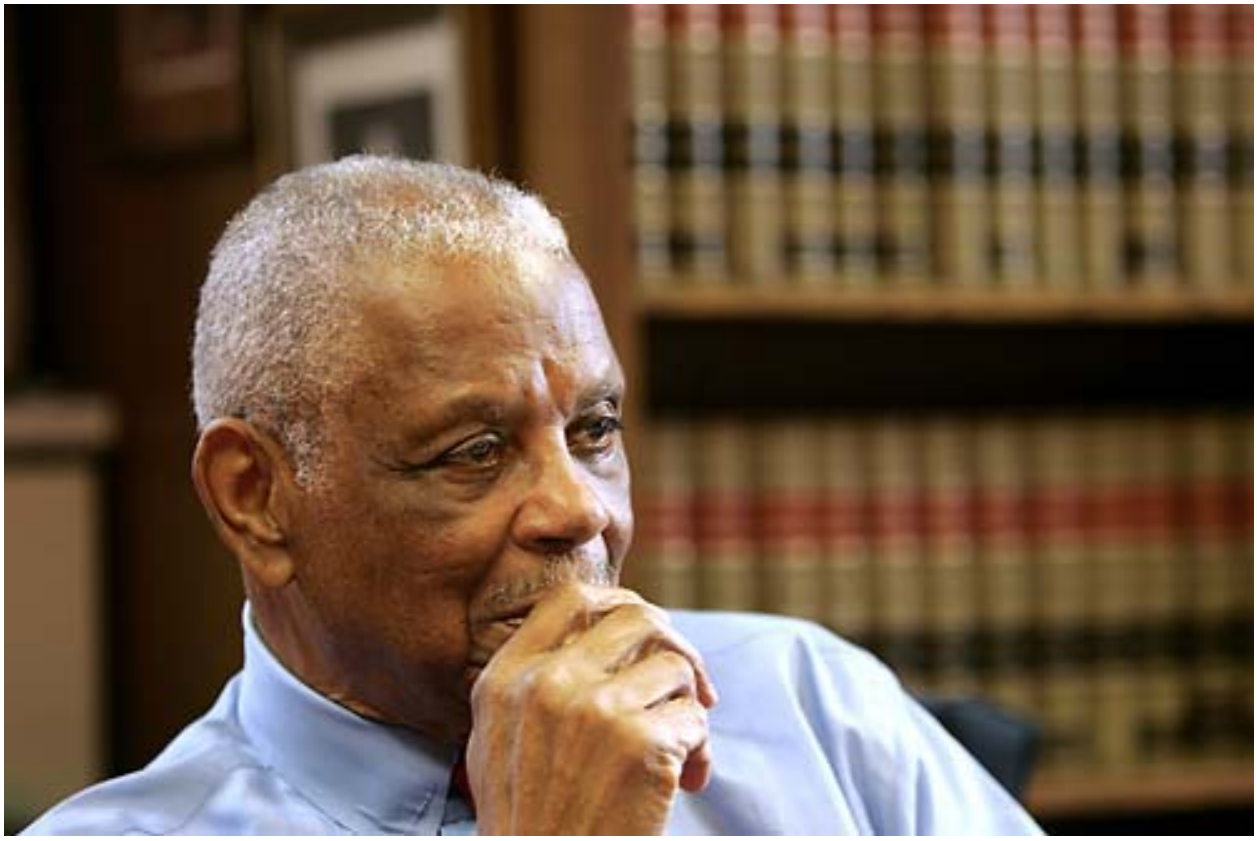
NOMINATION OF
THE HONORABLE DAMON J. KEITH
FOR THE
SARAH T. HUGHES CIVIL RIGHTS AWARD



"Judicial independence is not merely a principle to aspire to; it is a basic tenet of our system of governance that must be protected if our democracy is to flourish.

"In times of uncertainty, people blinded by fear are willing to sacrifice their rights in exchange for a false sense of security. But the judiciary cannot succumb to such pressures. People may be swayed by the politics of fear, but the Constitution will not waiver. Judicial independence guarantees it."

Contents

Brief Resume of the Honorable Damon J. Keith

Federal Judicial Service:

U.S. District Court, Eastern District of Michigan

- Nominated by Lyndon B. Johnson on September 25, 1967
- Confirmed by the Senate on October 12, 1967, and received commission on October 12, 1967.
- Served as chief judge, 1975-1977.

U.S. Court of Appeals for the Sixth Circuit

- Nominated by Jimmy Carter on September 28, 1977, to a seat vacated by Wade Hampton McCree, Jr.;
- Confirmed by the Senate on October 20, 1977, and received commission on October 21, 1977.
- Assumed senior status on May 1, 1995.

Education:

West Virginia State College, B.A., 1943

Howard University School of Law, LL.B., 1949

Wayne State University Law School, LL.M., 1956

Professional Career:

U.S. Army, 1943-1946

Private practice, Detroit, Michigan, 1950-1967

Attorney, Office of Friend of the Court, Detroit, Michigan, 1951-1955

THE HONORABLE DAMON J. KEITH
SUMMARY BIOGRAPHY AND AWARDS*

Damon Jerome Keith was born on July 4, 1922, in Detroit, Michigan, shortly after his father, Perry Alexander Keith, moved his wife, Annie Louise (Williams) Keith, and their five children from Atlanta, Georgia to take a foundry job at Ford Motor Company's Rouge plant.

After graduating from Detroit's Northwestern High School in 1939, Damon Keith became the first member of his family to attend college, earning a bachelor's degree from West Virginia State College, one of the nation's historically black schools, in 1943. He served three years in the U. S. Army and then, following the advice of his mentor, West Virginia State president, John W. Davis, enrolled in Howard University Law School, where Thurgood Marshall and others were planning the legal strategy for the civil rights battles of the 1950's. He received his LL.B. in 1949 and an LL.M. in labor law from Wayne State University in Detroit in 1956.

Judge Keith spent the early years of his career with the Detroit law firm of Loomis, Jones, Piper & Colden and on the staff of the Wayne County Friend of the Court. He was one of six Detroit attorneys invited to the White House in 1963 by then President John F. Kennedy to discuss the role of lawyers in the civil rights struggle. In 1964 he and four other black attorneys formed Keith, Conyers, Anderson, Brown & Wahls, locating themselves in what previously had been the all-white legal district of downtown Detroit. During this period he also served as chair of the Michigan Civil Rights Commission and president of the Detroit Housing Commission.

In 1967 President Lyndon Johnson, upon the recommendation of Michigan Senator Philip Hart, appointed him to the U.S. District Court for the Eastern District of Michigan, only the second African American to sit on that court. Judge Keith served on the district court from 1967 until 1977, becoming chief judge in 1975. During his tenure, he delivered several landmark rulings in civil rights and civil liberties cases: on school desegregation in *Davis v. School District of the City of Pontiac* (1970); on employment discrimination and affirmative action in *Stamps v. Detroit Edison Co.* (1973) and *Baker v. City of Detroit* (1979); and on housing discrimination in *Garrett v. City of Hamtramck* (1971) and *Zuch v. Hussey* (1975). But he is most frequently cited for his opinion in *U.S. v. Sinclair* (1971), dubbed the "*Keith decision*." In Sinclair, Judge Keith, sitting on the district court, found that then-President Richard Nixon and then-Attorney General John Mitchell could not engage in warrantless wiretap surveillance of three individuals suspected of conspiring to destroy government property because the surveillance was in violation of the Fourth Amendment. Judge Keith wrote:

> The great umbrella of personal rights protected by the Fourth Amendment has unfolded slowly, but very deliberately, throughout our legal history.
>
> . . .
>
> The final buttress to this canopy of Fourth Amendment protected is derived from the [Supreme] Court's declaration that the Fourth Amendment protects a defendant from the evil of the uninvited ear.
>
> . . .
>
> It is to be remembered that the protective sword which is

> sheathed in the scabbard of Fourth amendment rights, and which insured that these fundamental rights will remain inviolate, is the well-defined rule of exclusion. And, in turn, the cutting edge of the exclusionary rule is the requirement that the Government obtain a search warrant before it can conduct a lawful search and seizure. It is this procedure of obtaining a warrant that inserts the impartial judgment of the Court between the citizen and the Government.

This decision was affirmed by the Court of Appeals for the Sixth Circuit, and unanimously upheld by the United States Supreme Court.

In 1977 President Jimmy Carter appointed Judge Keith to the U.S. Court of Appeals for the Sixth Circuit where he has served for the past twenty-nine years (taking senior status in 1995).

To this day, Judge Keith remains a dedicated and active voice in support of civil rights. In 2002, he authored the Sixth Circuit's often-quoted and frequently eloquent opinion *in Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002), a landmark decision flatly rejecting the government's claim that it could hold deportation proceedings against Rabih Haddad in secret. Judge Keith wrote: "The Executive Branch seeks to uproot people's lives outside the public eye and behind a closed door. . . . Democracies die behind closed doors." "When government begins closing doors," he said, "it selectively controls information rightfully belonging to the people. Selective information is misinformation." He said, "A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the framers of our Constitution."

Judge Keith also has been an outspoken advocate of judicial independence, writing, in an April 16, 2006 op-ed entitled "Recent attacks on independence of

judges endanger democracy”:

> Our country is in crisis. The Constitution, the Bill of Rights and the independence of the judiciary are under attack. If we, as Americans, do not act, our democracy as we know it will be lost. As abolitionist Wendell Phillips said, "Eternal vigilance is the price of liberty."
>
> One need look no further than today's headlines about certain overzealous members of Congress who are once again threatening to strip away the constitutional system of checks and balances that has protected our democracy for more than 200 years. American history teaches us that whenever a court's decision does not agree with the nakedly partisan and self-serving interests of certain segments of the populace, then politicians begin to threaten the independence of the judiciary.
>
> As far back as *Marbury v. Madison* in 1803 and *Brown v. Board of Education* in 1954, calls have rung out to impeach chief justices for unpopular decisions. I have personal experience with unfounded questions about my judicial decisions. In the 1970s, President Richard Nixon's administration attacked my ruling that not even the president could bypass the Constitution to wiretap phone lines without a warrant in the name of "national security."
>
> Today's attacks are no different. In the past year, some threats against the judiciary have been very bold. U.S. Rep. Tom DeLay, R-Texas, upon disagreeing with the judgment of what he called the "arrogant, out-of-control, unaccountable judiciary," asked the Judiciary Committee to examine the decisions of judges. He unabashedly proclaimed: "We set up the courts. We can unset the courts. We have the power of the purse." What arrogance!
>
> Recently, Justice Ruth Bader Ginsburg described threats made against her and former Justice Sandra Day O'Connor on an Internet posting: "Okay, commandoes, here is your first patriotic assignment ...

an easy one. ... If you are what you say you are, and NOT armchair patriots, then these two justices will not live another week."

O'Connor also noted that death threats against judges were increasing, and that, according to National Public Radio, "It doesn't help when a high-profile senator suggests there may be a connection between violence against judges and decisions that the senator disagrees with." O'Connor was, of course, referring to comments U.S. Sen. John Cornyn, R-Texas, made after the husband and mother of a federal judge were brutally murdered last year by a man who was unhappy the judge dismissed his case.

These efforts to undermine the independence of the federal judiciary are motivated, more often than not, by anger from right-wing extremists upset over a judicial decision that affirmed either civil rights or civil liberties protections they did not agree with.

The framers of the Constitution did not arbitrarily grant life tenure to federal judges or casually prohibit the other branches of government from decreasing federal judges' salaries. It was done to promote and protect judicial independence. As Founding Father Alexander Hamilton stated, "The complete independence of the courts of justice is peculiarly essential in a limited constitution."

The importance of this independence was never more apparent than in the aftermath of the highly contested 2000 presidential election, when the Supreme Court voted 5-4 to give the presidency to George W. Bush. The country did not erupt. No one rioted in the streets. The nation was able to survive this questionable decision because the rule of law prevailed.

Judicial independence is not merely a principle to aspire to; it is a basic tenet of our system of governance that must be protected if our democracy is to flourish.

In times of uncertainty, people blinded by fear are willing to

sacrifice their rights in exchange for a false sense of security. But the judiciary cannot succumb to such pressures. People may be swayed by the politics of fear, but the Constitution will not waiver. Judicial independence guarantees it. In 1776, our nation's founders understood what those who wish to encroach upon judicial independence fail to realize today: The continued freedom of this country's citizenry must begin and end with an independent judiciary.

In the midst of these vicious attacks on the judiciary, I challenge the American people to exercise vigilance. If we who love America don't do it, who will?

DAMON J. KEITH

"If you want an American hero? A real hero?" wrote New York Times columnist, Bob Herbert, in his September 2, 2002 op-ed entitled *Secrecy is our Enemy*, "I nominate Judge Damon J. Keith."

In 1985, Chief Justice Warren E. Burger appointed Judge Keith as Chairman of the Bicentennial of the Constitution Committee for the Sixth Circuit. Then, in 1987, Judge Keith was appointed by Chief Justice William Rehnquist to serve as the National Chairman of the Judicial Conference Committee on the Bicentennial of the Constitution. In 1990, President George Bush appointed him to the Commission on the Bicentennial of the Constitution. In recognition of Judge Keith's service to the Bicentennial Committee, more than 300 Bill of Rights plaques commemorating this important constitutional anniversary bear Judge Keith's name and adorn the walls of courthouses and law schools throughout the United States and Guam, as well as the FBI Headquarters and the Thurgood Marshall Federal Judiciary Center in Washington, D.C.

In 1993, Wayne State University Professor Emeritus, Edward J. Littlejohn,

approached Judge Keith about creating a collection of photographs, personal papers, legal memoranda, and memorabilia from African-American lawyers and judges. This was the beginning of the Damon J. Keith Collection of African-American Legal History, which is the first and only collection of its kind. Wayne State University Law School continued with a series of projects honoring Judge Keith, including a proposed $16.5 million addition to the school called the Damon J. Keith Center for Civil Rights ("Keith Center"), the funding of the Damon J. Keith Chair in Civil Rights, and the further development of the Damon J. Keith Collection of African-American Legal History, which will have its permanent residence at the Keith Center.

Recognition, Awards and Honorary Degrees

Judge Keith is the recipient of numerous honors and awards, including the NAACP's highest award, the Springarn Medal, in 1974, the American Bar Association's Thurgood Marshall Award in 1997, the prestigious Edward J. Devitt Award for Distinguished Service to Justice in 1998 and honorary degrees from Yale University, Georgetown University, the University of Michigan, Tuskegee University and over thirty other institutions. The Detroit Board of Education has named an elementary and middle school in his honor.

Judge Keith has received 38 honorary degrees from the following colleges and universities: West Virginia State College, Wayne State University, Howard University, Lincoln University, University of Detroit, Atlanta University, Detroit College of Law, University of Michigan, New York Law School, Michigan State University, Marygrove College, Detroit Institute of Technology, Shaw College, Central State University, Yale University, Loyola Law School (Los Angeles), Eastern

Michigan University, Virginia Union University, Central Michigan University, Morehouse College, Western Michigan University, Tuskegee University, Georgetown University, Hofstra University, DePaul University, Ohio State University, Colgate University, Paine College, Bowling Green State University, College of William & Mary, Spelman College, University of Cincinnati, Oberlin College, and University of North Carolina at Chapel Hill, Oakland University, Ohio Northern University, Lawrence Technological University, and Wilberforce University.

In 1974, the Detroit Board of Education dedicated one of its primary schools in his honor, naming it The Damon J. Keith Elementary School. Judge Keith is also a recipient of numerous awards, most notably: the NAACP's highest award, the Spingarn Medal (past recipients include the Rev. Martin Luther King, Jr., Justice Thurgood Marshall, and General Colin Powell); and the Distinguished Public Service Award from the National Anti-Defamation League of B'nai B'rith. He has also been recognized by the Detroit Legal News as one of only 16 Legal Legends of the Century in Michigan. In addition, Wayne State University has recently created the Damon J. Keith Law Collection, the first national archive devoted entirely to the accomplishments of our nation's African American lawyers and judges. Most recently, he received the lifetime achievement award from the National Black College Alumni and was inducted into their Hall of Fame. Judge Keith was named the 1997 recipient of the American Bar Association's Thurgood Marshall Award. In naming Judge Keith the recipient of this highest of honors, the ABA said: "Judge Keith represents the best in the legal profession. His work reflects incisive analysis of issues, principled application of laws and the Constitution, passionate belief in the

courts' role in protecting civil rights, a commitment to community service and, most significantly, an independence of mind to do what's right that is at the core of his view of professional responsibility. There is no better role model today for lawyers and law students seeking to work for equal justice."

In 1998, Judge Keith was selected to receive of the Detroit Urban League's 1998 Distinguished Warrior Award, as well as recipient of the prestigious Edward J. Devitt Award for Distinguished Service to Justice. The Devitt Award annually honors a federal judge who has achieved an exemplary career and has made significant contributions to the administration of justice, the advancement of the rule of law, and the improvement of society as a whole. Judge Keith was nominated for the Devitt Award by lawyers and judges throughout the country. United States Court of Appeals Judge Peter Fay remarked: "One cannot be around Damon for very long without sensing his commitment to all that is good about our country. But, unlike many, he does not limit his commitment to words – his actions speak volumes. He gets involved. He spends the time. He does the work. Yes, he gets his hands 'dirty' because there is nothing he will not do if he is convinced it will help others and strengthen our way of life."

In 1999, The Michigan Chronicle chose Judge Keith to represent the legal profession as one of ten of "The Century's Finest" Michiganders. His dedication to equality under the law and his contributions to civil rights prompted the Chronicle to say: "There is no better role model today for lawyers and law students seeking to work for equal justice."

In January of 2000, Turner Broadcasting Systems, presented Judge Keith the

Pinnacle Award at the Eighth Annual Trumpet Awards in Atlanta. Trumpet Awards are given annually to African Americans whose achievements in their fields, coupled with their humanitarian and community-oriented efforts, have helped create a better society.

In February of 2000, Judge Keith's career was profiled by Court TV as part of a program honoring "America's Great Legal Minds" in honor of Black History Month.

On February 17, 2001, Judge Keith received the American Bar Association Spirit of Excellence Award.

