal Education and Legal Services for the Poor, 20 J. Legal Educ. 21, 22 (1967) (arguing that "there must be more Negro lawyers if the Negro is to be protected against the abuse and exploitation of everyday life"); Gellhorn, supra note 20, at 1073-77 (linking the need for affirmative action programs with the shortage of lawyers willing to provide legal services to blacks).

n22. See note 47 infra and accompanying text.

n23. See Hacker, supra note 17, at 113 (reporting that blacks constituted only 3.2% of all lawyers in 1990).

n24. See 1 N.Y. Commission on Minorities, supra note 11, at 33-34 (noting that black heads of households in New York report significantly more unmet legal needs than whites and that 83% of black housing court litigants are unrepresented).

n25. I return to these indirect contributions, including pro bono work and monetary contributions, below. See notes 40-42 infra and accompanying text.

n26. As Professor William Simon argues, "the distribution of legal resources is important because the practical value of some rights depends more on the relative than on the absolute amount of the citizen's enforcement resources. Such rights include rights of access to partly competitive lawmaker

n27. See Nelson, supra note 11, at 7-8 (discussing the expanded use of lawyers by corporations).


n29. As Cornell West notes, this distribution is profoundly skewed in favor of a few at the top. West, supra note 18, at 6 (noting that "as of 1989, 1 percent of the population owned 37 percent of the wealth and 10 percent of the population owned 86 percent of the wealth"). The fact that lawyers help to perpetuate this situation has been repeatedly noted by critics of the American legal profession. See, e.g., Mark Green, The Gross Legal Product: "How Much Justice Can You Afford," in Verdicts on Lawyers 63 (Ralph Nader & Mark Green eds., 1976).

n30. See Hacker, supra note 17, at 98 (reporting that in 1990, 37% of all black families had annual incomes under $15,000 and over 56% earned below $25,000, as compared to 14.2% and 30.2% of whites).

n31. See Rita Henley Jensen, A Firm Blessing: Attorneys from Cravath Found a Developer's Plan Lawful. A Jury Disagreed, Nat'l L.J., Aug. 24, 1992, at 1. In essence, the firm's advice to the client was that "in an economy such as ours," a seller is free to charge an above market price and then to work to divert the potential buyers' attention away from other sources of information that might indicate that the price was inflated. Id. at 30 (quoting a Cravath partner).

n32. Id. at 30-31.

n33. Id. at 30.

n34. Indeed, to the extent that the developer in the above example was a publicly traded company, it is possible that some of the profits it received ended up in the hands of stockholders, some of whom may be middle income people. I address the relevance of such "trickle-down" theories below. See notes 40-42 infra and accompanying text.

n35. For example, Marc Galanter speculates that one important element driving the growth of large corporate law firms during the 1980s was the rapid rise in litigation between large corporations. See Marc Galanter & Thomas C. Palay, Tournament of Lawyers: The Transformation of the Big Law Firm 51-52 (1991). Even clashes between the titans, however, can have important implications for the health and well-being of ordinary workers and consumers. See Robert A.G. Monks & Nell Minow, Power and Accountability 52-54 (1991) (discussing the widespread implications for stockholders and consumers of the advice certain corporate lawyers gave their clients during the take-over litigation in the 1980s).

n36. See, e.g., Anthony R. Chase, Assessing and Addressing Problems Posed By Environmental Racism, 45 Rutgers L. Rev. 335, 368 (1993) (noting that studies have "consistently indicated that hazardous facilities and polluting industries are disproportionately located in minority neighborhoods" and arguing that this phenomenon
is explained in part by "the lack of financial, organizational, and political skills necessary to resist attempts to locate within these communities"); Paul Mohai & Bunyan Bryant, Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards, 63 U. Colo. L. Rev. 921, 927 (1992) (finding "clear and unequivocal" class and racial bias in the distribution of environmental hazards).

n37. Whether a black lawyer in such a situation will in fact undermine the cause of racial justice depends upon many factors, including the actual merits of the claim.

n38. For example, it would be virtually impossible for a black lawyer who wanted to specialize in mergers and acquisitions, international tax, or public offerings to do so in any setting other than a corporate law firm or in-house legal department. See John P. Heinz & Edward O. Laumann, Chicago Lawyers: The Social Structure of the Bar 36-58 (1982) (arguing that the stratification of the Chicago bar by clients effectively means that only corporate law firms perform certain kinds of legal work). Of course, these jobs may in fact be less rewarding than they have been cracked up to be. See Alex M. Johnson, Jr., Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice, 64 S. Cal. L. Rev. 1231 (1991).

n39. As Richard Abel notes, before blacks were given access to "desirable positions" within the legal profession, there was a significant disparity between the incomes of black and white lawyers. See Abel, supra note 6, at 107 (noting that in 1966 black sole practitioners earned "very little, even less than black lawyers employed in government - a reversal of the relationship among white lawyers"). By 1983, however, the starting salaries for black and white law school graduates "were virtually identical." Id.

n40. Reginald Lewis exemplified this form of service. At the time of his death, Mr. Lewis had contributed more than $ 7 million to educational and charitable institutions, including $ 1 million to Howard University. Even the $ 3 million Mr. Lewis gave to Harvard Law School, the largest single donation in the school's history, was partially designated to fund a scholarship for students from the third world. See Teltsch, supra note 1, at A17.

n41. Both Vernon Jordan, President Clinton's transition director, and Commerce Secretary Ron Brown followed this route. See Clinton's Mr. Inside, Vanity Fair, Mar. 1993, at 172 (describing Vernon Jordan's career).