Judge Keith is married to Rachel Boone Keith, M.D. They have three daughters, Gilda Keith, Debbie Keith, and Cecile Keith-Brown. Cecile and her husband, Daryle Brown, are parents of Judge Keith's granddaughters, Nia and Camara.

As a community leader, Judge Keith organized local businessmen to provide housing for Mrs. Rosa Parks, after she was robbed and physically assaulted in her house. In 2004, Judge Keith was again responsible for organizing members of Detroit's African-American business community, this time to save the city's Charles H. Wright Museum of African-American History from bankruptcy. Judge Keith has played an active role in a number of civic, cultural and educational organizations, including the Detroit YMCA, the Detroit Arts Commission, the Detroit Cotillion Club and Interlochen Arts Academy, and has been a tireless fundraiser for the United Negro College Fund and the Detroit NAACP. In addition, he serves as a deacon of the Tabernacle Baptist Church.

In 2005, Judge Keith was honored to be a co-chair for the National Victory Celebration for the Farewell to Mrs. Rosa Parks, organizing the homegoing services for Mrs. Parks across the country. He accompanied her body, as she was honored in Montgomery, Alabama, Washington, D.C., and Detroit, Michigan. Judge Keith, who presented Mrs. Parks with the Spingarn Award, the NAACP's highest award, in Louisville, Kentucky in 1979, says that “Mother Parks represents everything that my legal and judicial career has stood for. It was a honor to celebrate her life with the rest of the world.”

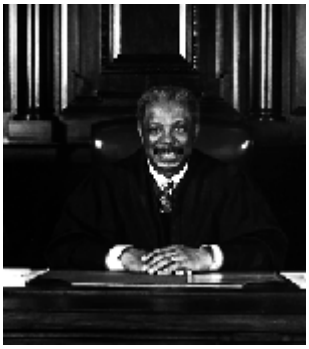
In Judge Keith's continuing commitment to develop and mentor aspiring lawyers and judges, he advises:

Hard work, absolute honesty and integrity, and being kind and considerate to your colleagues are the most important attributes of a good attorney or judge. Having faith in God and remembering to serve your fellowman, however are indispensable to being a complete and good human being.

Judge Keith is married to Rachel Boone Keith, M.D. They have three daughters, Gilda Keith, Debbie Keith, and Cecile Keith-Brown. Cecile and her husband, Daryle Brown, are parents of Judge Keith's granddaughters, Nia and Camara.

* This biography is quoted almost entirely from the official biographical sketch, which was provided by Judge Keith’s office, and the biography found on-line at http://keithcollection.wayne.edu/about/bio.html

Judge Damon Jerome Keith Chronology



"I enjoy difficult decisions. I am not indecisive."

--Judge Damon Keith, The Nation Dec. 24, 1973

b July 4, 1922 (Father Perry b 12/2/1875, married Annie Williams in Atlanta 12/6/06 -- moved to Michigan to work at Ford's River Rouge Plant foundry)

1939	Northwestern H.S., Detroit
1943	B.A., West Virginia State College
1943-1946	U.S. Army
1949	LLB., Howard University Law School
1950	Admitted to Michigan Bar
1950-1952	Associate: Loomis, Jones, Piper & Colden
1952-1956	Friend of Court Enforcement Attorney
1957	Partner: Colden, Snowden, Smith and Keith (Through 1961) NAACP "Fight for Freedom" Dinner Chair (has attended every dinner since first in 1956)
1958	Wayne County Board of Supervisors (through 1963) Detroit Housing Commission (through 1967) (VP, 1959; Pres 1960-67)

1960	Commissioner, State Bar of Michigan (through 1967)
1961	Solo practitioner (through 1964) Legal Staff, Detroit Board of Education
1963	Chair, Civil Rights Committee, Detroit Bar Association Invited to Washington by President John F. Kennedy to be one of six Detroit Lawyers to discuss civil rights
1964	Chair, Michigan Civil Rights Commission (through 1967) Establishes prominent African-American firm of Keith, Conyers, Anderson, Brown and Wahls (through 1967). Partners: Nathan Conyers, Herman Anderson, Joseph Brown, Myron Wahls. Committee to Study and Revise the Criminal Code of Michigan, State Bar Michigan Committee on Manpower development and Vocational Training
1965	Committee on Bail and Criminal Justice, State Bar (Appointed by Justice Michael Cavanaugh)
1966	Commissioner, State Bar of Michigan (through 1967) (1st African- American Commissioner)
1967	Appointed U.S. District Judge (Eastern District of Michigan) (2nd African-American Judge in Eastern District of Michigan) Nominated by Sen. Phillip Hart
1970	Davis v. School District of Pontiac, Inc.. 309 F. Supp 734. Pontiac desegregation decision (schools responsible for "necessary steps" to alleviate segregation -- eliminated distinction between de jure and de facto segregation) Madison Realty Co. v. Detroit 315 F. Supp 367 (E.D. Mich. 1970)
1971	U.S. v. Sinclair -- U.S. v. District Court for Michigan 321 F. Supp1074. (Nixon-White Panther Party wiretap decision) -- Keith: "Such power held by one individual [the President] was never contemplated by the framers of our

	Constitution and cannot be tolerated today." Named one of "One Hundred Influential Black Americans" by Ebony (1971 - 1992) Garrett v. City of Hamtramck 335 F. Supp. 16 (1971) and 357 F. Supp. 925 (1973)
1972	Morris v. Michigan State Board of Education No. 38169 E.D. Mich. 1972
1973	Stamps v. Detroit Edison Co , 365 F. Supp 87 (E.D. Mich 1973) (Detroit Edison Employee Discrimination suit)
1974	1974 NAACP Spingarn Medal "In tribute to his steadfast defense of constitutional principles as revealed in a series of memorable decisions he handed down as a U.S. District Court Judge; In praise of his trail- blazing Pontiac (Michigan) decision which virtually eliminated the distinction between de jure and de facto school segregation"; in recognition of his lifetime of distinguished public service on behalf of his city, state and nation and, particularly, of his race; and in genuine appreciation of the model he has afforded aspiring young black folk, The National Association for the Advancement of Colored people proudly presents this Fifty-ninth Spingarn Medal to Damon J. Keith Distinguished Jurist, Compassionate Interpreter of the Law and Dedicated Public Servant"(Spingarn citation, Box 2, Damon Keith Collection) Swears in Mayor Coleman Young of Detroit in January Special Award, Outstanding Trial Judge, Michigan Trial Lawyers Association Damon J. Keith Elementary School named by Detroit School Board
1975	Affirmative Action/layoff compromise within Detroit Police Department mediated by Judge Keith Zuch v. Hussey (Detroit "blockbusting" case)
1976	Considered in running to be named President Jimmy Carter"s U.S. Attorney General

	1977 Appointed to U.S. 6th Circuit Court by President Jimmy Carter Damon J. Keith Middle School named by Detroit School Board
1979	Writes decision in favor of Detroit Police Department affirmative action plan
Other:	Lani Guinier, Dennis Archer were law clerks 1st VP, Detroit NAACP

The Exhibit

The Marching Toward Justice exhibit was created by the Damon J. Keith Collection to inform the public about the fundamental importance of the 14th Amendment and our nation's ongoing quest to realize the high ideals of the Declaration of Independence. It tells the story of our government's promotion of justice and equality for some, while condoning the enslavement of others, and how the ratification of the 14th Amendment in 1868 created a dramatic and fundamental break from the past by promising full protection to all American citizens, regardless of race, social status, gender, or conflicting state laws. It was a significant step toward fulfilling the American Revolution's promise that all men are created equal and entitled to full and equal protection under the law.

Judge Keith with President Clinton, Rosa Parks, Mrs. Thurgood Marshall and Dean Irvin Reed, at the premiere of the Marching Toward Justice Exhibit at the Thurgood Marshall Law Center

Since the inaugural exhibition at the Thurgood Marshall Law Center in Washington, D.C., the Exhibit has traveled consistently for nearly six years, to more than 30 sites around the country, including Chicago, Detroit, Topeka Kansas, Boston, Dallas, and the U.S. Virgin Islands providing an opportunity for thousands to learn about the importance of freedom and justice.

TAB 4 FOLLOWS

Dennis W. Archer
President
AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5109
FAX: (312) 988-5100

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

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darcher@dickinson-wright.com

February 19, 2004

To Whom It May Concern:

Re: Judge Damon J. Keith
Nomination for the Sarah T. Hughes Civil Rights Award

I am writing to offer my strong support for Judge Damon Keith's nomination for the Sarah T. Hughes Civil Rights Award. The award is bestowed upon a person who has promoted the advance of civilian and human rights, and who has devoted service and leadership in the cause of equality. Judge Keith exemplifies these standards and much more.

As a civil rights advocate, as a defender of the constitution, as a trailblazer, and for his landmark decision in *United States v Sinclair*, commonly referred to as *The Keith Decision*, Judge Damon Keith has knocked down walls and cleared the way for men and women of color to enter doors that were once closed to them. He has remained committed to equal opportunity and fairness and has recruited law clerks of color to work for him, nurturing and mentoring and guiding their careers.

Judge Keith was named the 1997 recipient of the American Bar Association's Thurgood Marshall Award. In naming Judge Keith the recipient of this highest of honors, the ABA said: "Judge Keith represents the best in the legal profession. His work reflects incisive analysis of issues, principled application of laws and the Constitution, passionate belief in the courts' role in protecting civil rights, a commitment to community service and, most significantly, an independence of mind to do what's right that is at the core of his view of professional responsibility. There is no better role model today for lawyers and law students seeking to work for equal justice."

In 1998, Judge Keith was selected to receive prestigious Edward J. Devitt Award for Distinguished Service to Justice. The Devitt Award annually honors a federal judge who has achieved an exemplary career and has made significant contributions to the administration of justice, the advancement of the rule of law, and the improvement of society as a whole. Judge Keith was nominated for the Devitt Award by lawyers and judges throughout the country. U.S. Court of Appeals Judge Peter Fay remarked: "One cannot be around Damon for very long without sensing his commitment to all that is good about our country. But, unlike many, he does not limit his commitment to words – his actions speak volumes. He gets involved. He spends the time. He does the work.

Yes, he gets his hands 'dirty' because there is nothing he will not do if he is convinced it will help others and strengthen our way of life."

In January of 2000, Turner Broadcasting Systems, presented Judge Keith the Pinnacle Award at the Eighth Annual Trumpet Awards in Atlanta. Trumpet Awards are given annually to African Americans whose achievements in their fields, coupled with their humanitarian and community-oriented efforts, have helped create a better society.

On February 17, 2001, Judge Keith received the American Bar Association Spirit of Excellence Award.

Judge Keith has combined the highest professional and ethical standards in his public life with the highest standards of honor and integrity in his private life, and has done so without compromise. This is a gift of a truly remarkable man.

Receiving the Sarah T. Hughes Civil Rights Award would be one more well-deserved recognition for a man who, by his life's work, has set standards that few of us will ever attain. I strongly urge the Federal Bar Association to honor Judge Damon Keith with this year's Sarah T. Hughes Civil Rights Award. No one is more deserving.

Sincerely,

Dennis W. Archer

DWA/bf

TAB 5 FOLLOWS

NATIONAL BAR ASSOCIATION

Reply to:

February 26, 2004

Mr. Dennis J. Clark, Esquire
President
Federal Bar Association
Eastern District of Michigan Chapter
P.O. Box 310610
Detroit, MI 48231-0610

Dear Mr. Clark:

I write on behalf of the National Bar Association (NBA) to recommend the Honorable Damon J. Keith as the 2004 award recipient of the Federal Bar Association's Sarah T. Hughes Award.

As president of our nation's oldest and largest association of African American lawyers, judges, law clerks and legal practitioners, I salute the Federal Bar Association (FBA) for memorializing the legacy of any individual, such as Sarah T. Hughes, who worked so tirelessly to combat the injustices which still pervade our society. Such efforts have fortified the existing body of
Civil rights laws enacted in our statutes, and mirror the NBA's core mission to "protect the civil and political rights of all citizens of the several states of the United States."

As a member of the NBA, Judge Damon J. Keith has championed such causes for decades through the decisions he has courageously issued from the federal bench. The widely noted decisions included his pioneering orders of school desegregation with the city of Pontiac, Michigan; a municipal affirmative action plan; award of damages against big industry in a sex discrimination case, and his landmark "Keith Decision" which prohibited former President Nixon and former Attorney General John Mitchell from conducting warrant less wiretap surveillance of three U.S. citizens, which Judge Keith, and the Sixth Circuit Court of Appeals and United States Supreme Court, affirming, found were in violation of the citizens' Fourth Amendment rights.

Judge Keith rendered each of these ground-breaking decisions during an era when a stance for justice was taken at the risk of grievous retribution, including the loss of one's life. Notwithstanding, Judge Keith spoke truth

to power through the body of controlling legal precedent, and community activism, which demonstrates his sustained commitment to liberty and justice for all, both on and off the bench.

On behalf of the NBA, I therefore proudly herald his efforts, most enthusiastically recommend him for receipt of this highly esteemed award, and emphatically urge you to recognize Judge Keith's rare and unparalleled accomplishments by bestowing the 2004 Sarah T. Hughes Award upon him! Thank you for your very careful consideration.

Very truly yours,

Clyde E. Bailey, Sr.
President

TAB 6 FOLLOWS

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

JENNIFER M. GRANHOLM
GOVERNOR

JOHN D. CHERRY, JR.
LT. GOVERNOR

February 27, 2004

Greetings Fellow Barristers!

I am writing to provide my strongest support and most enthusiastic recommendation that you bestow the Federal Bar Association's 2004 Sarah T. Hughes Award upon the Honorable Damon J. Keith. I applaud the FBA for annually recognizing an individual who has epitomized the legacy of the late Judge Hughes' steadfast commitment to civil and humanitarian rights. As his former law clerk, I am personally aware of Judge Keith's lifelong devotion to the advancement and protection of every citizen's constitutional rights, and I can think of no other individual who is more deserving of this award than Judge Keith.

Early in his career, Judge Keith embarked upon this cause by responding to President John F. Kennedy's invitation to discuss the role of lawyers in the civil rights' struggle, by serving as chair of the Michigan Civil Rights Commission, and as president of the Detroit Housing Commission. Shortly thereafter, Judge Keith was appointed to the federal bench, and began his pioneering efforts to effect change from the bench.

Judge Keith specifically began to trail blaze a path through the annals of history with a plethora of decisions which ensured that all citizens enjoy equal protection and due process under the law, including his decisions to desegregate public schools (*Davis v. School District of the City of Pontiac* (1970)); to end employment discrimination *Stamps v. Detroit Edison Co.* (1973); *Baker v. City of Detroit* (1979) and to end housing discrimination as well (*Garrett v. City of Hamtramck* (1971 and *Zuch v. Hussey* (1975).

Most notably, Judge Keith's landmark decisions in *U.S. v. Sinclair* (1971) – "The Keith Decision" – and, recently, in *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), marshaled the freedoms of U.S. citizens and non-citizens alike by prohibiting the executive branch from trammeling upon the rights secured by the U.S. Constitution. He did so, respectively, by finding that President Richard Nixon, and United States Attorney General, John Mitchell, could not engage in warrantless wiretap surveillance, and that U. S. Attorney General John Ashcroft could not hold secret deportation proceedings. Notably, Judge Keith wrote that where "The Executive Branch seeks to uproot people's lives outside the public eye and behind a closed door ... democracies die.." Truly, his words speak truth to power that "[a]

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government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the framers of our Constitution." His courageous actions champions the battle towards equality for all in every segment of our society.

Judge Keith's dedication to community and civic endeavors parallels his fight for such freedoms as well, which have been heralded by the Detroit YMCA, the Detroit Arts Commission, the United Negro College Fund, and Detroit NAACP. Indeed, he has been the recipient of countless awards of distinction, including the American Bar Association's Thurgood Marshall Award, the Edward J. Devitt Award for Distinguished Service to Justice and over 38 honorary degrees, including those from Yale and Georgetown Universities and the University of Michigan.

Thus, his life of service is entrenched throughout our country. I trust that you will be fully convinced, as I, that Judge Keith's tireless efforts will be far-reaching in improving the freedoms we enjoy each day, and that he is a model candidate for the prestigious 2004 Sarah T. Hughes Award. Thank you.

Sincerely,

Jennifer M. Granholm
Governor

TAB 7 FOLLOWS

Howard Law Journal

1983

26 How. L.J. 1

LENGTH: 2701 words

ARTICLE: SHOULD COLOR BLINDNESS AND REPRESENTATIVENESS BE A PART OF AMERICAN JUSTICE? *

* This speech was given at the Judicial Council Awards Luncheon on July 29, 1981. The luncheon took place during the 56th Annual National Bar Association Convention in Detroit, Michigan.

HONORABLE DAMON J. KEITH **

** Circuit Judge, U.S. Court of Appeals for the Sixth Circuit; LL.M. 1956, Wayne State University School of Law; LL.B. 1949, Howard University School of Law; A.B. 1943, West Virginia State College.

SUMMARY:

... I would like to talk this afternoon about the relationship between three distinct concepts: the first concept is -- *justice;* the second is -- *representativeness;* and the third is -- *color-blindness. ... With this in mind, I ask you to consider the following questions: first -- can we have justice* in America without *representativeness* in the judiciary and in the legal profession?; second -- can we have such a thing as *colorblind justice* in this society as it is presently structured?; third -- can we have *representativeness* in America if we are truly *colorblind?;* and fourth -- can the *colorblind* in any way *represent* the collective experiences of minority groups in America? ... In one of his now famous conversations with Mr. Simple, Langston Hughes pointed out that one thing that was not colorblind -- was the law: ... Such affirmative-action programs and judicial remedies it is argued, are inconsistent with the American 'tradition' of colorblindness and individual merit. ... It is more than a little ironic that after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. ... Like Justice Marshall, we cannot be colorblind. ... Yes, there is no "royal road," but we must do our best to ensure that the legacy of 300 years of discrimination is an important and viable factor in the ongoing 'accommodation of conflicting interests.' ...

TEXT:

[*1] I would like to talk this afternoon about the relationship between three distinct concepts: the first concept is -- *justice;* the second is -- *representativeness;* and the third is -- *color-blindness.* We, of course, recognize these concepts as important components of the great American ideal. Each of them stands for different things, but they do interrelate -- and I submit that the way in which they interrelate has a lot to do with both determining the proper role of the courts in American society and with determining the proper role of the Black judge in the American judiciary. With this in mind, I ask you to consider the following questions: first -- can we have *justice* in America without *representativeness* in the

judiciary and in the legal profession?; second -- can we have such a thing as *colorblind justice* in this society as it is presently structured?; third -- can we have *representativeness* in America if we are truly *colorblind?;* and fourth -- can the *colorblind* in any way *represent* the collective experiences of minority groups in America?

[*2] After 14 years in the federal judiciary, I believe that the answer to these questions has to be a resounding -- *no;* and in the course of this short talk, I hope to explain why I have come to hold this view.

I

What do we in America mean by the term *justice?*

Judge Learned Hand has provided one of the best definitions I have seen thus far. He said, and I quote:

Justice . . . is the tolerable accommodation of conflicting interests of society . . . and there is [no] royal road to attain such accommodations concretely. n1

Why is there no "royal road"? Well, Ralph Waldo Emerson put it simply: "One man's justice is another's injustice; one man's beauty another's ugliness; one man's wisdom another's folly." n2

Judges, whatever their color, must be impartial, they must favor neither plaintiff nor defendant, they must not prejudge -- but in the final analysis they are also human beings and as human beings, they bring to judicial decision making their own perspectives of what constitutes reality in America. Those perspectives are formed through the life experiences of a judge -- that is, the judge's education, the judge's social and economic background, the judge's professional experiences -- and yes, the judge's race and sex.

II

That brings me to the second key issue -- *representativeness.* There are a number of ways to define this word. For example, it can mean -- portraying or typifying; it can also mean -- "standing for or in the place of another."

In our democracy, the voters ensure that their legislators "portray or typify" their views. After *Baker v. Carr,* n3 the courts play a role in ensuring that the legislators "stand in the place" of the actual voting populace. But recently, the question on the minds of many has been whether considerations of *representativeness* should legitimately play any role in the composition of the American judiciary.

[*3] I have read news commentary by George Will and Joseph Sobran among others who heatedly maintain that the President should not have gone out of his way to appoint a woman to the Supreme Court. They hold this view because in their minds, considerations of *representativeness* have no place in our judiciary -- that is, there should be no female seats, no Black seats, no Hispanic seats and no Jewish or White Anglo Saxon Protestant Male seats on the Supreme Court -- or on any court of law in this country.

Well, many, many other Americans disagree. A recent editorial I read in *National Commentary* magazine said, and I quote:

A woman should have been serving on the Supreme Court many years ago . . .

More than half the citizens of this country are female. Major far reaching decisions come before the Supreme Court every day concerning topics of women's rights, abortions, equal pay for equal work . . . [etc.] and yet, incredulously, for decades, it has been nine men who have passed judgment on these very important subjects which deal exclusively with the lives of women. n4

Well, I think that if you accept Judge Hand's view of *justice* as the "tolerable accommodation of conflicting claims" then it is hard to dispute the fact that it is highly regrettable that women have not served on the Court for decades. It is regrettable that Black Americans did not serve on the Court for over 150 years; and it would be extremely unjust if important segments of the American population do not serve on the Court at all times in the future. If large segments of the populace are absent from the Court, I think it will inevitably lead to an "accommodation of conflicting claims" that will be intolerable for much of America.

This is not to say that the courts should in any mathematical sense mirror the demography of our country or that they should meet the high standards of representativeness that we require for our legislatures. But it is to say that no longer can we simply close our eyes and end up with a judiciary that "just happens to be" all white and all male.

[*4] III

This brings me to our final issue -- colorblindness, or as Webster's defines it -- having a total inability to distinguish one or more colors. This is a word with three synonyms -- blind, insensitive and oblivious. n5 But as with many words, the best way to convey what colorblind means is to point out what is not colorblind. Years ago, Langston Hughes did just that with his fictional character, Mr. Jess Simple. In one of his now famous conversations with Mr. Simple, Langston Hughes pointed out that one thing that was not colorblind -- was the law:

'I definitely do not like the Law,' said Simple, using the word with a capital letter to mean *police* and *courts* combined.

'Why?' [Langston] asked.

'Because the law beats my head. Also because the law will give a white man one year and give me ten.'

'But if it wasn't for the law,' [Langston] said, 'you would not have any protection.'

'Protection,' yelled Simple. 'The law always protects a white man. But if *I* holler for the law, the law says, 'what do you want *negro?'*

'Maybe you'll be better treated next time'? [Langston asked].

'Not as long as I am Black,' said Simple.

'You look at everything, I regret to say, in terms of black and white,' [Langston Hughes pointed out].

'So does the law,' said Simple. n6

IV

It is ironic to some that minority leaders who years ago called for a colorblind law now favor race-conscious legislation, affirmative action in school admissions, and they even want representation in the courts. Well, I say there is no irony here at all; it is just a matter of the dialogue shifting to a higher plane.

This is what I mean. Years ago when people like Jess Simple wanted the law to be "colorblind," they meant that they wanted **[*5]** the judges to be impartial when a Black person came to court. They wanted an end to police abuse and a halt to discrimination. America was so far away from achieving these goals that the term "colorblind" could in a sense signify the ultimate objective.

Well today, the goals of the racially progressive are justifiably more ambitious and being colorblind will no longer do.

In an article in the *New York Times* two weeks ago, prominent Republican attorney William T. Coleman, Jr. made this clear. He wrote: "For black Americans, racial equality is a tradition without a past. Perhaps, one day America will be colorblind, [but] [i]t takes an extraordinary ignorance of actual life in America today to believe that day has come." n7

He went on:

Some who profess support for the goal of equal rights condemn affirmative action as 'odious' and 'invidious.' They would discard numerical goals and timetables . . .

Such affirmative-action programs and judicial remedies it is argued, are inconsistent with the American 'tradition' of colorblindness and individual merit. However, there never has been such a tradition for black Americans. Moreover, there is another American 'tradition' -- one of slavery, segregation, bigotry, and injustice. n8

He concluded that, "The failure to take race into account in the present often perpetrates the legacy of our past. Neutral practices . . . may simply ensure that blacks will continue to be excluded." n9

This article by William Coleman is one of the best I have read in the press in many years, and I recommend that each of you read the full article as it appeared in the July 13, 1981 issue of the *New York Times.* I would only add that Mr. Coleman's remarks echo the following observation made by Justice Harry Blackmun three years ago in *University of California v. Bakke:* "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them **[*6]** differently. We cannot -- we dare not -- let the Equal Protection Clause perpetrate racial supremacy." n10

So how does this all add up so far? I think what we have seen is first, that we cannot have *representativeness* in America today if we are in any sense of the word *colorblind;* and second, we cannot have *justice* in this country without a strong measure of *representativeness.* At this point, I think the only answer to my original four questions that remains unexplained is why the colorblind cannot represent the experiences of minority groups in America.

Let me start my explanation by reading from what I think is one of the greatest opinions in American jurisprudence -- Justice Thurgood Marshall's dissent in *California v. Bakke.* There Justice Marshall opined:

The position of the Negro today is the tragic but inevitable consequence of centuries of unequal treatment measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream . . .

It is more than a little ironic that after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none regardless of wealth or position, has managed to escape its impact.

The experience of Negroes in America . . . [i]s not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color, he never even made it into the pot. n11

Like Justice Marshall, we cannot be colorblind. Black judges must take every opportunity to fashion the law in a manner that **[*7]** reflects the 300 year history of discrimination our people have suffered in this land. Ladies and gentlemen, those of us on the appellate benches must write opinions that provide guidance. Not just as *stare decisis;* but as guidance to those of our brethren who do not share our mark of oppression.

Those of us in the trial courts must use our positions to influence others -- prosecutors, lawyers, policemen -- to act fairly and equitably. It will not do for us to be colorblind in the trial courts, we should know and remember the peculiar history that law enforcement, business and labor have had with our people.

Finally, all of us must remember that we are important role models for the Black youth and for the young Black bar. We must enthusiastically embrace community service, and we have an obligation to seek out and hire young minority lawyers to serve as our law clerks.

One day, we in the judiciary and others in society will properly have the luxury of being colorblind. That day will happen when American realities truly reflect our egalitarian aspirations. We have made progress, but that day is not today, and frankly I am not sure that I will ever live to see that great day arrive.

Until then, we as Black judges have a special role in making justice a reality in America. Yes, there is no "royal road," but we must do our best to ensure that the legacy of 300 years of discrimination is an important and viable factor in the ongoing 'accommodation of conflicting interests.' We cannot count on others because I think America is counting on us.

Let me close by reading a passage written not by a lawyer or a judge, but by that great poet and philosopher Dr. Martin Luther King:

I have a dream . . . that the brotherhood will become a reality in this day . . . and with this faith, I will go out and carve a tunnel of hope out of the mountain of despair . . . with this faith, I will go out with you and transform dark yesterdays into bright tomorrows . . . With this faith, we will be able to achieve this new day when all men will join hands and sing together in the spiritual of old . . . free at last, free at last . . . thank God almighty, we are free at last!!! n12

FOOTNOTES:

n1. P. HAMBURGER, THE GREAT JUDGE (1946).

n2. R. EMERSON, Circles, in THE PORTABLE EMERSON 237 (C. Bode ed. 1981).

n3. *Baker v. Carr, 369 U.S. 186 (1962).*

n4. NATIONAL COMMENTARY (date and edition unavailable).

n5. WEBSTER'S NEW COLLEGIATE DICTIONARY 222 (1973).

n6. L. HUGHES, SIMPLE SPEAKS HIS MIND 169, 175 (1950).

n7. N.Y. Times, July 13, 1981, at A15, col. 2.

n8. *Id.*

n9. *Id.*

n10. *Regents of the University of Cal. v. Bakke, 438 U.S. 265,407 (1978)* (Blackmun, J., dissenting).

n11. *Bakke, 438 U.S. at 395-401* (Marshall, J., dissenting).

n12. Speech at Civil Rights March on Washington, D.C. (August 28, 1963).

TAB 8 FOLLOWS

Spring, 1997

65 U. Cin. L. Rev. 853

LENGTH: 2512 words

SPEECH: ONE HUNDRED YEARS AFTER PLESSY v. FERGUSON

Judge Damon Keith *

* Judge Keith, Circuit Judge, United States Court of Appeals for the Sixth Circuit, addressed this speech, given on April 20, 1996, to the Black Lawyers Association of Cincinnati.

SUMMARY:
... As we applaud the accomplishments of tonight's award recipients, it is important to remember that their achievements would not have been possible if not for the heroic efforts of those who dedicated, and often gave, their lives in attempting to attain equality for African-Americans. ... In contrast, Justice John Marshall Harlan, in dissent, argued that the Louisiana segregation law was in clear conflict with the Thirteenth and Fourteenth Amendments. ... For having the courage to go against the social tide, they are remembered nearly a century later as advocates for justice. ...

TEXT:
[*853]

John L. Williams, Judge William McClain, Reggie Turner and members of the Cincinnati Black Lawyers Association:

It is a great honor to be here this evening to help all of you celebrate the accomplishments and achievements of tonight's award recipients. As we applaud the accomplishments of tonight's award recipients, it is important to remember that their achievements would not have been possible if not for the heroic efforts of those who dedicated, and often gave, their lives in attempting to attain equality for African-Americans. Just as I can never forget that my success is due to their sacrifices, all of you must remember that your successes are due in no small part to a group of men and women who stood up to oppression and fought for justice. In the process of their struggles, these individuals were willing to leave their comfort zones and risk life and limb to help make the goal of "equal justice under law" a reality for all Americans.

As we near the one hundredth anniversary of Plessy v. Ferguson, n1 I am reminded of a statement by Thomas Jefferson that "man is the only animal which devours his own." The Plessy case reminds me of this statement because the Court's decision in that case was clearly an instance of one class of citizens using the law to devour the dreams and aspirations of another class of citizens. To fully understand the egregious and unjust nature of the Plessy decision, it is necessary to give a little background.

In 1857, Chief Justice Roger Taney, in the infamous Dred Scott n2 case, held that: **[*854]**

Negroes were regarded as beings of an inferior order; and altogether unfit to associate with the white race; either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.

The expressly racist views of Judge Taney, which were incorporated into law in the Dred Scott decision, were rebuked in 1865 by the Thirteenth Amendment, which abolished slavery, and by the Fourteenth Amendment, which recognized that AfricanAmericans should be allotted equal treatment as white citizens. However, as we have often seen, a written law espousing equality does not ensure justice if applied in a racist and segregationist manner. During the years after the Thirteenth and Fourteenth Amendments were enacted, white legislators began incorporating Jim Crow laws that were intended to intimidate and humiliate African-Americans. African-Americans watched in despair as the mandates of the Thirteenth and Fourteenth Amendments were continually ignored and the walls of segregation began to mount against them.

The Jim Crow law mandating that African-Americans ride in separate trains in Louisiana came into effect on July 10, 1890. Almost immediately after the law's inception, two African-American men--Louis Martinet and Rudolph Desdunes--formed a citizens committee to test the constitutionality of the separate-car law. This committee soon raised $ 1,500.00 for the cause and contacted Albion Tourgee, a white New York attorney, to be lead counsel in the case. Tourgee was a white man who, in a time of mounting racism, was a vocal and persistent advocate of racial equality. Tourgee agreed to take the case, and it was decided that a test case would be brought in Louisiana to challenge the constitutionality of the separate but equal doctrine. Soon thereafter, the railroads, who often opposed the Jim Crow laws because the laws required the railroads to maintain a separate car for African-Americans, were notified of the impending plan.

On February 24, 1892, Daniel Desdunes boarded a train traveling from Louisiana to Alabama and sat in a whites-only car. Desdunes was immediately arrested and committed for trial. However, the case was disposed of before it went to trial by the Louisiana Supreme Court, which held that the Louisiana law was void because it attempted to regulate interstate passengers. Because Desdunes was travelling from Louisiana to Alabama, he could not be forced by the State of Louisiana to sit in a blacksonly car. However, the law still applied to intrastate passengers so it was decided that another test case would be brought, but this **[*855]** time wholly within the Louisiana state limits. Soon thereafter, Homer Adolph Plessy bought a ticket in New Orleans, boarded the East Louisiana Railroad bound for Covington, Louisiana, and took a seat in the white coach. Plessy was arrested and charged with violating the Jim Crow car law. Tourgee then argued that the law was null and void because the separate but equal doctrine violated the Thirteenth and Fourteenth Amendments of the United States Constitution. Plessy lost his case before the Louisiana Criminal District Court and the Louisiana Supreme Court.

The case reached the United States Supreme Court in 1896. At that time, there was a strong tide against equality for AfricanAmericans across the country, and lynchings had reached an all time high. On May 18, 1896, Supreme Court Justice Henry Billings Brown, a resident of Michigan, authored an opinion by the Court that gave approval to segregation by upholding the separate but equal doctrine. Only Justice Harlan dissented. Justice Brown's opinion was in accord with a host of state judicial precedents and the trend of the times. Brown relied heavily on the case of Roberts v. City of Boston, n3 a case from the Massachusetts Supreme Court that sustained the power of the City of Boston to maintain separate schools for African-Americans. However, the Roberts decision was rendered in 1849, twenty years before the enactment of the Fourteenth Amendment. Brown asserted that the validity of segregation laws depended upon their "reasonableness" and contended that the Framers "could not have intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality." Brown argued that "if one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." In contrast, Justice John Marshall Harlan, in dissent, argued that the Louisiana segregation law was in clear conflict with the Thirteenth and Fourteenth Amendments. Harlan claimed that the Thirteenth Amendment struck down not only the institution of slavery, but also any burdens that constitute badges of slavery and that the Fourteenth Amendment ensured equal protection of both dignity and liberty. Harlan stated:

In the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates **[*856]** classes among citizens. In respect to civil rights, all citizens are equal before the law.

However, Harlan's arguments were to no avail, and Plessy became the leading authority for segregationist laws throughout this country for the next half century.

Even the most staunchly conservative members of our society now recognize that Plessy was an affront to the goals and ideologies of the Constitution. It is plain to the eyes of a lay person that the opinion was not guided by reason or analysis, but by racist emotion and sentiment.

However, Plessy is a crucial case for all of us here tonight because it emphasizes a very important point--to attain what we know in our hearts is just, we must often be willing to leave the comfort zone of societal norms and dominant values. Louis Martinet and Rudolph Desdunes were African-American men who formed the committee against segregation. They were very brave men who risked their lives in an attempt to ensure liberty for AfricanAmericans. But we would expect that they, as African-American men, would not remain quiet in the face of the injustice done to them and to all African-Americans by segregation.

This was not the case with Justice Harlan. Harlan, along with Albion Tourgee, did not have to speak out against the rising tide of oppression and racism in this country. They were white men who did not follow the dominant social norm of segregation because they had a keen understanding of what was right not only morally, but also legally, under the mandates of the Thirteenth and Fourteenth Amendments. Harlan and Tourgee focused on the protections afforded all American citizens under the Constitution and ignored the values and ideals of the status quo. For having the courage to go against the social tide, they are remembered nearly a century later as advocates for justice.

On the other hand, I would be willing to wager that most of you probably did not remember the name of Henry Billings Brown, the author of the majority opinion in Plessy. This is because Brown and the other Justices who concurred in his opinion were afraid to follow the letter and spirit of the law because they did not want to face public criticism or resentment. Brown had to have realized that his opinion--which relied on case precedent that was clearly no longer relevant after the incorporation of the Thirteenth and Fourteenth Amendments--was in direct contradiction to the express language of the Constitution. However, Brown and the other Justices were afraid to leave their comfort zones, afraid to stand up for what was just and right. **[*857]**

It is thus no surprise that Harlan's dissent is what people remember most about Plessy today. History has always rewarded those who have had the strength and courage to do what is morally correct. For instance, we remember that in 1776, Thomas Jefferson wrote, "all men are created equal" because this simple declaration forms the basis for all that we hold dear in this country; that in 1858, Abraham Lincoln declared, "as I would not be a slave, also I would not be a master" because these words express the recognition that it is unjust to abuse and exploit others in a way that we would not wish to be subjected; that in 1861, Frederick Douglas declared, "free men can vote themselves into slavery, but slaves cannot vote themselves free" because this phrase acknowledges the hypocrisy of proclaiming a democratic society when not all members of that society are free; that in 1955, Rosa Parks refused to go to the back of the bus in Montgomery, Alabama and set the stage for the greatest civil rights movement in our nation's history; that Martin Luther King, a man who emerged from the struggle for civil rights by enunciating the beliefs and emotions of a people long denied equality, challenged all of us to remember:

Cowardice asks the question, is it safe?