n42. As Professor (and now Judge) Harry Edwards argued as early as 1971, "It is surely possible that one way to direct the interests of "the establishment" to the plight of the Black and to cause that establishment to move, albeit slowly, to eliminate the onerous oppressiveness of racism is to inject significant numbers of Black lawyers into the role of corporate legal advisor ...." Edwards, supra note 6, at 1417. Edwards therefore opposed the orientation of many of the early affirmative action programs which advocated developing " "relevant" curriculums, and in general ... focused institutional resources upon the preparation of a corps of young Black lawyers who can "return to their community." " Id. at 1416.

n43. I am grateful to several of the black students who attended a talk I gave on this subject to Yale's Black Law Students Association for emphasizing the importance of the limited nature of my claim.

n44. In these circumstances, the response, "If I don't do it, someone else will," is of little relevance. For an insightful discussion of the role of agent-relative reasons in moral argument, see Arthur Applebaum, Administrative Ethics from the Inside Out: Agent-Relative Reasons and Adversary Rules 19-21 (Aug. 1989) (unpublished manuscript, on file with the Stanford Law Review).
n45. Amy Gutmann, The Challenge of Multiculturalism in Political Ethics 25 (Feb. 14, 1993) (manuscript, on file with the Stanford Law Review) (forthcoming Phil. & Pub. Affairs, Summer 1993). Professor Gutmann goes on to reject this form of "comprehensive universalism" in favor of a form of "deliberative universalism" that allows for the possibility that different cultures might reach different morally acceptable judgments about the demands of justice. Id. at 28-38. As I argue below, I believe that the obligation thesis is compatible with both kinds of universalism, although the argument I propose is closer to Professor Gutmann's eloquent formulation.


n47. See Edwards, supra note 6, at 1416 (chastising early affirmative action programs on this ground).

n48. 1 N.Y. Commission on Minorities, supra note 11, at 83.

n49. See id. (quoting a black litigator in New York).

n50. See note 188 infra and accompanying text.

n51. See Edwards, supra note 6, at 1417.

n52. For example, Glenn Loury, a well known opponent of racial preference programs, agrees that "it is only reasonable to ask those blacks who have benefitted from the special minority programs ... to contribute to the alleviation of the suffering of poor blacks, for without the visible ghetto poor, such programs would lack the political support needed for their continuation." Glenn C. Loury, Achieving the "Dream": A Challenge to Liberals and Conservatives in the Spirit of Martin Luther King, Jr. (Feb. 12, 1990) (unpublished manuscript, on file with the Stanford Law Review). Despite bemoaning the "victim mentality" among blacks, Shelby Steele does appear to reject the obligation thesis. See Steele, supra note 46, at 161 (claiming that blacks make their "most serious strategic mistake" when they emphasize collective goals over individual achievement).

n53. In a related argument, these critics might also assert that even though the obligation thesis does not actually rely on essentialist or victim-based arguments, it will nevertheless reinforce these problems by encouraging blacks and whites to think in racialized terms. I return to this problem below. See notes 99-102 infra and accompanying text.

n54. I am grateful to my colleague Scott Brewer for recommending this method of framing the question as well as for clarifying my thinking about much of what follows. For the record, however, I should point out that Scott disagrees with many of the conclusions I advance on these issues.

n55. The quoted phrase hung above the schoolhouse door in Spike Lee's satire of black college life, School Daze. It invokes DuBois' famous call for black colleges to train a "talented tenth" who will "pull all that are worth saving up to their vantage ground." DuBois, supra note 13, at 45.
n56. See George P. Fletcher, Loyalty: An Essay on the Morality of Relationships 13 (1992) (arguing that the central premise of liberal philosophy is "the familiar postulate that "all men (and, obviously all women) are created equal" "). It is logically possible to defend the obligation thesis on grounds outside of this general moral consensus. In order to do so, however, one would have to embrace an extreme form of cultural distinctiveness (i.e., that black and white culture are so distinct that they share no common moral universe) and a thoroughgoing cultural relativism (i.e., that there are no principles by which even radically different cultures can evaluate each other). For reasons that will become clear below, I reject both these propositions. See note 65 infra and accompanying text (on cultural distinctiveness); note 131 infra and accompanying text (on cultural relativism).

n57. Some might argue that in cases of "extreme scarcity," stealing in one or both of these cases might be morally justified. See, e.g., Alan H. Goldman, The Moral Foundations of Professional Ethics 5 (1980) (arguing for such an exemption for family members). My point here is simply that even this argument must be justified on some principle other than preference for the interests of group or family members. This is especially true in this context if one believes, as I do, that racial identity constitutes a much less morally significant tie than familial relationships.

n58. See, e.g., id. at 4 (arguing that "family members are expected to weigh each other's interests more heavily than those of strangers, to provide for each other's needs as they would not for strangers"); Michael Walzer, Obligations: Essays on Disobedience, War, and Citizenship 169-89 (1970) (discussing the obligations citizens owe to the state). I take up below Walzer's claim that these and all other moral obligations must be voluntarily assumed. See notes 105-111 infra and accompanying text.

n59. See Goldman, supra note 57, at 3-4. As I argue below, the fact that law schools are responsible for teaching students to identify professional obligations and to recognize the extent to which these specialized norms must ultimately be justified in terms of common moral considerations, provides one of the compelling reasons for giving proper attention to the obligation thesis.

n60. See John Rawls, A Theory of Justice 114-15 (1971). Rawls distinguishes this kind of "natural duty" from the political obligations that citizens owe to each other in virtue of their commitment to just institutions. For present purposes, however, I will ignore this distinction, since it is implicit in my argument that people in the original position would accept that the obligation thesis should be considered a nonconsensual moral duty under the circumstances defined herein.