Expediency asks the question, is it politic?

Vanity asks the question, is it popular?

But conscience must ask the question, is it right?

We also remember that Nelson Mandela was imprisoned in the struggle for justice and risked his life in the fight for liberty. Justice Blackmun recognized that:

In order to look beyond race, we must first take account of race. There is no other way, and in order to treat some persons equally, we must treat them differently. We cannot--we dare not--let the Equal Protection Clause perpetuate racial supremacy.

And, of course, we remember that Justice Thurgood Marshall, a mentor of mine who often provided the moral conscience to the rest of the Supreme Court, stated:

The experience of Negroes in America . . . is not merely the history of slavery alone, but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color, he never even made it into the pot.

These men and women all had an ability to go against the fray, to rise above the tide, all in the name of justice. There is **[*858]** no doubt that their names are synonymous with courage and conviction. I would hope that all of you would commit yourselves to following the principles of morality, even in the face of criticism and resentment. As my former law clerk, Lani Guinier, often says in quoting a west African writer, "The poet who is not in trouble with the king, is in trouble with his work."

As attorneys, our work is to seek truth and justice. The law is the vehicle that we use to accomplish this task. But like all things, the law is administered by men and is, thus, subject to being influenced by the norms of society. I hope that all of you here tonight focus on the poetry of your work--which, in no uncertain terms, is the pursuit of truth and justice--regardless of the criticism that may befall you. History will reward you for standing up for the strength of your convictions.

You are the key to the future of America. All of you are talented, and inevitably, many of you will become rich, perhaps some famous. But more significantly, I fervently hope that all of you will be men and women of integrity. Please remember:

Talent is god-given, treat it with humility; fame is man-given, treat it carefully; but integrity comes as the result of a conscious and continuous search for the highest principles of life. Guard this pursuit with your very life.

Do not sacrifice your goal of pursuing truth and justice simply because you may go against the dominant values of present day society. Justice Harlan in Plessy did not make such a sacrifice, and if the other Justices had found the same courage of conviction, many of the problems that African-Americans face today would have been prevented.

Previous generations will watch, just as we have watched, to see if you will use those special qualities of humanity, compassion, understanding, and most importantly, integrity in your practice of the law to help eliminate the social injustices that beset us. Perhaps some of you may choose to ignore the challenge to speak out against injustice because you believe that, as individuals, you are powerless to solve the vast problems of our nation. To those of you with this sentiment, I urge you to contemplate the words of Edwin Hall who realized that:

I am only one, but still I am one.

I cannot do everything, but I can do something.

And because I cannot do everything, I will not refuse to do what I can.

If you, the proud members of the Cincinnati Black Lawyers Association, do not meet this challenge--do not have the courage **[*859]** to leave your comfort zones in the name of truth and justice-then I ask you, who will?

Thank you for allowing me to come here this evening and God bless you all!!

FOOTNOTES:

n1 *163 U.S. 537 (1896).*

n2 *Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).*

n3 *149 Mass. 346 (1889).*

TAB 9 FOLLOWS

Winter, 2001 / Spring, 2002

47 Wayne L. Rev. 1161

LENGTH: 27296 words

ARTICLE: A PARADIGM FOR EQUALITY: THE HONORABLE DAMON J. KEITH

Blanche Bong Cook +

+ Associate, Seyfarth Shaw; Judicial Law Clerk for the Honorable Damon J. Keith, United States Court of Appeals for the Sixth Circuit, 1999-2000. B.A., 1989, Vassar College; J.D., 1995, University of Michigan Law School. First, I must give thanks to God, the head of my life and the peace that surpasseth all understanding. Second, I must also thank Reverend Louis K. Johnson, a living saint without whom I would have never made it this far. I am greatly indebted to my co-clerks N. Jeremi Duru, Charles Hamilton Houston III, Daniel Abebe, Cynthia L. Evans, and Marchelle Falconer. Jeremi, Daniel, Cynthia, and Marchelle provided several edits, suggestions, and encouragement. I am equally grateful to Charles for his editing ability and for keeping the tradition of his grandfather, Charles Hamilton Houston, alive and well in our chambers. I would also thank Dr. Moses Nkondo, Justice Gregory K. Scott, Len Givens, Joan J. Hollier, Laureen Robinson, Marie Horton Godush, Roland T. Baumann III, and my much adored parents Albert and Bong Son Cook. Finally, I wish to thank the Honorable Damon J. Keith for inspiring all of his law clerks through both his life and legal opinions.

SUMMARY:
... As the twentieth century yields to the twenty-first, Damon J. Keith, United States Court of Appeals Judge for the Sixth Circuit, paradigmatically exemplifies, in both his life and jurisprudence, a single individual's effective contribution to the struggle for equality. ... Judge Keith justified the affirmative action program and withstood reversal on appeal by (1) utilizing a historical approach; (2) fully developing the factual record; (3) giving meaning to the facts before the court by placing them within their relevant historical context; (4) documenting the police department's long-standing racist policies of excluding Black police officers and violence toward Black citizens; and (5) avoiding a false symmetry of despair between Whites harmed by the plan and Blacks against whom the defendant had institutionally and violently discriminated. ... When judges establish a symmetry of racial victimization between Whites adversely affected by remedial programs and Blacks historically subjected to discrimination, they must deny the difference race has made in the historical treatment of the two groups and the disparity in power between the two groups. ... At a time when just about all civil rights groups, poor people and people of color absolutely fear going into the federal courts for relief from injustice and bias, Judge Keith's legacy reminds us of his tireless and effective struggle for equality. ...

HIGHLIGHT: The question is no longer whether the first move must be made in order to accomplish equality within our society; the question has become and, possibly has always been, who has the power and duty to make those moves so as to advance the accomplishments of that equality.

- The Honorable Damon J. Keith n1

TEXT:
[*1163]

I. Introduction

As the twentieth century yields to the twenty-first, Damon J. Keith, United States Court of Appeals Judge for the Sixth Circuit, paradigmatically exemplifies, in both his life and jurisprudence, a single individual's effective contribution to the struggle for equality. Despite hegemony's n2 seemingly overwhelming power to both create and maintain material subordination for people of color, Judge Keith has effected socioeconomic change. Despite building political pressures that continue to repeal the gains of the Civil Rights Movement, Judge Keith has upheld and cogently justified programs that distribute power more fairly. His legal opinions reflect a transformative legal ideology that has not only impacted the material conditions of people of color, women and citizens generally, but has also withstood both political attack and reversal on appeal.

Judge Keith has set an example for those who will continue the struggle for equality. As analyzed in this Article, Judge Keith has gone **[*1164]** beyond the abolition of the substantive conditions of Black n3 subordination. He has devoted his legal tenure to the eradication of inequality for all people of color, women, and citizens generally.

Judge Keith has demonstrated that in order for future leaders to resist and overcome the co-opting force of legal reform and the empty rhetoric of equal opportunity, they must develop and maintain a distinct political consciousness grounded in the material subordination of Black people. n4 History has demonstrated that the Black community's most valuable political assets have been its ability to assert a collective identity and to name its collective political reality. Judge Keith is an example of such an asset. Judge Keith's legal philosophy is grounded in the reality of the oppressed. He has consistently resisted the temptation to separate himself from the greater collective of Black people and assert himself as an "individual," in the American tradition, in order to curry favor with majority society and to make himself more palatable to them. Instead, he has consistently identified himself with the collective struggle of Black people. Unlike some Black leaders, Judge Keith has transcended the "I" and embraced the "we." He has and will continue to speak to, for, and about people of color, women, and justice in general.

This Article analyzes Judge Keith's contributions to equality in both his life and jurisprudence. In Part I, I discuss the centrality of racist hegemony in our world in order to place in sharp relief Judge Keith's personal triumph and the effectiveness of his legal opinions. The full hegemonic force of race not only informs Judge Keith as a person, but also the historical context of his cases, and the political climate in which he adjudicates. The same fortitude that has empowered Judge Keith to triumph over hegemony inspires his adherence to the struggle for both justice and equality for everyone.

In Part II, I discuss how the hegemonic force of race has structured Judge Keith's lived reality. Additionally, I demonstrate how Judge Keith's own experiences with racist hegemony have produced in him a **[*1165]** keen awareness of power imbalance, whether it is between Whites and persons of color, men and women, or citizen and government. Moreover, Judge Keith's personal struggle paradigmatically exemplifies Black Americans' power and ability to resist the brunt of hegemony successfully. n5

In Part III, I analze how anti-discrimination law has produced two conflicting visions and goals: the restrictive view of equality as process and the expansive view of equality as a result. n6 I also argue that the world view of the interpreter informs his/her adherence to the restrictive or expansive view, as opposed to some self-evident, neutral principle. n7 I further argue that Judge Keith has consistently and willingly embraced the challenge of the expansionist vision by developing a legal ideology grounded in the material and historical reality of the oppressed.

In Part IV, I analyze Baker v. City of Detroit, n8 Stamps v. Detroit Edison, n9 Davis v. School District of the City of Pontiac, n10 and Garrett v. City of Hamtramck, n11 as examples of Judge Keith successfully using a historical approach emblematic of the expansionist vision. By fully elaborating the facts of these cases within their greater historical context, Judge Keith has exposed racism as societal policy, not the product of individual bad actors. Furthermore, Judge Keith's use of a historical approach has negated the possibility of drawing a false symmetry of despair between Whites harmed by remedial efforts and Blacks harmed by America's racist past. Additionally, each of these cases demonstrates Judge Keith's willingness to summon the institutional power of the courts to effect equality.

In Part V, I demonstrate that in addition to a legal sensibility keenly sensitive to injustice generally, and sensitive to race specifically, Judge **[*1166]** Keith has also embraced the expansionist view in the struggle for gender equality and summoned the full power of the court to ameliorate the substantive power imbalance between men and women. In his dissent in Rabidue v. Osceola Refining Co., n12 Judge Keith employed his signature method of adjudicating: exhausting the facts within the historical context of gender inequality. In addition to exposing the majority opinion by exhausting the record, Judge Keith (1) established that societal norms cannot set the standard for permissible sexual

harassment in the workplace; n13 (2) introduced the reasonable woman standard in assessing the severity of sexually offensive conduct in order to avoid drawing a false symmetry of power between women and men and to avoid masking the power imbalance between the two; n14 (3) rejected the notion that women in "blue collar" environments voluntarily assume the risk of such exposure; n15 and (4) summoned the institutional power of the courts to effect the vision of Title VII, workplace equality. n16

In Part VI, I demonstrate how Judge Keith has reached beyond the subjectivity of his own life to create a more equitable world, particularly in situations involving governmental abuse of power against its citizens and his adherence to "equal justice under the law." Even in the face of peril and political pressure from the office of the presidency, Judge Keith used the same fortitude that enabled him to triumph over hegemony to protect the rights of every citizen from the government's uninvited ear. In addition, in Part VI, I provide two examples of Judge Keith's adherence to fairness and the rights of every citizen to a fair trial.

Finally, in part VII, I argue that Judge Keith exemplifies the most compelling reasons for diversity on the bench. His presence on the bench manifests that racial diversity among judges promotes, rather than undermines, impartiality. n17 As an African-American, Judge Keith promotes impartiality because his presence on the bench negates the possibility of any viewpoint, perspective, or set of values that is not **[*1167]** informed by the brunt of hegemony from persistently dominating legal decision making. Furthermore, Judge Keith has demonstrated that minority judges whose reality has been informed by racist hegemony not only decrease both racial and gender bias in the courts, but also increase the level of sensitivity to injustice generally. Judge Keith's judicial legacy exemplifies a greater sensitivity to all injustices because he has experienced and survived first-hand struggles with American hegemony.

II. Hegemony: The Creation of the Other

[A] page of history is worth a volume of logic.

- Oliver W. Holmes, Jr. n18

The centrality of hegemony in our world and Judge Keith's life inspires his keen sensitivity to power imbalance. n19 It also provides the historical and political backdrop for his life and the cases discussed in Parts IV and V of this Article. Moreover, the seemingly overwhelming power of hegemony brings the effectiveness of Judge Keith's methods **[*1168]** of adjudicating and contributions to the struggle for equality into sharp relief. An analysis of the man and his contributions necessitates a historical examination of race.

According to hegemonic theory, n20 the ruling class legitimizes the current distribution of power by peddling a ruling class world view that attracts and entices subordinated Whites. Historically, ruling class White elites have successfully solidified their interests with subordinated Whites through the institution of racism. Racism builds a consensus among Whites about both Whiteness and Blackness by defining and privileging membership in the White community. n21 Racism designates Blacks as the ultimate "other," whose interests are diametrically opposed to those who identify-by virtue of color and/or culture-with the dominant class. Racism creates an illusion of White solidarity because many Whites, regardless of their class or gender, will align their interests with those of the dominant class and dissociate themselves from the "other" as much and as quickly as possible. n22

[*1169]

The hegemonic force of race defines White as virtuous, "good, hard-working and human," and Black as virtueless, "lazy, unemployed, criminal and less-than- human." n23 Through this definitional process, Black subjugation appears natural, deserved, and "just the way things are." Furthermore, the seemingly natural state of Black subjugation is further supported because many Whites willingly embrace a shared consensus that Black oppression is legitimate, if not natural, and that Blacks are worthy objects of antipathy and coercion. This is where consensus and coercion come together: ideology convinces one group that the coercive domination of another is legitimate. n24 As Michel Foucault comments "power is tolerable only on condition, that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanism." n25

White consensus in Black subordination is a political operative in American history. American history is rife with examples where Black interests in the redistribution of power have been sacrificed so that different groups of Whites could settle disputes and establish or reestablish White solidarity. n26

[*1170]

In sum, the ability of race to unite White interests across class and party lines brought about the demise of the First Radical Reconstruction. Although Whites had clearly identifiable class differences, those conflicts were resolved in order to maintain the material subordination of Blacks. It is ironic that the same Principle of Involuntary Sacrifice that brought about the end of the First Reconstruction is the same principle that brought about the end of the Second Reconstruction as demonstrated below. The GOP's creation of a populist hegemony provides a contemporary example and also sets the political climate for the cases discussed in this Article.

Despite shameless posturing as the all-inclusive political party in the **[*1171]** 2000 presidential election, n27 the GOP's formulation of a populist hegemony, otherwise known as "playing the race card," n28 exemplifies ruling class deflection of class antagonism through the further victimization and vilification of Blacks. During the Second Reconstruction, the gains of the civil rights era such as busing, nominal residential integration and affirmative action have placed the core of the New Deal coalition, namely Blacks and working and middle class Whites, in bitter competition over jobs, schools, neighborhoods n29 and in a broader sense over intangibles such as prestige, authority and social space. n30 Moreover, racial tensions in the New Deal coalition are further exacerbated by (1) race conscious remedial measures that clash with White working class-interests; and (2) the growth of suburbia, which has established a jurisdictional and geographic boundary between White counties and dark cities.

The GOP's once opportunistic rush to the rescue of "victimized" and "innocent" White males has provided the party with a greatly needed cosmetic facelift. n31 Once viewed as the party of the wealthy and corporate America, the GOP has used race and taxes to capitalize on the racial tensions within the New Deal coalition. n32 By appropriating the **[*1172]** language and posture of political oppression, the GOP became the advocate and defender of a new conservative egalitarianism, namely those Whites who feel "victimized" by remedial efforts to more fairly distribute power. n33 Under the GOP schematic, Blacks, as opposed to the ruling classes, are the reason for the perceived decline in White working and middle class material conditions. n34

This new conservative egalitarianism singles out race conscious remedial measures as a primary threat to a democratic political system. **[*1173]** By embracing the need for "equal opportunity" and strictly color-blind policies, this ideology vehemently opposes race conscious remedial measures in job selection, government contracting, and university admissions. Most importantly, this ideology casts the use of taxes as the essence of a coercive federal bureaucracy mandating, regulating, and legislating social, cultural, and racial change.

By making racially laden social issues the centerpiece of the political agenda under the guise of a new conservative egalitarianism, the GOP has seized the populist vote. Key White voters have abandoned their former allegiance to a coalition of the dominated and joined a coalition of the ruling in part because the GOP has successfully persuaded them that (1) federal taxation was used as a means to redistribute hard earned wages to the lazy in general, and Black welfare recipients specifically; (2) the thrust of federal regulation was diminishing their collective ability to exclude Black people from their schools, neighborhoods, jobs, and other formerly White enclaves; and (3) federal expenditures were subsidizing enormously wasteful programs that encouraged dependency, sloth, and a fundamental breakdown of American family values. The transformation of former Democrats agonized over race- freighted issues into "Reagan Democrats" or presidential Republicans has enabled the GOP to rally a political consensus for conservative retrenchment and to enact upward economic distribution. n35

III. Hegemony and the Life Triumph of Judge Keith

"The life of the law has not been logic: it has been experience." n36

"Sometimes the reasons people give for taking a position are just window dressing, good for public display but only incidental to the heart of the matter, which is the state of their hearts." n37

[*1174]

[T]he scientist never completely succeeds in making himself into a pure spectator of the world, for he cannot cease to live in the world as a human among other humans . . . and his scientific concepts and theories necessarily borrow aspects of their character and texture from his untheorized, spontaneously lived experience. n38

The hegemonic force of race has structured Judge Keith's lived reality. For him, racial domination is reality, not a hypothetical and not something that can be taken for granted. The full hegemonic force of race informs Judge Keith as a person, the historical context of his cases, and the political climate in which he adjudicates. More importantly, Judge Keith's own experiences with the hegemonic force of racism have produced in him a keen awareness of power imbalance, whether it is between Whites and persons of color, men and women, or citizen and government.