n61. The example is loosely based on one used by Peter Singer. Peter Singer, Famine, Affluence, and Morality, 1 Phil. & Pub. Aff. 229, 231 (1972) (arguing that someone who sees a child drowning in a shallow pool of water has a moral obligation to "wade in and pull the child out"). Singer goes on to argue that this obligation requires us to give equally to all those in need until the point that we are likely to impose serious moral harms to ourselves or others. Id. at 238. The obligation thesis, by recognizing the moral weight of relationships, contemplates a far less stringent duty.


n63. Anthony Appiah persuasively argues that "blacks" in Africa, the Caribbean, the United States, and the many other places that people with dark pigmentation have been called by this or similar names throughout history share neither a common racial genealogy nor a common culture. See Anthony Appiah, In My Father's House: Africa in the Philosophy of Culture (1992). Given the wide dispersion of dark-skinned people across
continents and traditions, any other conclusion would have been astounding. So long as the proponents of the obligation thesis limit their claims to the conduct of black Americans, however, this global observation is of little consequence. In the spirit of Appiah's argument, however, it is important to clarify two points. First, as Cornell West notes, even in the United States, "blackness" is primarily a "political and ethical construct." West, supra note 18, at 26. For the reasons stated above, the obligation thesis is consistent with this reality. Second, just because the obligation thesis seeks to define the moral duties of black Americans does not mean that the interests of blacks from other countries play no role in the analysis. For example, one way in which black corporate lawyers have succeeded in generating business is by representing American companies seeking to establish operations in Africa and the Caribbean and by assisting business and government interests in those areas in their dealings with the United States. Given that Americans tend to view all issues, both foreign and domestic, in racial terms, and that many black Americans are especially concerned about the development of Africa and the Caribbean, the obligation thesis may have implications for the manner in which black corporate lawyers should undertake this kind of representation. The recent controversy surrounding the disclosure that as a partner in the Washington, D.C. law firm of Patton, Boggs and Blow, Commerce Secretary Ron Brown represented Haitian Dictator "Baby Doc" Duvalier may provide a case in point. My argument is simply that the obligation thesis as herein defined is only relevant to the moral responsibilities that Ron Brown may have as a black American; it does not seek to define what actions a black Haitian lawyer should take under similar circumstances.

n64. Amy Gutmann argues that even within allegedly "total" systems of belief such as Mormonism one can identify dominant and dissenting views. See Gutmann, supra note 45, at 4-5.

n65. See West, supra note 18, at 4 (arguing that discussions of race must "begin with a frank admission of the basic humanness and Americanness of each of us").

n66. As early as 1975, researchers asserted that "blacks are increasingly divided into two groups - those who have succeeded and those who have been left behind." Sar A. Levitan, William B. Johnston & Robert Taggart, Still A Dream: The Changing Status of Blacks Since 1960, at 185 (1975); see also Farley, supra note 10, at 191. As Farley notes, however, even with respect to income and opportunities, "it is an oversimplification to claim that the black community is now split into an elite and an underclass since some trends point toward such polarization, but others point in the opposite direction." Id. at 190.


n69. See Hacker, supra note 17, at 93-106 (documenting the "racial income gap").

n70. See, e.g., Jennifer L. Hochschild & Monica Herk, "Yes, But ...": Principles and Caveats in American Racial Attitudes, in Majorities and Minorities: Nomos XXXII, at 308, 316-20 (John W. Chapman & Alan Wertheimer eds., 1990) (noting that the range of views in the black community on many racial justice issues is both narrower than and readily distinguishable from the range of views among whites). Similarly, one only has to observe the manner in which black styles of dress, music, language, and food still drift from one neighborhood, city, social class, or region of the country to another to recognize the continuing vitality of black culture.

n71. Cornell West puts the point brilliantly:

A mature black identity assumes neither a black essence that all black people share nor one black perspective to which all black people should adhere... Instead, blackness is understood to be either the perennial possibility of white supremacist abuse or the distinct styles and dominant modes of expression found in black cultures and communities. These styles and modes are diverse - yet they do stand apart from those of other groups (even as they are shaped by and shape those of other groups). And all such styles and modes stand in need of ethical evaluation.

West, supra note 18, at 28. It is this last project that I am attempting to further here.

n72. Id. at xi.

n73. See, e.g., Hacker, supra note 17, at 31-49; Staples, supra note 67, at 231.

n74. As Patricia Williams has eloquently argued, "I was acutely aware that the choice of identifying as black (as opposed to white?) was hardly mine; that as long as I am identified as black by the majority of others, my own identifying as black will almost surely follow as a simple fact of human interdependency." Patricia J. Williams, The Alchemy of Race and Rights 10 (1991).


n76. The social meaning and significance of artificially created categories such as race and religion are always subject to change. As many have noted, however, race - and particularly the social and economic stigma attached to "black" as an identifying characteristic - has proven remarkably impervious to change. See, e.g., Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism 3-10 (1992). Nevertheless, a significant change in the economic, political, and social position of blacks in American society would affect both the validity and the operation of the obligation thesis. It is for this reason that I limit my analysis to the obligations of black corporate lawyers as opposed corporate lawyers from all oppressed groups. Although blacks, Hispanics, Asians, women, gays and lesbians, and physically challenged individuals have all faced overt discrimination both in the legal profession and in the wider society, each group's experience and current status is unique. See, e.g., Abel, supra note 6, at 83-108 (documenting discrimination within the profession against blacks, Hispanics, Asian Americans, and women). These differences plausibly affect both the justifications for and the implementation of the obligation thesis. See, e.g., Subcommittee on Retention of the Committee to Enhance Minorities in the Profession, Report on the Retention of Minority Lawyers in the Profession, reprinted in 48 The Record 355 (1992) (reporting significant differences in the experiences and attitudes among black, Hispanic, and Asian American lawyers in large corporate law firms). As a result, unless otherwise specified, I limit my argument to the moral obligations of black corporate lawyers.
n77. This is not to suggest that our aspirations for the world, no matter how utopian, are irrelevant to the question of how we should act today. The claim that giving in to current injustice will preclude the dawning of a better tomorrow is one that should always be taken seriously. I discuss such an attack on the obligation thesis below. See notes 99-102 infra and accompanying text. For the moment, I am only arguing that one must also account for the realities of today - no matter how unpleasant - if one is to develop a moral theory that can actually guide human behavior.

n78. As Stephen Carter argues, "racial solidarity, in the sense of self-love, is the key to our survival in a frustratingly segregated integrated professional world, just as it is the key to our survival in a frustratingly oppressive nation." Stephen L. Carter, The Black Table, the Empty Seat, and the Tie, in Lure and Loathing, supra note 67, at 55, 66; see also Fletcher, supra note 56, at 3 (arguing that our loyalties, including loyalties to a race or a people, sometimes "generate the interactions that make our daily lives meaningful").

n79. Carter, supra note 78, at 79. As Fletcher puts it:

The historical self generates duties of loyalty toward the families, groups, and nations that enter into our self-definition. These duties may be understood as an expression of self-esteem and self-acceptance. To love myself, I must respect and cherish those aspects of myself that are bound up with others. Thus by the mere fact of my biography I incur obligations toward others...

Fletcher, supra note 56, at 16.

n80. Bates & Whitehead, supra note 11, at 84.

n81. By benign, I mean to refer to the intent of the white actor and not necessarily to the effects on the black recipient.

n82. See Hacker, supra note 17, at 20-21 (discussing this example).

n83. This complaint has been frequently made by black conservatives. See, e.g., Steele, supra note 46, at 111.

n84. See Martin Kilson, Realism About the Black Experience: A Reply to Shelby Steele, Dissent, Fall 1990, at 519, 520 ("If racism ... is not eliminated or at least reduced to a benign level, the chances for development (social mobility) of any black individual are problematic at best and rigidly circumscribed at worst.").

n85. Even those who claim that the civil rights strategies pursued by Marshall and his contemporaries are no longer relevant or effective do not dispute the value of dismantling the barriers of legal segregation. See, e.g., Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice 45-49 (1987) (acknowledging that the dismantling of legal segregation was an important victory while at the same time stressing that the economic, social, and political status of many blacks is worse today than it was 25 years ago).

n86. Indeed, some have argued that most of the public and private programs that were created in response to the civil rights movement have benefitted only middle-class blacks. See, e.g., Carter, supra note 15, at 71-72.
n87. As Carter argues, if it is right to compare blacks to other immigrant groups, then "an ideology of solidarity becomes even more pressing a need, for other immigrant groups relied on it heavily." Id. at 243.

n88. There are, or course, good reasons to be careful of comparisons between blacks and other groups given "the clearly more vicious and violent nature of the ethnic denigration of blacks compared to, say, Asian Americans, Jews, Italians, or the Irish." Kilson, supra note 84, at 521. In this context, however, these differences reinforce the need for group solidarity.

n89. As George Fletcher cogently argues,

loyalty is a critical element in a theory of justice; for we invariably need some basis for group cohesion, for caring about others, for seeing them not as strangers who threaten our security but as partners in a common venture. There is no easy response to the idealist who insists that all five billion people constitute one community, with one cause. The answer must begin with an understanding of how we as human beings are constituted and what our natural limits of sympathy may be.

Fletcher, supra note 56, at 21.

n90. See Kilson, supra note 84, at 520 (arguing that even "self-identifying blacks" should recognize that if they do not "aggregate themselves into organizations and coalitions to combat the massive vestiges of American racism, no amount of ... individual development is either conceivable or attainable").

n91. David Luban defines the duty of fair play as follows: "In a generally beneficial scheme of social cooperation that won't work unless most people shoulder a burden and in which most people do shoulder that burden, it is unfair to those who do for you to accept the benefits of the scheme without doing your part." David Luban, Lawyers and Justice: An Ethical Study 37-38 (1988). Lawrence Becker elaborates this basic idea under the heading of "reciprocity," which he sums up in these maxims: "That we should return good for good, in proportion to what we receive; that we should resist evil, but not do evil in return; that we should make reparation for the harm we do; and that we should be disposed to do those things as a matter of moral obligation." Lawrence C. Becker, Reciprocity 4 (1986). For a sampling of the extensive philosophical literature on this family of moral duties, see, for example, Kent Greenawalt, Conflicts of Law and Morality 121-58 (1987); A. John Simmons, Moral Principles and Political Obligations 101-42 (1979).

n92. Whether the company in fact is guilty of discrimination is relevant to the moral calculation. I return to this issue below.

n93. As I make clear below, these arguments do suggest important limits on the content of the obligation thesis.

n94. As Sartre pointedly observed in a related context, "It is the anti-Semite who makes the Jew." Jean-Paul Sartre, Anti-Semite and Jew 69 (George J. Becker trans., 1948).

n95. Of course, these wrongs do create moral obligations among the oppressors.

n96. See note 61 infra and accompanying text.
n97. Black lawyers frequently complain about the absence of mentors. See 1 N.Y. Commission on Minorities, supra note 11, at 85 (quoting a black litigator as complaining, "I have few if any contacts, no mentor and no one to turn to in considering other avenues of law that may interest me or that may be interested in me."). Such relationships are critically important to success. See Stille, supra note 11, at 9 (quoting a black partner as stating that "in order to make partner in one of these firms you need someone to take your hand and lead you through it, to tell you "Don't go into that area because it's not a priority at the firm' ").