In witnessing how Judge Keith's experiences as an African- American have produced his sensitivity and unyielding commitment to equality, Justice Stephen Breyer stated:

I cannot tell you just where, in his background, he learned to combine so effectively "head" and "heart." Perhaps that ability reflects, in part, his own early experiences as the son of a Ford foundry worker, where he learned, as he put it, about an auto worker's need "to drag his sore bones out of bed on a freezing January day to go off and feed his family." Perhaps, too, it reflects his experience of the evils of segregation. n39

For Judge Keith, discrimination has not been an isolated incident, but rather societal policy over which he has triumphed. In 1943, having graduated from West Virginia State, n40 a predominantly Black college, Judge Keith was drafted into the segregated U.S. Army. n41 He served for two years in an "all- colored" unit, eventually becoming a staff sergeant. **[*1175]** Although he possessed a college degree, Judge Keith was inducted as a private, the military's lowest rank, and was assigned to the quartermaster corps. n42 In reflecting on the American military's racist policies, Judge Keith stated "[w]e drove trucks and took care of the other soldiers' supplies. . . . Every single officer in our 'all-colored' outfit was white-captains, the lieutenants-we had no black officers." n43

Judge Keith's experiences with American hegemony in its military motivated his legal career. After witnessing German POWs being treated better than African American servicemen in the segregated U.S. Army during World War II, Judge Keith decided to pursue the law. n44 Upon returning home, Judge Keith noted the irony of risking his life for a country that simultaneously denied him equality:

I served my country, but when I returned, I still had to ride on the back of the bus, drink from separate water fountains and use separate bathrooms. I thought, is this what I've been fighting for? Have I been laying down my life to come back to this world of Jim Crows and racists? n45

In 1949, Judge Keith received his legal education at Howard University School of Law, n46 where he was groomed by and among legal scholars who possessed both intellectual fervor and an unyielding commitment to an expansive vision of anti- discrimination law. These legends included James N. Nabrit, Jr., who later became Dean of Howard Law School and then President of Howard; George E. C. Hayes; William H. Hastie, who later became Chief Judge of the Third **[*1176]** Circuit Court of Appeals; Charles Hamilton Houston; Thurgood Marshall, who later became a United States Supreme Court Justice; and Spottswood Robinson, who later became Chief Judge of the D.C. Circuit Court of Appeals. n47 Judge Keith credits his judicial vision to his student days at Howard. n48 There, in the company of Justice Marshall, Dean Houston, and many others, Judge Keith came to accept the Constitution as a living document, which he believes offers insight, and even prescription, for correcting societal wrongs even if Congress is too weak or malevolent to act. n49

In discussing the genesis of his understanding of his role as a judge, Judge Keith stated "I was taught the law should be an instrument of social change," n50 and that "the Constitution was our best hope; that equality would come through the law." n51 "If I would not have met Thurgood Marshall, it would have drastically changed my life. He told me that through the law and the Constitution, we could challenge the theory of racism. He was the pivotal legal giant who changed my life." n52

Although Judge Keith has triumphed over the hegemonic force of race, racism greatly burdened his early legal career. As of September 1949, the 160th anniversary of our nation's founding, no African-American had ever been appointed to the federal courts as an Article III judge. "Before 1950, there were no black judges in Michigan, and few black lawyers were hired in key government posts." n53 In conveying his treatment from the all White bench, Judge Keith stated:

Many of the white judges simply were not nice to us-they didn't treat us as they did other lawyers, with dignity and respect. Some were actually outright mean, if not nasty, and belittling in their dealings with black attorneys. . . .We [black lawyers] had to struggle to get case assignments from the bench. In addition, clients saw or knew how poorly black lawyers were **[*1177]** treated in court. Many of the black citizens in Detroit came from the South and they knew, first-hand, about racism in the legal system and how it could determine the outcome of their case. n54 Judges, as much as any aspect of the legal system, caused many black clients to shun black lawyers. n55

Despite these obstacles, Judge Keith, in 1964, founded the highly successful law firm of Keith, Conyers, Anderson, Brown & Wahls. n56 In 1967, when President Lyndon B. Johnson appointed Judge Keith to the federal bench, he had already immersed himself in the struggle for equality as a member of the Wayne County Board of Commissioners, the Detroit Housing Commission, and the Michigan Civil Rights Commission. n57 His commitment to equality earned him his nickname "the Jackie Robinson of modern day judges." n58

In describing the political climate for African-American federal judges in the 1980s, Harvard law professor and former law clerk to Judge Keith, Lani Guinier, noted that African American judges were an endangered species on the federal appeals circuit during the Reagan- **[*1178]** Bush administrations, when that Court became "a symbol of White power." n59 Guinier quoted an African writer who said that "a poet who is not in trouble with the king is in trouble with his work." n60 Judge Keith, she continued, may have been in trouble with the king during the Reagan-Bush years, but he was not in trouble with his work. n61

Even after several decades of success on the federal bench, Judge Keith found no insulation from the effects of race. Although he had achieved the pinnacle of successful contribution to equality, racism continued to mar his own life. For example, the Honorable Frank X. Altimari, United States Court of Appeals Judge for the Second Circuit, relates this story, which occurred in 1991 while Judge Keith was serving as the National Chairman of the Judicial Conference Committee on the Bicentennial of the Constitution: n62

I will never forget the day when we were together at a conference in Virginia. Judge Keith and I were standing outside the entrance of our hotel when a car pulled up. The driver jumped out of the car, apparently in a rush, and attempted to give the keys to Damon with the command, "Boy! Park this car in the parking lot." Damon quietly turned his back and walked in the opposite direction. As, I, furious, rushed toward the offending driver, Damon stopped me, again intoning the words, "Whom the devil would destroy, he first makes angry." n63

[*1179]

The systemic denial of his own civil rights has made Judge Keith keenly aware of the rights of others. He has used his positioning in the margins to develop an acute sensitivity to fairness and commitment to equality. His own experiences with material subjugation as a governmental policy have created in him an unyielding commitment to a more equitable distribution of power. "With enthusiasm and warmth that is irresistible, he works in countless ways, formal and informal, in tireless pursuit of a society that is more tolerant and just." n64

IV. Resistance: Judge Keith's Legal Ideology and the Expansive View of Anti- Discrimination Law

"The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." n65

The war between those committed to a more equitable distribution of power and those who feel victimized by the remedial gains of the Civil Rights Movement has produced two ideological trends in anti-discrimination law. Professor Kimberly Crenshaw has coined these two conflicting ideologies, the expansive view and the restrictive view. n66 Adherents to the restrictive vision (1) see equality as a process, downplaying actual outcomes; (2) seek to prevent future wrongdoing, rather than redress present manifestations of past injustice; (3) accept oppression as isolated actions against individuals, not a societal policy against an entire group; n67 (4) reject the idea that courts should redress **[*1180]** harms from America's racist and sexist past, n68 as opposed to policing society to eliminate a narrow set of proscribed discriminatory practices; and (5) adopt an ahistorical approach to adjudicating, which deemphasizes America's discriminatory past. n69 Moreover, adherents to **[*1181]** the restrictive view argue that even where injustice exists, remediation must be balanced against, and limited by, the interests of Whites-even when Black subordination created those interests. Accordingly, the alleged innocence of Whites and the benefits that they have derived from racism, are more important than the harm racism inflicts on Black people. n70 In sum, the restrictive view seeks to proscribe only certain kinds of subordinating acts, and even then only if White interests are not overly burdened.

By contrast, adherents to the expansive view (1) accept equality as a result, (2) strive to prevent future wrongdoing and redress present manifestations of past injustice, (3) understand discrimination as a societal policy against an entire group, (4) use the institutional power of the courts to ameliorate the effects of oppression, (5) attempt to eradicate the substantive conditions of subordination, (6) avoid drawing a false symmetry of racial victimization between Whites adversely affected by remedial programs and Blacks historically subjected to discrimination, and (7) adopt a historical approach to adjudication, which fully outlines both current and past American hegemony.

Adherence to the expansionist or restrictive view of anti-discrimination law results from the world view of the interpreter, as opposed to an apolitical, self- evident interpretation or neutral principle. n71 Critical Legal Studies (CLS) scholars have argued that judges **[*1182]** are "socially constructed"; n72 thus, culture, social background, and context direct their decision making. n73 Although judges interpret the law in good faith, they do so according to their social experiences, which are positioned according to gender, race, class, and culture. n74 As a necessary corollary, no legal rule is truly "neutral" because it incorporates political, ideological, economic, and philosophical assumptions. Moreover,

legal rules reflect political or cultural sensibilities and judges incorporate these sensibilities when applying legal rules to individual cases.

For example, in both the expansionist and the restrictive approach, all arguments about what the law is are premised upon what the law should be, given a particular world view. The conflict is not between the true meaning of the law and a bastardized version, but between two different interpretations of society. Thus, although adherents to the restrictive vision claim an apolitical advantage and accuse civil rights visionaries of bastardizing the law through politics, neoconservatives themselves rely on their own political interpretations to give meaning to their concepts of rights and oppression. The critical point is that law itself does not dictate which vision will be adopted as an interpretive base, but rather, the viewer's life experiences. n75

As another example, advocates of color-blind policies, a by-product of the restrictive view, implicitly assume that racial equality already exists. These advocates posit that inconveniencing Whites with remedial programs is "just as bad" as the history of discrimination against people of color. Thus, the "proper" role for judges is to assure equality of process. Once equality of process is obtained, real differences between groups would explain a difference in outcome, not past discrimination. Furthermore, when the free market is liberated from burdensome **[*1183]** government regulation, such as affirmative action, and irrational prejudices, employers' decisions to hire the best workers at the least cost would explain any stratification between groups. n76

By contrast, adherents to the expansionist vision recognize the importance of historical contextuality and understand that historical fact negates color-blindness as a viable option. According to expansionists, color-blindness and equal process would be obsolete if, in fact, people of color had been treated differently historically and if the effects of this disparate treatment had not created the current material subordination. n77 Furthermore, expansionists understand that racial domination, not cultural inferiority, explains differences in economic status. In fact, expansionists recognize that historical discrimination itself creates cultural disadvantage.

Because equal opportunity rhetoric ambiguously incorporates both the expansionist view and the restrictive view, n78 such that University X can claim to be an equal opportunity educator, and yet maintain a disproportionately White student body, the civil rights community runs the risk of allowing an ambiguous, ahistorical antidiscrimination discourse to pollute its political consciousness. To give equal opportunity meaning, the civil rights community must maintain a contextualized world view that reflects Black reality. n79 Despite the need for creativity, ingenuity, and the acceptance of multiple methods for engaging the struggle, an effective political consciousness for the civil rights community necessitates an ideology grounded in the material and historical reality of Black people. n80 The expansionist view represents this ideology.

Judge Keith has consistently and willingly embraced the challenge **[*1184]** of the expansionist vision. Through his opinions, Judge Keith has demonstrated an effective ideology grounded in the material and historical reality of the oppressed. In articulating his vision of the law as an instrument of equality, Judge Keith stated:

> We must continue to pave the way for progressive discourse in the way of race and economic relations in this country. In the face of great adversity, our heads may be bloodied but remain unbowed. We must live the vision of equality in its many facets.
>
> America's problem can no longer be regarded as a problem solely of civil rights. It has now become an issue of human rights with social and economic justice.
>
> The principle difference lies in the fact that civil rights sought changes in the law and the gaining of equal protection of those laws. Social and economic justice seek to bring about a total restructuring of our society and our institutions. We must seek to achieve not simply the integration of the races, but the liberation, equality, and economic independence of all peoples.
>
> Do not mistake this assertion as a call for social engineering. For justice has as its goal achieving equity and parity in the access to all of the opportunities, all of the benefits, all of the rewards and all of the powers of the total American society. n81

V. Judge Keith's Expansionist Vision and Race

Baker v. City of Detroit, n82 Stamps v. Detroit Edison, n83 Davis v. School District of the City of Pontiac, n84 Garrett v. City of Hamtramck, n85 United States v. Harvey, n86 and United States v. Taylor, n87 exemplify Judge Keith's successful use of a historical approach emblematic of the expansionist vision. In these cases, Judge Keith has

given the facts meaning by fully elaborating them within their greater historical context. By contextualizing the facts, Judge Keith has debunked the notion of racism as the product of **[*1185]** individual bad actors and exposed it for the societal policy that it is and has always been. Baker, Stamps, Davis, Garrett, Harvey, and Taylor reflect the material reality of Black people in areas of employment, education, and housing. As a matter of legal history, Judge Keith has documented that Black people do not create their own material inequality; but rather, the hegemonic force of racism unequally distributes power leaving Blacks subordinated.

In addition, both Taylor and Harvey involve racial profiling, a practice by which law enforcement subjects blacks and other people of color to discriminatory searches because they are not white.

Judge Keith's use of the historical approach provides a sharp contrast to the ahistorical approach and highlights its shortcomings. The ahistorical approach creates a false equality between Whites and Blacks and draws a false symmetry of despair between Whites burdened by remedial measures and Blacks historically subjugated. This false symmetry enables courts to privilege harm imposed on Whites from remedial action over the harms imposed on Blacks by a history of discrimination. n88 In Baker, Stamps, Davis, and Garrett, Judge Keith has demonstrated that allegedly "innocent Whites" have made gains, not only from individual merit, but also from institutional policies that deliberately exclude Blacks and include Whites. Having established the historical institutionalization of racist hegemony in the facts of the cases, Judge Keith summoned the full power of the court to ameliorate **[*1186]** the substantive and material conditions of inequality that are present in these cases.

A. Affirmative Action: Baker v. City of Detroit

In Baker, the defendant Detroit Police Department (police department or defendant) n89 adopted an affirmative action plan (the plan) in which equal numbers of Black and White police sergeants were promoted to the rank of lieutenant. n90 In response, plaintiffs, White candidates who the police department would have promoted if it had followed customary rank order, claimed that the defendant "passed over them" solely because they were white, n91 in violation of Title VII of the Civil Rights Act of 1964. n92

Judge Keith justified the affirmative action program and withstood reversal on appeal by (1) utilizing a historical approach; (2) fully developing the factual record; (3) giving meaning to the facts before the court by placing them within their relevant historical context; (4) documenting the police department's long-standing racist policies of excluding Black police officers and violence toward Black citizens; and (5) avoiding a false symmetry of despair between Whites harmed by the plan and Blacks against whom the defendant had institutionally and violently discriminated.

Baker is phenomenal in both the breadth of the facts and the historical context included in the court's opinion. Having ruled that plaintiffs were not entitled to a jury, n93 the following facts were before Judge Keith and he included them in his opinion. **[*1187]**

1. Facts

In 1943, at the time of the first Detroit race riots, the police department had only forty-three Black officers out of more than three thousand. Walter White and Thurgood Marshall, who at the time worked for the National Association for the Advancement of Colored People (NAACP) and later became a justice on the Supreme Court, prepared an analysis of the riot. Justice Marshall described the police department's role in the riot as follows:

In the June riots of this year, the Detroit police ran true to form. The trouble reached riot proportions because the police of Detroit once again enforced the law under an unequal hand. They used "persuasion" rather than firm action with [W]hite rioters while against [N]egroes they used the ultimate force; night sticks, revolvers, riot guns, submachine guns, and deer guns. As a result, 25 of the 34 persons killed were Negroes. Of the 25 Negroes killed, 17 were killed by police. n94

Of the White people who were killed, none were killed by police officers. n95

In the same report, Mr. White complained of the "inadequate number" of Black officers and specifically recommended "that the number of Negro officers be increased from 43 to 350 [and] that there be immediate promotions of Negro officers in uniform to positions of responsibility." n96

The City of Detroit (the "City"), however, refused to follow this recommendation. n97 According to the 1950 census, non-white people comprised 84% of Detroit's population. However, between 1944 and 1953, annual Black hires ranged from four to twenty-eight whereas annual White hires ranged from 135 to 560. n98 White officers were

occasionally assigned to ride with Black officers as a form of **[*1188]** punishment. n99 Furthermore, "there were only a handful of Black Sergeants and Lieutenants. However, they were not deemed good enough to supervise Whites." n100

The "New Bethel Church Incident" of 1969 provides another illustration of the relationship the police shared with Black residents:

Following reports that a [W]hite policeman had been shot near the New Bethel Church, twenty or thirty policemen converged on the building. The people inside the church were [B]lack and included women and children. The police went on an unprovoked rampage and began shooting and looting. The people in the church ducked for cover as best they could. The shooting was stopped by two [B]lack officers who physically removed the guns from the hands of the White officers. n101

In 1967, the police department was no more than 6% Black although the City of Detroit was almost 40% Black. n102 At the same time, Blacks represented a paltry 2.1% of the police department's supervisors. Nine of 348 Sergeants and two of 158 Lieutenants were Black. n103 In June 1974, the department was 17.2% Black, but only 5.15% of the sergeants and 4.78% of the lieutenants were Black. n104

2. Holding

Judge Keith upheld the plan, and stated "no reasonable person could fail to conclude that given the history of antagonism between the police department and the Black community, the affirmative action plan was a necessary response to what had been an ongoing city crisis." n105 Furthermore, by fully contextualizing the facts within their greater historical dimensions, Judge Keith established the following premises in his written opinion: (1) racism is a societal policy perpetrated by some **[*1189]** Whites against Blacks; n106 (2) racism has directly caused the subordination of Blacks; n107 (3) some Whites, as individuals and Whites generally, have benefitted from Black subordination; n108 (4) the historical willingness of Whites to engage in racist conduct and to benefit directly from such conduct undermines their claim to alleged "innocence"; n109 and (5) the need to redress this historical wrongdoing outweighs competing White interests. n110

a. Racism as Societal Policy

The facts of Baker exemplify the coercive power of race, specifically the police department's institutional commitment to not only exclude Blacks, but to direct violence at them. n111 The police department had implemented several employment policies deliberately designed to exclude Blacks. n112 As Judge Keith noted, "the evidence in the record of blatantly discriminatory treatment of Black citizens winked at by the department as well as blatant discrimination against Black officers in the department provides additional compelling evidence that the department was deliberately keeping Blacks out." n113 Having thus established the record, it was impossible for the plaintiffs to argue that only a few White officers had discriminated against a few individual Blacks in a few isolated circumstances.

b. Inequality as Direct Product of Racism

The police department's exclusionary and discriminatory conduct directly caused the the paltry numbers of Blacks within the police department. Judge Keith demonstrated that if the police department had hired Blacks in proportion to their representation in the relevant labor market, 1,366 more Blacks would have been hired. n114 As a **[*1190]** necessary corollary, 1,366 Whites had jobs that they would not have had "but for" the deliberate exclusion of Blacks.

c. Rejection of White "Innocence"

In claiming that they were "innocent," plaintiffs attempted to deflect the reality that Whites had benefitted from Black oppression in an abundance of conspicuous and less conspicuous ways. By failing to examine critically the opportunities that racism created for Whites, namely 1,366 jobs, the plaintiffs failed to comprehend that the denial of opportunity for minorities led to increased opportunities for Whites. The exclusion of minorities, contemporarily and historically, from access to opportunities necessarily implies the over-inclusion of Whites. Until this basic truism is addressed, racial hierarchy will persist. n115 Thus, in presenting themselves as "innocent," plaintiffs obscured the following questions: (1) What White person is "innocent," if innocence is defined as the absence of advantage at the expense of others?; and (2) Since discrimination against people of color has been historical, pervasive, and legally enshrined, what Black person is not an "actual" victim? n116

Moreover, in constructing the defense of White "innocence," plaintiffs demonstrated two hegemonic reactions to remedial measures: Remediation hurts innocent White people, and it advantages undeserving Black people. n117 In other words, the plan did not merely do **[*1191]** bad things to good ("innocent") people nor merely do good things for

bad ("undeserving") people; the plan did both at once and in harmony. Given the hegemonic appeal of this construction, its persistence in politics and legal opinions is not surprising.