n98. This is not to say that the extent of the obligation - i.e., what the lawyer is obligated to do - will be similarly unaffected.

n99. For example, some might argue that a prisoner who agreed to perform musical concerts in order to keep the inmates pleasantly distracted and therefore docile had made the wrong choice.

n100. As Stephen Carter says, "to put the matter bluntly, our people need us. The better trained our minds, the more we have to contribute to the debate over the best way of alleviating the crisis in which the black community finds itself." Carter, supra note 15, at 241.

n101. Ian Haney-Lopez argues that "eliminating the conscious recognition of community affiliation will not extinguish different communities in the United States, for these communities will continue to exist whether consciously recognized or not." Ian Haney-Lopez, Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don't Think White, 3 Reconstruction 46, 57 (1991). Although this is undoubtedly something of an overstatement (if race consciousness were truly "eliminated" the communities that subsequently developed would look very different than they do today), it is unlikely that blacks refraining from thinking of themselves in racial terms will persuade whites to follow their lead.

n102. Of course, some might deny that race-blindness is either possible or desirable. See, e.g., id. (arguing that the diversity movement rejects "the normative goodness of uniformity"). As should be clear, the obligation thesis does not depend upon endorsing this assumption.

n103. Andrew Hacker posits a chilling allegory in which white college students are asked how much they should be paid if they were suddenly to become black. The fact that answers in the range of $ 50 million ($ 1 million for every remaining year of their lives) are common is as good a testament as any to the "value that white people place on their own skins." See Hacker, supra note 17, at 31-32.

n104. See David Thomas, Mentoring and Irrationality: The Role of Racial Taboos, 28 Hum. Res. Man. 279 (1989) (discussing the difficulties in interracial mentoring relationships). Of course, as Thomas readily acknowledges, there is nothing inevitable about this.

n105. Walzer, supra note 58, at 7 ("One does not acquire any real obligations ... simply by being born or by submitting to socialization within a particular group. These obligations come only when to the fact of membership there is added the fact of willful membership."). Walzer goes on to apply this theory to the obligations of racial minorities. Id. at 53.
n106. It is important to note that many blacks lawyers have promised to be loyal in a myriad of ways, including promises to friends and family, graduation speeches, essays in college and professional school admissions applications, grant proposals, and award ceremonies. Those making such promises should be reminded that they carry moral weight.

n107. Again, this will not always be the case. Many blacks have voluntarily accepted the benefits of affirmative action. Like promises, voluntary acceptance carries moral weight.

n108. See Simmons, supra note 91, at 122.

n109. Walzer himself seems to acknowledge the force of this argument when noting that "it is the fate of the oppressed that the whole of their moral lives be mediated by their common situation" and when describing those who "pass or assimilate" as having "moved into a world of deceit and self deceit, where trust and mutuality are lost ideals." Walzer, supra note 58, at 51, 52.

n110. This is not to suggest that every black corporate lawyer has benefitted from every aspect of the collective struggle. To the contrary, some aspects of that struggle were certainly harmful to some or all of the intended beneficiaries. But the obligation is to the project of advancing blacks as a group, not to any particular tactic or strategy. So long as no black corporate lawyer could rationally reject the benefits of the project, the fact that their acceptance was not "voluntary" does not prevent the formation of a legitimate obligation.

n111. See Becker, supra note 91, at 125 (arguing that a voluntary contractual model does not capture adequately the way we use and support public goods like clean air).

n112. See note 13 supra (citing DuBois on the obligation thesis) and notes 140-142 infra (citing Houston and Marshall on the obligation thesis).

n113. See note 21 supra and accompanying text (on goals of early affirmative action programs).

n114. As George Fletcher cautions: "For all those who marched with Martin Luther King, Jr., there were millions more seduced by the Fuhrer. For every prophet there are countless mountebanks, and in every loyal follower may lurk the mindless zealot yearning to be a slave." Fletcher, supra note 56, at 35.

n115. Id. at 36.

n116. Cornell West calls this "the pitfall of racial reasoning." West, supra note 18, at 21-32. It should be noted that this closing of ranks is both understandable, in light of the long history of racist attacks on blacks, and sometimes justifiable, given the ever present danger of selective prosecution. Nevertheless, it is the unthinking quality of the response that should give one pause.

n117. Indeed, even such bitter opponents as Booker T. Washington and W.E.B. DuBois both couched their bitter feud in these terms. Compare Booker T. Washington, Industrial Education for the Negro, in The Negro Problem, supra note 13, at 7, 18 (quoting Fredrick Douglass to justify industrial education on the ground that...
"every blow of the sledge hammer wielded by a sable arm is a powerful blow in support of our cause") with DuBois, supra note 13, at 33 (justifying educating the "talented tenth" on the same ground).

n118. The idea that a proposition is more likely to be true if it fits with our common intuitions has a long and distinguished philosophical heritage. See, e.g., Ronald Dworkin, Taking Rights Seriously 150-68 (1977).

n119. As Randall Kennedy notes, for example, Washington and DuBois were locked in a "ferocious ideological struggle that degenerated into bitter personal enmity" over which policies would actually advance the cause of blacks. Kennedy, supra note 46, at 1785.

n120. See Scott Brewer, Introduction: Choosing Sides in the "Racial Critiques' Debate, 103 Harv. L. Rev. 1844, 1854 (1990) (suggesting that Kennedy and his critics remember that they "share a goal whose importance is so overwhelming as to dwarf instrumental disagreement about the best ways to achieve it").