When judges establish a symmetry of racial victimization between Whites adversely affected by remedial programs and Blacks historically subjected to discrimination, they must deny the difference race has made in the historical treatment of the two groups and the disparity in power between the two groups. n118 When courts decide to subject race conscious remedial action to the same level of scrutiny as White racist conduct, they are equalizing power between Blacks and Whites. This equalization of power only exists in a hypothetical world that ignores the structural reality race has created. This fallacious equality of despair demonstrates the ability of decontextualization and an ahistorical approach to erase reality, create fiction, and repeal attempts to ameliorate Black subordination. n119

By contrast, Judge Keith's historical approach negated the White officers' ability to claim innocence. Although plaintiffs claimed that they were "wholly innocent" and that the City, as opposed to them as individuals, was guilty of the original discrimination, Judge Keith **[*1192]** squarely confronted the White officers and their innocence stating:

It was the [W]hite officers who were guilty of mistreating [B]lack citizens. It was [W]hite officers who went on a ticket strike in 1959 when the City proposed integrating squad cars. It was [W]hite officers who fiercely resisted efforts to integrate the department throughout the 1960s. . . .

. . . .

The City did not ask what the plaintiffs and the Lieutenants and Sergeants Association were doing during the many years that [W]hite officers abused [B]lack officers in the department and [B]lack citizens on the street. This Court will not ask either. . . .

. . . .

Instead, the Court will uphold the City's affirmative action plan as proper under federal and state law. n120

d. Historical Wrongdoing Outweighs White Innocence

The facts of Baker brought the conflicting interests of Whites in the benefits made possible by a discriminatory past and the interests of Blacks in justice into sharp relief. Judge Keith squarely confronted this conflict and held that "[t]he City did not act to favor [B]lacks out of malice toward [W]hites, or even capriciousness[; but rather,] [i]t acted to favor [B]lacks because as a class, they had been subject to debilitating discrimination for years on end." n121 Furthermore, according to Judge Keith "[a]ll affirmative action programs have an adverse effect on Whites and to one extent or another upset their settled expectations. Where past discrimination against Blacks has been shown, courts have reasoned that making up for past discrimination justifies upsetting the **[*1193]** expectations of White workers." n122 In other words, "[a]ll affirmative action programs have some adverse effect on Whites who must step aside so that Blacks may be hired or promoted." n123

B. Employment Discrimination: Stamps v. Detroit Edison Co.

In holding that defendant Detroit Edison (Edison), a utility, had discriminated against minority employees, in violation of the Civil Rights Act, n124 Judge Keith fully historicized Edison's discriminatory practices in both hiring and assigning its minority employees. n125 The following facts were before Judge Keith and were included in his opinion.

1. Facts

Until July 2, 1965, Edison only used White hiring interviewers. n126 In 1966, when Detroit was approximately 40% Black, n127 Edison employed 304 Blacks out of 9,475 employees and only four of Edison's 1,722 officials and managers were Black. n128 In 1972, Edison employed approximately 860 Blacks out of approximately 11,500 employees although Detroit was approximately 44% Black. n129

In addition to hiring few Blacks, Edison had a reputation of limiting its Black employees to menial jobs such as janitor, porter, shoe shine boy, elevator operator, wall washer, lamp changer, coal ash handler, and utility serviceman. n130 Rather than promote its Black employees, Edison would sometimes hire skilled tradesmen from Canada who, in some cases, did not speak English. n131 Additionally, Edison deliberately recruited Blacks with poor employment records, when Blacks on its **[*1194]** own payroll had good employment records, and yet Edison refused to promote or transfer them. n132 Moreover, Edison used a non-job-related examination to "freeze the status quo of past discrimination." n133

In dealings with its unions, only Whites represented Edison, and with the exception of the named plaintiff, only Whites represented the unions. n134 One of Edison's unions, Local 223, refused to process Blacks' grievances, negotiated discriminatory seniority provisions, failed to accord Black meter readers the rights that Whites had, gerrymandered seniority districts, and excluded Blacks from political office, by among other things, requesting reelections where Blacks had been elected. n135

2. Holding

Despite overwhelming evidence to the contrary, Edison continued to claim recalcitrantly that it "ha[d] and d[id] recruit, hire, transfer, and promote qualified persons according to their availability and their ability without regard to race or color." n136 In response to Edison's defense and based on a fully developed factual record, Judge Keith replied that, in regard to hiring and promoting Blacks, Edison "ha[d] done nothing at all which has produced fruitful results." n137 Furthermore, "because of discrimination, Black employees and rejected applicants ha[d] lost employment opportunities which would have allowed them to earn more than they ha[d] earned." n138 Therefore, Judge Keith held that it was "appropriate to award them amounts of back pay sufficient to restore them to the economic position in which they would have been but for this discrimination." n139 Accordingly, Judge Keith ordered Edison to pay four million dollars and Local 223 to pay two hundred fifty thousand dollars. n140

In addition to providing new job opportunities for Black workers, at the time Judge Keith's ruling represented the largest damage award **[*1195]** in employment discrimination history against a single company. In remarking on the impact of Judge Keith's ruling, Carl T. Rowan wrote in Just Between Us Blacks: n141

Judge Keith lowered the judicial boom on Detroit Edison in the belief that only this unprecedented kind of decree could jar American industry out of the grip of entrenched, institutionalized racism. . . . [T]he message is clear that half-hearted attempts at corporate fairness in hiring and promotion will no longer satisfy the courts. . . . With a stroke of his pen on a monumental decree he has done more for Black equality than a thousand loud speeches cursing Whitey. n142

C. Education Discrimination: Davis v. School District of Pontiac n143

In Davis, Judge Keith demonstrated his ability and willingness to pierce the veil of empty equal opportunity rhetoric and unmask a practice of deliberate discrimination even in the face of death threats. n144

1. Facts

In Davis, a case decided seventeen years after Brown v. Board of Education, n145 Black children, through their parents and guardians, brought a class action against defendant School District of the City of Pontiac, its Superintendent and Assistant Superintendents, and the seven members of the Pontiac Board of Education (collectively Pontiac). n146 Plaintiffs claimed that Pontiac denied them an education under the same terms as White children and discriminated in their hiring and assigning of teachers. n147

In its defense, Pontiac presented several board resolutions and policies that had incorporated the empty rhetoric of equal opportunity. **[*1196]** For example, in 1954, Pontiac resolved to build new schools without regard to race, color, or creed. n148 However, Pontiac had, on at least two occasions, built new Black schools to accommodate overcrowding in predominately Black schools rather than accommodate the overflow of Black students in nearby predominately White schools that had "an overwhelmingly large capacity." n149

As another example of Pontiac's equal opportunity rhetoric masking deliberate segregation, in 1955, Pontiac resolved to employ and assign teachers and administrators "without regard to race, color, marital status, nationality, or religion." n150 Despite these written commitments to integrate faculties and administrations, Pontiac deliberately created the following conditions:

Alcott School ha[d] a total enrollment of 608 students, 605 of which are white; Alcott ha[d] no [B]lack teachers. Emerson School ha[d] an enrollment of 656 students all of whom are [W]hite; Emerson ha[d] one [B]lack teacher. Weaver School, Whitfield School, Wisner School, Malcolm School and Willis School all ha[d] a [W]hite student body; each ha[d] one [B]lack teacher. Other all-[W]hite schools ha[d], at most, two [B]lack teachers. Whitter School, an all [B]lack school, ha[d] two [W]hite teachers. n151

2. Holding

In announcing his decision in Davis, Judge Keith started his analysis by identifying the impact of discrimination on the actual material realities of Black children stating: "The Court begins its decision in this matter confronted with the

undisputed fact that Negro children are being deprived of quality education in the Pontiac School System and that early deprivation of innocent young children culminates in permanent, devastating, irreparable harm - harm incapable of subsequent correction." n152

[*1197]

Next, Judge Keith pierced Pontiac's smoke-screen defense. Although Pontiac "had established a very long record of making policy statements to the effect that they were committed to integrating the Pontiac School System, [it] did nothing to implement that policy." n153 Moreover, according to Judge Keith "[p]ronouncements of good intentions with nothing more amounts to 'monumental hypocrisy.'" n154

Pontiac claimed that a school district had "no affirmative obligation to achieve a balance of the races in the schools when the existing imbalance [was] not attributable to school policies or practices and [was] the result of housing patterns and other forces over which the school administration had no control." n155 According to Pontiac, segregated housing patterns, and not Pontiac's discriminatory policies and conduct, caused the racial imbalance in its schools. Despite Pontiac's claim of innocence, Judge Keith focused his attention on Pontiac's policy of shifting boundary lines and locating new schools in order to minimize the prospect of achieving racial integration. n156 Having identified this practice, Judge Keith held that Pontiac "intentionally us[ed] the power at disposal to perpetuate a pattern of segregation that had the effect of irreparably harming innocent young Negro children by depriving them of a quality education." n157 In further emphasizing Pontiac's "wrongdoing," Judge Keith stated:

[O]fficials of the Pontiac School System admitted that the black children in their system were being given an inferior education which was psychologically damaging to their self-image and economically damaging to their ability to perform in an adult world; and that in 1967, after approximately twenty years of doing nothing more than issuing resolutions and policy statements regarding its intent to strive for and achieve racial balance. . . . ma[de] one more statement of policy without any act of implementation. n158

[*1198]

In addition to piercing empty promises of equal opportunity, Judge Keith fashioned a legal remedy commensurate with the harm done. For the first time in a United States school district above the Mason-Dixon line, Judge Keith ruled that Pontiac was to be integrated by cross-district busing at the beginning of the next school year. n159 Moreover, his order applied with equal force to Pontiac's teachers and administrators. n160

Shortly after his ruling, on August 30, 1971, eight days before fall classes were to begin, ten Pontiac school buses were dynamited. n161 The investigation of the bombing led to the arrest and conviction of Robert Miles, the Grand Dragon of Michigan's Ku Klux Klan. n162

In the face of FBI warnings that the Klan had targeted him for an assassination plot, Judge Keith called for his order to be implemented as scheduled. n163 In remarking on his ability to withstand both political pressure and even death threats, Judge Keith quotes the late Dr. Martin Luther King Jr.: "Cowardice asks the question, is it safe? Expedience asks the question, is it politic? Vanity asks the question, is it popular? But conscience asks the question, is it right?" n164

D. Housing Discrimination: Garrett v. City of Hamtramck

The Garrett v. City of Hamtramck trilogy n165 further exemplifies Judge Keith's willingness to pierce alleged White innocence and unmask a history and pattern of deliberate discrimination. Furthermore, Garrett **[*1199]** typifies the vehemence and endurance of racist practices as well as Judge Keith's equally potent ability to remediate proportionately with the racist harm. In Garrett, Judge Keith found that defendants City of Hamtramck, its Mayor, its City Planning Commission, and its coordinator of urban renewal (collectively Hamtramck) deliberately engaged in a program of "Negro Removal" designed to get rid of its Black population. n166

1. Facts

In order to remove its Blacks, Hamtramck had, among other things, turned residential areas into industrial sites and placed an expressway through Black dwellings. n167 These activities coupled with racially discriminatory private housing practices caused a decrease in Hamtramck's Black population from 14.5% in 1960 to approximately 8.5% in 1966. n168

As another example of invidious Hamtramck practices, eighteen Black families lived in one portion of an area slated for "urban renewal" in a row of consecutive multi-family flats while Whites occupied the remainder of the homes in the same area. n169 Hamtramck could not establish that the condition of the Black- owned residences differed from those of their White counterparts. n170 Nevertheless, Hamtramck destroyed the Black-owned houses before it touched the White- owned houses. n171

2. Holding

Summarizing Hamtramck's "wrongdoing," Judge Keith stated "[t]he defendants simply cannot surreptitiously permit and encourage displacement of [B]lack residents from their homes . . . without taking reasonable steps to assure that housing for rental or purchase will be made available to those displaced." n172 Moreover, Judge Keith went on **[*1200]** to allocate responsibility for the "Negro Removal" at its source:

If what has occurred in Hamtramck is ever to be stopped, responsibility must be placed at the source, that is, the Department of Housing and Urban Development which funds and administers the programs. It must be clearly understood that in order for the City of Hamtramck to bring about the "Negro removal" and ancillary discriminatory results of which plaintiffs are complaining in this action, federal financial assistance and involvement was essential. n173

Garrett came before Judge Keith on November 20, 1968. n174 As an example of racism's endurance, Hamtramck had "through dilatory tactics . . . delayed, attempted to delay, and frustrated the implementation of any program to redress the grievous injustices for which they ha[d] been responsible" well past May 21, 1975. n175 Despite Hamtramck's insolence and delay, Judge Keith was evenly matched for the hold-out and continued to order defendants to build 515 to 604 replacement units n176 and to contact the displaced Black residents, via Black radio stations and newspapers, in order to determine if they desired replacement housing in Hamtramck. n177 As further evidence of Judge Keith's tenacity, he retained jurisdiction of the case even after he had been promoted to the Sixth Circuit Court of Appeals, receiving special permission to retain the case every year. In 2001, Judge Keith ordered the homes be rebuilt. n178

In sum, Garrett v. City of Hamtramck, n179like Baker v. City of Detroit, n180 Stamps v. Detroit Edison, n181 and Davis v. School District of the City of Pontiac n182 reflects Judge Keith's ability to ground both his adjudication and **[*1201]** opinions in the reality of material subordination by fully historicizing an exhaustive factual record. The breadth of the factual record and its historical context provides a thorough record of racist policies and practice. Yet, these opinions are refreshingly bold, particularly where courts have polluted the landscape of anti-discrimination law with legal opinions that obfuscate racism by deemphasizing historical reality. Each of these cases is a veritable recipe for effective remediation.

E. Racial Profiling: United States v. Harvey and United States v. Taylor

Both Taylor n183 and Harvey n184 involve the phenomenon of "driving or walking while black," where law enforcement equates color with criminality and, through the vehicle of racial profiling, subjects people of color to discriminatory searches and seizures. In both of these cases, Judge Keith dissented to the majority's finding of probable cause and exposed the racially discriminatory practice.

1. Facts

In Taylor, the defendant was the only black person to deplane from a Miami flight by the time he was stopped. n185 In addition, the defendant "walked away from the gate nervously, hurriedly and moved faster than the other passengers; constantly looked backwards as he walked; carried a tote bag that he held tightly to his body; and left the terminal walking very fast." n186 According to the arresting officer's testimony, the officer stopped the defendant because he was both dressed in dingy clothing and nervous. n187

In Harvey, law enforcement stopped the defendant because he was driving "three miles over the speed limit in a car which was missing a bumper and a headlight." n188 In addition, when asked "[w]hat was it about the appearance of the occupants that got [his] attention," n189 the arresting officer replied "[a]lmost every time that we have arrested drug **[*1202]** traffickers from Detroit, they're usually young black males driving old cars." n190

2. Analysis

In Taylor, Judge Keith began his dissent by cutting through to the heart of the matter stating "[l]aying aside the legality of the seizure and the subsequent search of Taylor under established fourth amendment principles for the

moment, the Drug Enforcement Agency (DEA) personnel stopped [defendant] . . . solely because he was an African-American." n191 Furthermore, Judge Keith exposed the racial component of the profiling methods employed:

The disproportionate number of African-Americans who are stopped indicates that a racial imbalance against African-Americans does exist and is implicitly sanctioned by the law enforcement agency. The assumption that seventy-five percent of those persons transporting drugs and other contraband through public modes of transportation are African-American is impermissible. It flies in the face of reason and legitimates a negative stereotype of African-Americans. Surely, this practice must "be subjected to the strictest scrutiny and [can be] justified only by the weightiest of considerations." If our "right of locomotion," "right to be let alone," or simply our right to be free from capricious and arbitrary government interference in public places is to mean anything, then this race-based practice must stop.

We cannot allow law enforcement officers to cloak what may fairly be characterized as a racist practice in a generic drug courier profile that openly targets African-Americans. n192

[*1203]

In challenging the majority's opinion in Harvey, Judge Keith related the reality of racial profiling for Black people:

Unfortunately, the present case is not unique; rather, it eloquently illustrates the plight of many African-Americans. News reports detail unreasonable stops of African Americans [sic] by police motivated solely by irrational and illogical racial stereotypes. For example, a national newspaper reported "the same percentages of whites and blacks use drugs." Arguably, for every 100 people arrested for drug use or trafficking, 50 should be black. Blacks, however, are four times as likely to be arrested for drugs in central cities, six times as likely in suburbs, and three times as likely in rural areas. . . . African-Americans are more likely to be arrested because drug courier profiles reflect the erroneous assumption that one's race has a direct correlation to drug activity. n193

VI. Resistance: the Expansive View Applied to Gender

In addition to maintaining a legal sensibility keenly sensitive to all forms of injustice, Judge Keith has also reached beyond the subjectivity of his own male experience, embraced the expansionist view in the struggle for gender equality, and summoned the power of the court to ameliorate the substantive power imbalance between men and women. In Rabidue v. Osceola Refining Co., n194 the Sixth Circuit majority held that plaintiff failed to sustain her Title VII sexual harassment claim. n195 However, in his dissent, Judge Keith characteristically (1) developed the full factual record and (2) elaborated those facts within their historical **[*1204]** and material reality. Having exhausted the facts within the context of gender inequality, Judge Keith established that the majority erred in finding that "defendant's treatment of plaintiff evinced no anti-female animus and that gender- based discrimination played no role in her discharge." n196

In addition to undermining the majority's opinion by exposing the record, Judge Keith's dissent in Rabidue evinces a keen receptiveness to pervasive issues in sexual harassment law that directly affect gender equality. First, Judge Keith established that societal norms cannot set the standard for the level of inequality women must tolerate in the workplace as the majority suggested. Second, just as he understands the disparate historical treatment of persons of color, Judge Keith, unlike the majority, rejected gender neutral standards for assessing sexually offensive conduct because gender-blind standards create a false symmetry of power between men and women and mask the power imbalance between the two. n197 Third, Judge Keith took issue with the majority's suggestion that women who work in environments infected with misogyny voluntarily assume the risk of exposure. Finally, as in cases involving race, particularly under the restrictive view of anti-discrimination law, the majority opinion expressed an unwillingness to use the courts to eradicate or correct the anti-female environment at issue in Rabidue. Judge Keith, however, used the institution of the courts to fulfill the vision of Title VII-workplace equality.

A. Judge Keith's Development and Contextualization of the Facts within the Material Reality of Female Subordination

The majority analysis in Rabidue violated "the most basic tenet of a hostile work environment cause of action, the necessity of examining the totality of the circumstances." n198 Instead of applying the "totality of the circumstances" test, the majority evaluated each of plaintiff's allegations separately and rejected each one as having a "de minimus" **[*1205]** effect on the workplace. n199 The majority's opinion is particularly startling in light of Osceola Refining Company's (defendant's) egregious conduct. n200 However, as is characteristic of Judge Keith, he (1) fully developed the facts of the case and then (2) gave those facts meaning by contextualizing them within the material reality of female subordination and the power imbalance between men and women.

Although the majority failed to focus critically on the defendant's behavior or elicit the following facts in its opinion, Judge Keith characteristically developed the full factual record and presented the following in support of his dissent:

One poster, which remained on a wall for eight years in plaintiff's work environment, showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling "Fore." A desk plaque declared "[e]ven male chauvinist pigs need love." n201 A supervisor "routinely referred to women as 'whores,' 'cunt,' 'pussy,' and 'tits.'" The same supervisor, remarked of plaintiff that "'[a]ll that bitch needs is a good lay'" and called her "fat ass." When plaintiff complained about such treatment, she was told to "calm down."

In addition to tolerating this anti-female behavior, defendant excluded plaintiff, the sole female in management, from activities she needed to perform her duties and progress in her career. For example, unlike male salaried employees, plaintiff did not receive free lunches, free gasoline, a telephone credit card or entertainment privileges. Nor was she invited to the **[*1206]** weekly golf matches. n202 Defendant prevented plaintiff from visiting or taking customers to lunch because it would be improper for a woman to take male customers to lunch and because she "might have car trouble on the road." n203 In a "Catch 22," plaintiff's supervisor stated that "we really need a man on [plaintiff's] job" and added that plaintiff "can't take customers out to lunch."

Presenting another "Catch-22," the majority found plaintiff "to be an abrasive, rude, antagonistic, extremely willful, uncooperative, and irascible personality." n204 Plaintiff's supervisor, however, stated that "plaintiff was not forceful enough to collect slow-paying jobs." n205 Judge Keith, noting the irony, stated "[h]ow plaintiff can be so abrasive and aggressive as to require firing but too timid to collect delinquent accounts is, in my view, an enigma." n206

B. Rejection of Societal Norms that Perpetuate the Status Quo

The majority opinion went out of its way to emphasize the plaintiff's aggressive and cantankerous personality n207 while simultaneously excusing defendant's offensive conduct. n208 Unlike the majority, however, Judge Keith's dissent recognizes that the pivotal issue under Title VII is the defendant's conduct, n209 not the victim's, **[*1207]** particularly not the victim's reaction to sexually offensive conduct in light of societal norms that may actually reinforce gender discrimination. In Rabidue, Judge Keith refused to let societal norms dictate the measure of inequality women must tolerate in the workplace. According to Judge Keith, societal norms are no excuse for the debilitating effects of pornography in the workplace.

C. Reasonable Woman Standard

Just as he has recognized the difference race has made, Judge Keith, unlike the majority, rejected gender neutral standards of assessing sexually offensive conduct in Rabidue because he recognized that gender-blind standards create a false symmetry of power between men and women and mask the power imbalance between the two. n210 Instead, Judge Keith introduced the reasonable woman standard to account for not only the differences of perception between the sexes, n211 but also the difference in power. While other courts have adopted the reasonable woman standard, n212 Judge Keith has been credited with introducing the **[*1208]** reasonable woman standard in case law. n213

Just as colorblindness is used to erect the status quo and mask a vision that is white, Judge Keith understood that genderless standards of assessing offensive conduct would only assume the current distribution of power, namely male. In justifying the reasonable woman standard, Judge Keith stated:

Nor can I agree with the majority's notion that the effect of pin-up posters and misogynous language in the workplace can have only a minimal effect on female employees and should not be deemed hostile or offensive "when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at newsstands, on prime-time television, at the cinema and in other public places." "Society" in this scenario must primarily refer to the unenlightened; I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture. In fact, pervasive **[*1209]** societal approval thereof and of other stereotypes stifles female potential and instills the debased sense of self worth which accompanies stigmatization. The presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy. That some men would condone and wish to perpetuate such behavior is not surprising. However, the relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery. I conclude that sexual posters and anti-female language can seriously affect the psychological well being of the reasonable woman and interfere with her ability to perform her job. n214

Having contextualized the facts of Rabidue within their historical context, Judge Keith demonstrated that women disproportionately suffer the brunt of sexual harassment and gender bias. n215 Unlike the adherents to the restrictive view of anti-discrimination law, Judge Keith established that the legal system must account for the woman's perspective regarding appropriate behavior. According to Judge Keith, the reasonable person standard failed because it did not reflect women's perceptions of what constitutes sexual harassment. The reasonable woman standard, on the other hand, evaluates the conduct from the woman's perspective and thus minimizes the risk of reinforcing the prevailing level of sexual harassment in society. n216

[*1210]

D. Assumption of Risk

The majority excused the work atmosphere in Rabidue stating that courts must consider the "prevailing work environment," "the lexicon of obscenity that pervaded the environment both before and after plaintiff's introduction into its environs," and plaintiff's reasonable expectations upon "voluntarily" entering that environment. n217 The majority further suggested that it is "through these factors that a woman assumes the risk of working in an abusive anti-female environment." n218 In other words, the majority implicitly supported the notion that female employees assume the risk of sexual harassment when they enter male-dominated, traditionally vulgar, and mysogonistic work environments.

By contrast, Judge Keith rejected the majority's voluntary assumption of risk suggestion and stated "I conclude the misogynous language and decorative displays tolerated at the refinery (which even the district court found constituted a 'fairly significant' part of the job environment), the primitive views of working women expressed by Osceola supervisors, and defendant's treatment of plaintiff as the only female salaried employee clearly evince anti-female animus." n219

E. Summoning the Power of the Court to Effect Equality

As in cases involving race under the restrictive view of anti-discrimination law, the majority opinion expressed an unwillingness to use the courts to eradicate or correct the anti-female environment in Rabidue. Beyond the mere tolerance of such environments, the majority suggested that such work environments have an innate right to perpetuation and are not to be addressed under Title VII:

Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. **[*1211]** Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to-or cannot-change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female worker of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers. n220

In response to the majority's judicially restraining Title VII in the sexual harassment field, Judge Keith stated that the majority had undermined the very purpose of Title VII, which was the promotion of social change and equality in the workplace by perpetuating working environments hostile to women:

In my view, Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment . . . . To condone the majority's notion of the "prevailing workplace" I would also have to agree that if an employer maintains an anti-Semitic workforce and tolerates a workplace in which "kike" jokes, displays of Nazi literature and anti-Jewish conversation "may abound," a Jewish employee assumes the risk of working there, and a court must consider such a work environment as "prevailing." I cannot. . . . as I believe no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative, I dissent. n221

VII. Equality and the Rights of Citizens

Judge Keith has reached beyond the subjectivity of his own life to create a more equitable world for everyone. His keen sensitivity to an abuse of power is not isolated to cases involving race and gender discrimination; rather, the same level of sensitivity and effective adjudication that Judge Keith applies to cases involving race and gender equally applies to cases involving governmental abuse of power against **[*1212]** its citizens. One famous example marks Judge Keith's adherence to principle even in the face of peril: United States v. Sinclair. n222 There, despite overwhelming political pressures, particularly from the Office of the President, Judge Keith protected every citizen from the uninvited ear of the government. The same fortitude and courage that enabled Judge Keith to triumph over the forces of hegemony in his own life enabled him to resist political pressure and ensure the privacy rights of every citizen. In another set of

examples, Judge Keith protected the rights of every citizen, even a corrupt governor, to a fair trial. In sum, each of the following cases further exemplifies Judge Keith's commitment to equality in all of its many dimensions.

A. The Keith Case: United States v. Sinclair

Judge Keith's keen sensitivity to equality and his own experiences of exclusion coupled with his unyielding sense of fortitude and bold courage directed him in United States v. Sinclair, n223 perhaps his most legendary case. n224 In Sinclair, notwithstanding the office of the presidency and President Nixon's enormous popularity at the time, n225 Judge Keith held that the Constitution prohibited President Richard Nixon, Attorney General John Mitchell, and the federal government n226 from wiretapping the residence of the White Panthers, a Michigan-based political dissident group, whom the government had accused of conspiring to bomb a CIA building, unless a warrant had been issued consistent with the Fourth Amendment. n227 The Supreme Court unanimously upheld Judge Keith's decision, which became known as "the Keith case." n228

Beyond the specific facts or particular parties before the court, n229 the **[*1213]** decision in Sinclair shielded the privacy rights of every United States citizen from the government's "uninvited ear." Apprehending the need to protect every citizen's rights against governmental abuse, Judge Keith squarely confronted the executive branch of the government and stated:

The great umbrella of personal rights protected by the Fourth Amendment has unfolded slowly, but very deliberately, throughout our legal history. n230

. . . .

The final buttress to this canopy of Fourth Amendment protection is derived from the Court's declaration that the Fourth Amendment protects a defendant from the evil of the uninvited ear. n231

. . . .

It is to be remembered that the protective sword which is sheathed in the scabbard of Fourth Amendment rights, and which insures that these fundamental rights will remain inviolate, is the well-defined rule of exclusion. And, in turn, the cutting edge of the exclusionary rule is the requirement that the Government obtain a search warrant before it can conduct a lawful search and seizure. It is this procedure of obtaining a warrant that inserts the impartial judgment of the Court between the citizen and the Government. n232

In articulating the impact of Judge Keith's ruling, the Puzzle Palace, a widely celebrated book on the National Security Agency ("NSA") and the pervasive influence of America's intelligence community, reported that Judge Keith's "[o]rder rocked the NSA," n233 because it exposed that organization's questionable practices of electronic surveillance. Historian Jeff A. Hale has stated that "Keith has become one of the **[*1214]** foundations of our modern conception of privacy rights." n234

Ironically, the individual who has devoted his life to equality, particularly for those who have been denied it, is the same individual who has championed the rights of everyone, including the privileged. This touch of irony is illustrated in the following excerpt from a conversation between Henry Ford and Judge Keith, in Judge Keith's own words:

I remember my good friend Henry Ford said to me after the wiretap case, "Damon, what is this wiretapping case all about that everybody is talking about."

. . . .

I said, "Well, Henry, if you and your wife were having a private conversation, the government would say that Henry Ford and his wife are having a conversation that may be a threat to the national security. Once they declared the conversation a threat to the national security, they could wiretap your telephone without going before a neutral magistrate and showing probable cause that what you are saying was actually a threat to this country. The government could do it alone. If Nixon and John Mitchell wanted to intercept telephone calls they could do it just by invoking national security. National security would be their defense." I told Henry that the Supreme Court decision in that lawsuit against me prohibited the Nixon administration, the government, from wiretapping without judicial approval. Henry said, "My goodness, I would never have believed it." n235

In addition to securing privacy rights, Sinclair exemplifies the importance of an independent judiciary. Author Joseph C. Goulden reflected on Judge Keith's contribution to the independence of the judiciary in the following excerpt from his book, The Benchwarmers:

Keith's action . . . is a prime example of an independent Federal Judge interposing his authority between an executive action and the general citizenry. As the public knows through **[*1215]** the various Watergate-released disclosures, the Nixon administration had grandiose schemes for surveillance of domestic "enemies," political and otherwise; warrantless wiretapping of the sort used against [one of the plaintiffs in Sinclair] was a key weapon. But Judge Damon Keith, a jurist not answerable to a presidency which likened itself to a "sovereign" had the courage to say "no". . . .

. . . .

The strength of the judiciary is rooted in just such independence as that displayed by Keith. n236

In remarking on the case, Judge Keith stated "I feel honored as a federal district judge to have made a ruling that protects the rights of all Americans. This is a country of laws and not of men. No one is above the law. That's what makes this country so great." n237

B. Prosecutorial Misconduct

In United States v. Blanton, Judge Keith's sense of justice remained vigilant even in the face of a governor whose administration reeked of corruption. n238 There, former Governor Leonard R. Blanton was charged and convicted of various violations after he arranged for friends to receive liquor licenses from the state of Tennessee. n239 True to form, Judge Keith expressed his concerns for justice stating "[t]his case, however, concerns something that is more important and fundamental-a man's liberty and his right to a fair trial. Under our system of justice, everyone, including an allegedly corrupt ex-governor, is entitled to a fair trial before a fair and impartial jury of his peers-no more and no less." n240

In another example of Judge Keith's sensitivity to prosecutorial misconduct, and also in light of recent accusations of mishandled **[*1216]** investigations involving President Clinton, n241 United States v. Bess, n242 further exemplifies Judge Keith's sensitivity toward justice and impartiality, specifically the rights of every citizen to a fair trial. In Bess, the United States Attorney's office had prosecuted plaintiff for concealing and retaining scrap metal from a military reservation. n243 During the trial, the United States Attorney, engaged in prosecutorial vouching stating that "[i]f the United States did not believe the defendant was guilty of committing these charges in the indictment, based on the evidence that has been presented to you, this case, of course, would have never been presented to you in the first place." n244

In admonishing the United States Attorney, Judge Keith wrote "[t]he function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." n245

[*1217]

VIII. And Justice for All: Direct Evidence for Diversity on the Bench

President Jimmy Carter was the first Chief Executive to pledge expressly to increase the number of "women and minorities on the federal bench." n246 Despite this laudable goal, many view African American judges with suspicion and see them as a salve for narrow, parochial interests rather than a benefit to the judicial system as a whole. n247 At the core of this suspicion lies the belief that only Whites are capable of impartiality. For example, in Baker v. City of Detroit, n248 White police officers challenging the Detroit Police Department's affirmative action plan sought to recuse Judge Keith allegedly because he was an acquaintance of one of the nominal defendants, African American Mayor Coleman Young. In rejecting the recusal motion, Judge Keith candidly remarked:

The reality of life is that only a small number of [B]lack persons have been elevated to positions of responsibility in our national life. It therefore is highly likely, especially in a predominantly [B]lack city like Detroit, that a [B]lack Federal Judge would know, on a friendship basis, a [B]lack Mayor. n249

Furthermore, Judge Keith identified the true basis of the recusal motion as premised not on his acquaintance with Mayor Young, but rather on his race:

The conclusion is inescapable that the likely grounds upon which plaintiffs' motion is based is the fact that I am [B]lack, that Mayor Young is [B]lack, that this action was brought by [W]hite policemen seeking to challenge the affirmative action program in the Detroit Police Department. . . . n250

[*1218]

Although the White police officers attempted to mask a critique of Judge Keith's impartiality, Judge Keith was able to respond with an impeccable record of service on the federal bench. Judge Keith countered that the White police officers "can point to no instance in which this Court has conducted proceedings in this matter in anything but a fair and impartial manner." n251 Furthermore, in another case in which Judge Keith presided, Judge Keith noted that in Bars & Stripes, the official publication of the Detroit Police Lieutenants and Sergeants Association, which was one of the plaintiffs in Baker, noted the following:

The (Lieutenants and Sergeants) Association owes much to Judge Damon Keith. Judge Keith displayed compassion, concern and fairness in acting as an arbitrator in this matter. n252

The allegory of the recusal motion in Baker and Judge Keith's response exemplify evidence for diversity on the bench. In the face of racist critiques of impartiality, Judge Keith has countered with an impeccable record of sensitivity to both race and gender bias, and also justice. Judge Keith exemplifies the value of a diversified bench informed by a diversity of life experiences. Furthermore, the same power Judge Keith uses to resist hegemony has enabled him to fortify the rights of every citizen against extreme political pressure and death threats. The strength that enables him to be a Black man in the United States inspires his ability to protect the rights of all citizens. Rather than exhibiting partiality, Judge Keith has been an engine for equality for all citizens. Judge Keith's personal experiences with hegemony have created in him a greater allegiance to the protection of rights. n253

[*1219]

Moreover, Judge Keith's hegemonically-informed consciousness is not isolated to race; rather, Judge Keith's keen awareness of injustice has also benefitted every citizen, including white privileged citizens. Despite racist critiques concerning the inability of Blacks to be impartial, Judge Keith is an example of a Black man using his sensitivity toward justice to benefit the rights of all. Moreover, the diversity that Judge Keith's presence brings to the bench has provided an example for our entire justice system. A presence which both practitioners and other judges have not only recognized, but applauded.