n121. This appears to be Stephen Carter's position. In his most recent essay on the subject, Carter argues that the obligation to solidarity is "something personal, a choice within a choice." Carter, supra note 78, at 78. He elaborates: "This means, of course, that every one of us who is black and a professional becomes insulated from the cruel suggestions that we have left our people behind, because only we know that." Id.

n122. Recall that at this stage of the analysis, I am assuming that advocates of the political correctness critique agree that there are obligations but disagree about how they should be defined.

n123. As Stephen Carter concedes, for example, the obligation to solidarity is premised in part on the fact that "our people need us." Carter, supra note 15, at 241 (emphasis added).

n124. See Walzer, supra note 58, at 58-59 (arguing that those who purport to act on behalf of oppressed minorities have a moral obligation to act in ways that actually benefit the oppressed and that members of the oppressed have a right to hold their leaders accountable to this obligation). As I noted above, Walzer argues that only those who volunteer to be "activists" have moral obligations. Once obligations are extended to others, however, his claims about how these commitments should be identified and evaluated have great force.

n125. See West, supra note 18, at 50 (acknowledging that "black liberalism - especially among black academic and political elites - does impose restraints on the quality and scope of black intellectual life").

n126. Carter, supra note 78, at 77.

n127. As Amy Gutmann cogently argues, the best response to even fundamental moral conflict is "actual deliberation among reasonable perspectives in forums well-designed for deliberation." Gutmann, supra note 45, at 30.

n129. The classic work on the differences between these forms of representation is Hanna Fenichel Pitkin, The Concept of Representation (1967). For a thoughtful description of how Pitkin's work might inform the current controversy over diversity in hiring and in the arts, see Martha L. Minow, From Class Actions to Miss Saigon: The Concept of Representation in the Law, 39 Clev. St. L. Rev. 269 (1991).

n130. Pitkin, supra note 129, at 88.

n131. To quote Justice Marshall's thinly veiled reference to Clarence Thomas when he was asked whether it was important for President Bush to appoint a black to fill Marshall's seat, "there's no difference between a black snake and a white snake. They'll both bite." Neil A. Lewis, Marshall Urges Bush to Pick "the Best', N.Y. Times, June 29, 1991, at A8. The point here is not whether Marshall was right in calling Thomas a "snake," but rather his insistence that we focus on the merits of his views. The penalty is moral criticism, not excommunication. With Thomas, of course, there was the additional question of whether he should be given a seat on the Supreme Court. The question whether it is appropriate to deny Thomas his seat on the ground that he had failed to live up to his obligation to the black community (assuming this to be the case) is a separate question from whether he can be criticized for this failure. It seems plausible, however, that in this case, a failure to exercise the quasi-public moral responsibility contemplated by the obligation thesis would be a legitimate ground for opposing his nomination to a position of moral as well as legal leadership.

n132. See Pitkin, supra note 129, at 173-74 (concluding that a theory of representation ultimately depends upon taking a substantive position on a conception of the good).

n133. Lawrence A. Blum, Antiracism, Multiculturalism, and Interracial Community: Three Educational Values for a Multicultural Society 2 (1991) (defining antiracism as "striving to be without racist values oneself as well as being prepared to work against both racist attitudes in others and racial injustice in society more generally").

n134. Rawls, supra note 60, at 75.

n135. See note 16 infra.

n136. However, to the extent that most of the attorney's efforts are directed at procuring business for herself, the claim that participation in the program benefits the black community becomes even more attenuated as the line between antiracism and simple self-interest begins to blur.

n137. See Don J. DeBenedictis, Changing Faces: Coming to Terms with Growing Minority Populations, A.B.A. J., Apr. 1991, at 54, 56 (noting that "some argue that minorities are in increasing demand as insurance defense attorneys because jurors are increasingly members of minority groups").

n138. There is nothing, of course, that requires that this or any other self-help program for corporate lawyers be examined from the perspective of the obligation thesis. In that case, the question of whether a given lawyer had fulfilled his obligations to the black community would simply remain unanswered.
n139. See Deborah L. Rhode, Ethics By the Pervasive Method, 42 J. Legal Educ. 31, 46 (1992) (arguing that ethical behavior depends heavily on such situational pressures as "temptation, workplace pressures, and collegial attitudes").


n142. Id. at 56 (quoting Houston).

n143. I realize that I am painting with a broad brush. There are undoubtedly many currents in contemporary legal education that press against the tendencies I describe below. Nevertheless, legal education continues to be oriented towards the ends of the dichotomies that I criticize. To the extent that it is moving away from this polarity, my purpose here is to simply help it along its way.

n144. See notes 54-116 supra and accompanying text.


n146. See Martha Minow & Victoria Spelman, In Context, 63 S. Cal. L. Rev. 1597 (1990) (arguing that the law privileges generality over context).

n147. See Crenshaw, supra note 145, at 1 (defining "perspectivelessness"). In addition, Chuck Lawrence notes that these "universal" accounts are particularly pernicious when the assertion of universality is left unstated, as is most often the case. Charles R. Lawrence, III, The Word and the River: Pedagogy as Scholarship as Struggle, 65 S. Cal. L. Rev. 2231, 2253 (1992).

n148. See Granfield, supra note 11, at 77 (noting that for many Harvard Law School students, "the real life drama of human events in law school as well as its social context is considered superfluous to the legal issues at hand").

n149. In fact, Crenshaw argues that "what is understood as objective or neutral is often the embodiment of a white middle-class world view." Crenshaw, supra note 145, at 3.

n151. As Crenshaw argues, "dominant beliefs in the objectivity of legal discourse serve to suppress ... conflict." Crenshaw, supra note 145, at 2. As a result, she continues, "while Black students are likely to be concerned with the impact of laws on the Black community," these issues are unlikely to arise unless they are raised by black students, and when they are, they will often be dismissed as unimportant or special pleading "while the other values or world views that are routinely invoked are not viewed as racial or self-interested, but as general - or even universal - values." Id. at 2 n.4.


n153. See id. (arguing that a commitment to generality and neutrality inevitably links race consciousness by blacks with reverse racism); see also Kimberle Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331 (1988).

n154. The title is a paraphrase of Scott Brewer's endorsement of a "flight to substance" when we are confronted with claims that we should defer to the "perspective of the oppressed." Scott Brewer, Pragmatism, Oppression, and the Flight to Substance, 63 S. Cal. L. Rev. 1753, 1759 (1990). In this respect, he and I agree that "we ought to feel compelled to exercise, not to flee from, substantive judgement, no matter who we are, no matter who else shares the podium of debate." Id. at 1761.

n155. See Roger C. Crampton, The Ordinary Religion of the Law School Classroom, 29 J. Legal Educ. 247, 254, 262 (1978) (arguing that "surface goals such as "efficiency,' "progress,' and "the democratic way' are taken at face value and more ultimate questions of value submerged" and contending that legal education is entangled in "modern dogmas," including "a moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, and a realism tending toward cynicism").

n156. Robert Granfield's study of the attitudes of Harvard Law School students suggests that both of these dangers are real. On the one hand, he quotes a black student responding to the charge that he has "sold out" by going into corporate law practice as stating that

"I think I can be more effective making deals than by doing public interest law... For years, Blacks have been treated as slaves, sharecroppers, or porters. So I think that whether I want to be a partner at a major New York firm or to be an NAACP defense attorney, either of these positions are sic politically correct because I'm just saying I'm going to do what I want, I'm going to be free."

Granfield, supra note 11, at 155. In keeping with the obligation thesis, the student goes on to state that he intends to "use his money and position to advance the interests of black people." On the other hand, Granfield reports that students (including black students) who came to law school with a commitment towards promoting social justice came away from the experience thinking that "it's all a game" and that they no longer had confidence in their ability to tell "what's right or wrong anymore." Id. at 63-64. As Granfield argues, such "cynical relativism regarding the nature of one's actions is a type of consciousness that is contrary to the pursuit of social justice." Id. at 65.


n158. See Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 38 (1992) (quoting a former law clerk as reporting that "many professors ... had an "attitude'
that ... practitioners were sell outs, endured intolerable drudgery and were not the bright lights in the profession").

n159. See Granfield, supra note 11, at 146-49 (describing how Harvard Law School students who choose to go into corporate practice are often referred to as "corporate tools").

n160. I pursue this argument at some length elsewhere. See David B. Wilkins, Legal Realism for Lawyers, 104 Harv. L. Rev. 468, 483-84 (1990).


n162. Professor Murray Schwartz refers to this as the principle of partisanship. See Murray L. Schwartz, The Professionalism and Accountability of Lawyers, 66 Cal. L. Rev. 669 (1978). As Professor William Simon argues, this conception of the lawyer's role privileges the client's legal rights over all other values that arguably might apply. See Simon, supra note 26, at 1114.

n163. Professor Schwartz calls this the principle of nonaccountability. See Schwartz, supra note 162, at 671; see also Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060, 1066 (1976) (arguing that the system, not the individual lawyer, is morally responsible for legally permissible results).

n164. For example, some lawyers take the view that it is unethical for an attorney to take a position adverse to the interests of the firm's paying clients in the course of pro bono or law reform work. See John S. Dzienkowski, Positional Conflicts of Interest, 71 Tex. L. Rev. 457 (1993). Although such "positional conflicts" have rarely been officially recognized, the more central the role that client loyalty assumes in defining the scope of zealous advocacy, the more likely it is that a lawyer who does anything that might be interpreted as adverse to the client's interest will face pressure to curtail his "disloyal" conduct. Cf. Steven Gillers, Conflicts: Risky New Rules, Am. Law., Sept. 1989, at 39, 40 (arguing against a proposal by the American Law Institute to prohibit lawyers from representing a client with a "position" materially adverse to the position of a former client). The ALI proposal was subsequently withdrawn. See Restatement (Third) of the Law Governing Lawyers 213 (Tent. Draft No. 3, 1990).

n165. There would still be benefits even on this narrow reading of professional roles. For example, even the most stringent interpretation of "position conflicts" would probably not preclude black corporate lawyers from donating money to a neighborhood homeless shelter or representing blacks on death row. Nor would black corporate lawyers be precluded from pushing their employers to hire other black lawyers, provided that these new entrants can be counted on to zealously guard client interests to the same degree as their white peers. I return to this issue below. See text accompanying notes 182-194 infra. Although undeniably important, these activities neither threaten particular corporate prerogatives nor alter the existing balance of power. Once a black corporate lawyer crosses either of these boundaries - for example by lobbying Congress to make it easier for blacks to file and win employment discrimination law suits or by trying to steer a corporate client away from locating a toxic waste dump in a poor black neighborhood - he or she would probably run afoul of the kind of ethical scheme that places unstinting client loyalty at the epicenter of the lawyer's role.

n167. See Edwards, supra note 158, at 38.

n168. See id. at 73 & n.110 (noting several students who expressed this sentiment).

n169. See notes 174-188 infra and accompanying text.

n170. See Rhode, supra note 139, at 50-53 (cogently making a similar case for the so-called "pervasive method").

n171. For an admirable attempt to investigate these issues, see Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. Rev. 1, 33-48 (1988) (analyzing the "institutional conditions of independence").

n172. See J.L.A. Garcia, Re-conceptualizing Racism: A Consideration of Some Recent Work in Social Philosophy (Dec. 11, 1992) (unpublished manuscript, on file with the Stanford Law Review) (rejecting the polar claims that blacks cannot be racist and that all acts of communal solidarity by blacks are racist).

n173. For example, consider the experience of American Jews. Prior to the mid-1960s, overt and thinly veiled anti-Semitism was rampant in American society in general and the American legal profession in particular. See, e.g., Sanford Levinson, Identifying the Jewish Lawyer: The Construction of Professional Identity, 14 Cardozo L. Rev. (forthcoming 1993). Under these conditions, the claim that Jewish lawyers should protect the interests of other Jews - for example, by pushing a recalcitrant law firm to hire more Jews - seems quite defensible. Given the large number of Jews currently employed in virtually every corporate law firm, as well as the general improvement in the economic and social status of Jews, such preferential treatment is much less justifiable, particularly if it also has the effect of closing off opportunities for lawyers from other groups whose members currently face more severe discrimination. This does not mean that Jews may never prefer the interest of other Jews to non-Jews. There may be some occasions when preferential treatment by Jews who have access to wealth and power is warranted. But these actions must always be justified in terms of both the objective conditions of the Jewish community and the fit between the proposed action and the proffered justification. (I am grateful to Amy Gutmann for helping me work through this example.)


n175. The term comes from Robert Gordon, who, to be fair, is aiming at a different target when he dismisses the profession's claim that this form of divided consciousness solves all of the problems of libertarian advocacy. Gordon, supra note 171, at 22-23.

n176. In perhaps his most famous passage, W.E.B. DuBois argued that black Americans are afflicted with a form of "double consciousness" in which "one ever feels his two-ness, - an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder." DuBois, supra note 75, at 17. As Gerald Early notes in the introduction of an excellent collection of essays exploring the concept of double consciousness, "although this passage is endlessly quoted," there is considerable disagreement over its meaning, validity, and continuing relevance. Gerald Early, Introduction, in Lure and Loathing, supra note 67, at xviii. Nevertheless, even those who dispute some or all of the implications of what they consider to be DuBois' thesis do not deny that today's successful black
professionals live in at least two worlds. See Stanley Crouch, Who Are We? Where Did We Come From? Where Are We Going?, in Lure and Loathing, supra note 67, at 80, 87 (arguing that DuBois was wrong to simplify consciousness to only two polarities because doing so fails to account for other important elements like class, region, and professional identification).

n177. Robert Nelson reports that the views held by most of the corporate lawyers he surveyed were strikingly similar to those of their corporate clients. See Nelson, supra note 11, at 256 ("Three quarters of the respondents indicated that they had never been faced with a conflict between their personal values and the request of a client."). Whether this general convergence is the result of background attitudes or professional socialization, it is arguably less likely that a survey of the attitudes of black corporate lawyers would produce similar results.

n178. Not surprisingly, this seems to be the approach most commonly used by black lawyers seeking to discharge their obligations to the black community.

n179. Most lawyers do little if any pro bono work. See, e.g., Joel F. Handler, Ellen Jane Hollingsworth & Howard S. Erlanger, Lawyers and the Pursuit of Legal Rights 91-110 (1978); Deborah Rhode & David Luban, Legal Ethics 872 (1992) (noting a 1989 ABA study which indicated that less than 17% of all lawyers participated in organized pro bono programs for the poor). Although black lawyers, on average, may have more interest in doing pro bono work than other lawyers, they may also face greater pressures to demonstrate that they are "team players" willing to shoulder their share of the paying business. As a result, the average time spent on pro bono and law reform projects by black lawyers may be no greater than the time spent by their white counterparts.

n180. See, e.g., Freedman, supra note 161, at 50-52 (arguing that lawyers have a duty to engage their clients in moral dialogue).

n181. See Model Rules of Professional Conduct Rule 2.1 (1983) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

n182. Gordon, supra note 171, at 25; see also Freedman, supra note 161, at 51 (arguing that lawyers often wrongly assume that "the client wants us to maximize his material or tactical position in every way that is legally permissible, regardless of non-legal considerations").

n183. Louis Brandeis is often cited as the model for this kind of independent lawyering. See Phillipa Strum, Louis D. Brandeis: Justice for the People 96-102 (1984) (describing Brandeis' efforts to get two of his clients to adopt an alternative course of action that would reduce the harm to third parties).

n184. See Simon, supra note 26, at 1113-19 (objecting to what he calls the "specious law-versus-morality characterization"). This line, of course, is far from clear. Indeed, as I have argued elsewhere, Simon may include more on the "legal" side of the equation than can be justified by a fair understanding of our present traditions and practices. See Wilkins, supra note 160, at 508.

n185. See Stuart Macaulay, Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar, 32 J. Legal Educ. 506, 523 (1982) (arguing that law school classroom
discussions "frequently celebrate individualism, efficiency, an incremental process, and protection of zones of freedom within which those with power can exercise it").

n186. See Fletcher, supra note 56.

n187. See, e.g., Edwards, supra note 158, at 67-70 (discussing the increasing competitiveness of the bar and its effect on ethical behavior); Robert MacCrate, Paradigm Lost - or Revised and Regained?, 38 J. Legal Educ. 295, 296 (1988) (same).

n188. See, e.g., Jack & Jack, supra note 157, at 42-44 (discussing the idea of a moral remainder); Bernard Williams, Ethical Consistency, in Moral Dilemmas 115 (Christopher W. Gowans ed., 1987) (discussing the concept of moral conflict).


n192. See Rhode, supra note 139, at 49.

n193. Id.

n194. Id.