A. Impartiality Through Diversity

Because majority and minority groups occupy different social spaces and because knowledge is "socially positioned," majority and minority groups adhere to different epistemologies. n254 This is not to say that all Blacks think exactly alike or all women think alike; however, race, gender, and class determine life experiences and inform perspectives. n255 For example, competition for resources, acceptance of the status quo, and rejection of hegemony have all produced many perspectives that are sometimes sharply at odds with each other. The current attack on affirmative action programs reveals a deep racial divide. n256 Most Whites **[*1220]** oppose affirmative action as a policy of group quotas or preferences. n257 Most racial minorities support affirmative action as a way to combat the hegemonic force of race. n258 On the gender front, the media has helped to popularize the notion that men and women communicate and perceive differently, and that men and women have distinct values and different orientations toward problem solving. n259

Because different life experiences inform different ways of knowing, the bench should reflect this diversity. n260 Moreover, pluralist communicative democracy embraces the value of including all members of the polity and treating them as equal, coparticipants in constructing the fundamental values of the polity. James Madison, in Federalist No. 39, emphasized inclusion of all the polity's members as fundamental to the constitution of democracy. Exclusion of significant sectors of a polity "degrade[s] . . . the republican character" of the government, because **[*1221]** "[i]t is essential to a [republican] government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it." n261

Judicial decision-making is most effective, conscious, and representative when it is informed by the variety of perspectives and qualities that race, gender, and class generate. To that degree, structural impartiality is realized through the interaction of diverse viewpoints on the bench and the resulting decreased opportunity for one perspective to dominate consistently judicial decision-making.

Judge Keith's presence on the bench demonstrates the most compelling reasons for diversity among judges. He paradigmatically exemplifies racial diversity in the courts promoting, rather than undermining, impartiality. n262 The hegemonic force of race not only informs his life, but also the opinions he expresses on the bench. Thus, he promotes impartiality because his presence negates the possibility of any viewpoint, perspective, or set of values that is not informed by life experiences shaped by the brunt of hegemony from persistently dominating legal decision making. In fact, his presence functions as a check on bias. n263 Judge Keith's jurisprudence demonstrates that increased diversity

enhances the judiciary's understanding of complex public policy issues, such as securing and retaining employment, education, and housing.

Furthermore, Judge Keith has demonstrated that minority judges not only decrease both racial and gender bias in the courts, but also increase the level of sensitivity to injustice generally. His opinions establish that racial minorities bring a legal acumen to the bench that is enhanced by marginalization, but not limited to issues solely involving race. Judge Keith's presence on the bench demonstrates that, given the subordinated role of minorities in the social, economic, and political life of our country, increasing racial diversity on the bench results in the inclusion of alternative perspectives reflective of other kinds of subordination-such as gender and class. n264 Moreover, Judge Keith's sensitivity toward justice has protected every citizen, rich and poor, **[*1222]** from the dangers of unrestrained power in the hands of government.

B. A Role Model for the Bench

Judge Keith has not only educated his colleagues through the example he sets, but also by informal as well as formal exchanges. n265 Aside from the manifestation of his character and sensibility in his judicial opinions, other practitioners have gone on record to attest to Judge Keith's gentlemanly-like quality. An ongoing theme in the many accolades paid to Judge Keith is his sensitivity and commitment to treating everyone under all conditions with basic human courtesy and respect. As an example, in his autobiography, My Life as a Radical Lawyer (1994), William M. Kunstler described his appearance before Judge Keith in the White Panther case, United States v. Sinclair, as follows:

In Chicago, where Judge Hoffman turned off and didn't want to deal with anything and the marshals in the courtroom were often confrontational, the defendants reacted accordingly. But the White Panther case was very different. I am often asked how judges can stop disruptive trials. One answer is to have more judges like Damon Keith. On the first day of trial, he called the prosecutors and defense lawyers into his chambers for a conference; he served, as I recall, very delicious buns and coffee. He broadly hinted to Len and me that he did not expect this trial to be similar to Chicago. We assured him that unless we had the same type of provocations that permeated the Chicago trial, we didn't expect any difficulties. n266

In a similar vein, of the many accolades that Judge Keith holds dear, one of the most telling came from a juror. The unnamed juror sat through an eight-month trial and twenty-seven hours of deliberations regarding the notorious "Tony Jack" Giacalone, an alleged mafia kin pin. In remarking on the deliberations, the juror said, "[i]t was painful, really hard, but we tried to be as fair and honest as we believed the **[*1223]** judge was during the trial." n267

In remarking on Judge Keith's innate sense of fairness to everyone, including an alleged mafia boss, Giacalone's own defense attorneys' echoed such praise when "they said repeatedly on the record that their client was getting a fair trial." n268 Judge Keith himself has remarked:

I am constantly alert to treat the lawyers who appear before me with the dignity and respect they deserve as officers of the court-something that Black lawyers often didn't get when I practiced. In my [thirty-two] years on the bench, I have never held nor threatened to hold a lawyer or anyone else in contempt of court. n269

In addition to his diplomatic and gentlemanly character on the bench, Judge Keith has set an example for diversity in his own hiring selections. He has employed and mentored more than twenty-five female law clerks n270 and more than fifty law clerks of color, more than **[*1224]** any other federal judge in the history of our nation. n271 Where some Judges have argued that they cannot find qualified law clerks of color, Judge Keith has employed law clerks spanning the entire globe, including Caucasian, Jewish, Chaldean, Ethiopian, Nigerian, Korean, Indian, and African American. As a direct result of his tutelage, all of his law clerks, regardless of race, ethnicity or gender, have inherited a legacy of penetrating and sophisticated legal analysis, coupled with principled commitment to justice and equality. n272

As an example of Judge Keith's legacy and lived commitment to equality, in her book Lift Every Voice, n273 Harvard law professor Lani Guinier recalls how one day in court, Judge Keith instructed a panel of jurors to begin deliberations by choosing a foreman and a spokesman. n274 Later, when Judge Keith returned to his chambers, there was a note on his desk from one of his law clerks (Guinier) discreetly suggesting that this esteemed, veteran jurist modify his language and use "foreperson" or "spokesperson" next time because that might help jurors think about **[*1225]** selecting a woman. n275 Some judges might have been indignant at such a suggestion from a lowly clerk. Others might have dismissed it as an ambitious young lawyer being hypersensitive or too politically correct. Not Judge Keith. He took the advice and complimented Guinier on her assertiveness. n276 In reflecting on the incident, Guinier wrote "Judge Keith tried to teach all his law clerks to respect the rule of law, 'but to realize it is a changing thing.' That's

why he liked my note: It showed 'sensitivity' and awareness of the need for change, even in our most basic speaking." n277

Judge Keith's colleagues on the bench have also recognized his lived commitment to equality. In presenting Judge Keith with the Edward J. Devitt Award for Distinguished Service to Justice, which honors a federal judge who has achieved an exemplary career and has made significant contributions to the administration of justice, United States Circuit Court of Appeals Judge Peter Fay noted:

One cannot be around Damon for very long without sensing his commitment to all that is good about our country. But, unlike many, he does not limit his commitments to words-his actions speak volumes. He gets involved. He spends time. He does work. Yes, he gets his hands "dirty" because there is nothing he will not do if he is convinced it will help others and strengthen our way of life. n278

In addition to countless accolades from colleagues and practitioners, **[*1226]** Judge Keith's most enduring legacy may be the "Damon J. Keith Law Collection of African-American Legal History, Wayne State University," founded by Judge Keith. The collection, a central depository for the nation's African-American legal history, documents the contributions of Black lawyers and judges to the struggle for equality. n279 It contains the substantial historical accomplishments of African-American lawyers and judges with more than a century of records, documents, photographs, personal papers, memorabilia, and interviews. In remarking on the purpose and importance of the collection, Judge Keith stated:

I can think of no other place in the world where researchers, students, and others will be able to take advantage of a central repository with more than a century of records, documents, photographs, and personal papers that may have in many ways impacted American lifestyles. n280

I am finding it more and more significant that young African Americans are not familiar with the struggles that went on years ago. They don't seem aware that they are now standing on the shoulders of giants who sacrificed and went to jail for their rights. We should have a depository where people can come in and ask questions and have them answered. n281

As further evidence of his triumph over hegemony, Judge Keith has received numerous award and recognitions, including, but not limited to:

1. Chairperson of the Michigan Civil Rights Commission 1964-1967

2. President of the Detroit Housing Commission 1958-1967

3. In 1967, President Lyndon B. Johnson appointed Judge Keith to the United States District Court for the Eastern District of Michigan, where he was Chief Judge from 1975 to 1977.

4. From 1971 to 1990, Ebony Magazine selected Judge Keith as **[*1227]** one of the "One Hundred Most Influential Black Americans."

5. In 1974, the Detroit Board of Education dedicated one of its primary schools in Judge Keith's honor, naming it "The Damon J. Keith Elementary School."

6. In 1977, President Jimmy Carter elevated Judge Keith to the United States Court of Appeals for the Sixth Circuit.

7. In 1976, Judge Keith traveled to the former Soviet Union to show support for the Soviet Jewish Refusniks. n282

8. "In 1985, Chief Justice Warren Burger appointed Judge Keith as the Chair of the Committee on the Bicentennial of the Constitution of the Sixth Circuit. Two years later, Chief Justice William Rehnquist appointed him the National Chair of the Judicial Conference Committee on the Bicentennial of the Constitution. In 1990, President George Bush, in recognition of Judge Keith's contributions to the development of constitutional law, appointed him to the Commission on the Bicentennial of the Constitution." n283

9. "Under Judge Keith's leadership, over three hundred Bill of Rights plaques have been placed in courthouses and law schools throughout the United States and Guam. In October 1991, the Commission on the Bicentennial of the Constitution in celebration of the Bill of Rights held a three-day conference that included over 350 federal judges, the largest gathering of the federal judiciary in American history. For his work as Chair of the Judicial Conference Committee, Judge Keith received a special resolution of commendation from the Judicial Conference. He was also the

Chair of the Fortieth Anniversary Conference of Brown v. The Board of Education, held May 17-18, 1994 at the College of William Mary, Marshall-Wythe School of Law." n284

10. "Judge Keith's peers within the nation's leading civil rights and service organizations have also recognized his devotion to the Constitution and equality under law. In 1974, he was a **[*1228]** recipient of the NAACP's prestigious Spingarn Medal. Other Spingarn winners include: Justice Thurgood Marshall; Dr. Martin Luther King, Jr.; and the 'Mother of the Civil Rights Movement,' Mrs. Rosa Parks. The Spingarn Award notes particularly Judge Keith's decisions in the 'Keith Case' and the 'Detroit Edison Case', which in addition to providing new job opportunities for Black workers, was, at the time, the largest damage settlement in an employment discrimination case against a single company." n285

11. In 1988, he was the co-recipient with General Colin Powell of the One Nation Award from the Patriots Foundation in Washington, D.C. Also in 1988, Judge Keith received the Distinguished Public Service Award of the Anti-Defamation League of B'nai B'rith for his humanitarianism and commitment to equality.

12. In 1992, the National Bar Association honored Judge Keith with the C. Francis Stratford Award.

13. In 1997, Judge Keith received the American Bar Association's Thurgood Marshall Award. The award, named in honor of the late Supreme Court justice goes annually to a nominee with a history of substantial and long-term contributions to the advancement of civil rights, civil liberties, and human rights in the United States. n286 In naming Judge Keith the recipient, the ABA said:

14. Judge Keith represents the best in the legal profession. His work reflects incisive analysis of issues, principled application of laws and the Constitution, passionate belief in the courts' role in protecting civil rights, a commitment to community service and, most significantly, an independence of mind to do what's right that is at the core of his view of professional responsibility. There is no better role model today for lawyers and law students seeking to work for equal justice.

15. In 1998, Judge Keith received the Detroit Urban League's Distinguished Warrior Award. He also received the Edward J. Devitt Award for Distinguished Service to Justice. The Devitt **[*1229]** Award annually honors a federal judge who has achieved an exemplary career and has made significant contributions to the administration of justice, the advancement of the rule of law, and the improvement of society as a whole. In addition, the Damon J. Keith Law Collection of African-American Legal History founded the Marching Toward Justice exhibit, a tribute to Justice Thurgood Marshall. The exhibit informs the public about the fundamental importance of the Fourteenth Amendment and the ongoing quest to realize equality. n287 The exhibit chronicles the United States history of promoting justice and equality for some, while condoning the enslavement of others. As the exhibit demonstrates, although the philosophy of "justice and equality for all" is the founding principle of the nation, in practice, the nation long denied due process and equal protection to African Americans under the law.

16. In 2000, Judge Keith received the Turner Broadcasting Systems Trumpet Award, for those African Americans whose achievements in their fields, coupled with their humanitarian and community-oriented efforts, have helped create a better society.

17. As of the publishing of this Article, Judge Keith has received 38 honorary degrees from colleges and universities across the country.

In sum, Judge Keith's experiences of marginalization have informed a jurisprudence that not only acts as a check on race and gender equality, but also on the abuse of power by a government toward all of its citizens. Rather than catering to only a narrow set of interests, Judge Keith has participated in securing the rights of all citizens. His sensitivity toward justice has set a shining example for both colleagues and practitioners alike. Judge Keith's example has not gone unnoticed.

[*1230]

IX. Conclusion

Unlike judges who deny as judges that which they know as men, Judge Keith has resisted the fallacy of distorting social reality when fashioning legal formula. Instead, he has developed a method of legal adjudication that gives facts meaning by contextualizing them within their historical context, and specifically in the relevant history of power imbalance. At a time when just about all civil rights groups, poor people and people of color absolutely fear going into

the federal courts for relief from injustice and bias, Judge Keith's legacy reminds us of his tireless and effective struggle for equality. In describing his unyielding commitment to equality, Judge Keith often quotes Edwin Hall:

I am only one, but still I am one.

I cannot do everything, but I can do something, and because I cannot do everything,

I will not refuse to do what I can.

Judge Keith's legacy offers insight into the heart and mind of an individual whose lived experiences of racist hegemony have informed an acute sensitivity toward power and justice. He has remained steadfast in his belief that the United States belongs to all its citizens-regardless of race, gender, class, religion, or background. Throughout his career, Judge Keith has held high this light of basic, simple justice for all. He has brought honor on the system he serves. Both his life and legal legacy breathes life into the immortal words etched in marble on the United States Supreme Courthouse-"equal justice under law." Judge Keith's tenure as a federal judge has been devoted to making those words a reality for everyone.

FOOTNOTES:

n1 *Davis v. School Dist. of Pontiac, 309 F. Supp. 734, 742 (E.D. Mich. 1970).*

n2 Hegemonic theories appear throughout this Article. In examining domination as a combination of both physical coercion and ideological control, "Antonio Gramsci, an Italian neo-Marxist theorist," developed the concept of hegemony. See Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, *101 Harv. L. Rev. 1331, 1350 (1988)* [hereinafter Race, Reform, and Retrenchment]. "Hegemony is a system of attitudes and beliefs which permeate both popular consciousness and ruling class ideology." Id. It "reinforces [the] existing social arrangements and convinces the dominated classes that the existing order is inevitable," unchangeable, and natural. Id. Critical Legal Studies (CLS) scholars have used the concept of hegemony to track the continued legitimacy of American social arrangements. See id. According to these theorists, the unequal distribution of wealth and resources within American social arrangements has historically sustained its legitimacy by inducing the poor to consent and accept their own oppression as natural and obvious. See id. For example, Robert Gordon, legal historian, argues that the legal system is at its best when it appears uncontroversial, neutral, and acceptable. See id. (citing Robert Gordon, New Developments in Legal Theory, in the Politics of Law Unfreezing Legal Reality: Critical Approaches to Law, *15 Fla. St. U. L. Rev. 195 (1987)).* This is the most potent form of hegemony because "both the dominant and dominated classes believe that the existing order" is inescapable. See Race, Reform, and Retrenchment, supra, at 1349-51 (citing Gordon, supra, at 286); see also James Boyle, The Politics of Reason: Critical Legal Theory and Local Social Thought, *133 U. Pa. L. Rev. 685 (1985).* In addition to hegemonic theories and other CLS theories, Professor Kimberle Williams Crenshaw's article Race, Reform, and Retrenchment provides the ideological underpinning for this article. The theories Professor Crenshaw explores in her article are applied to both the life and legal opinions of Judge Keith in this Article.

n3 I acknowledge that many scholars have argued that "Black," as opposed to African-American, references a pan-African inclusiveness. See Black is Back, The New Yorker, Oct. 30, 1995, at 33. However, in this Article, I use "Black" and "African American" interchangeably and both are meant to reference a pan- African inclusiveness.

n4 Kimberle Williams Crenshaw examines and discusses the formulation of this political consciousness in Race, Reform, and Retrenchment, supra note 2.

n5 Rev. Dr. Martin Luther King, Jr. described the kind of strength and power Judge Keith has exhibited when he told a group of white segregationist "[w]e will wear you down with our capacity for suffering." Houston A. Baker Jr., Critical Memory and the Black Public Sphere, in Public Culture 25 (1994).

n6 Professor Crenshaw develops the idea of the restrictive and expansive views in Race, Reform, and Retrenchment, supra note 2, at 1336. I have used Crenshaw's restrictive and expansive theories to analyze the effectiveness of Judge Keith's legal jurisprudence in the struggle for equality.

n7 See id. at 1344.

n8 *483 F. Supp. 930 (E.D. Mich. 1979).*

n9 *365 F. Supp. 87 (E.D. Mich. 1973).*

n10 *309 F. Supp. 734 (E.D. Mich. 1970).*

n11 *394 F. Supp. 1151 (E.D. Mich. 1975).*

n12 *805 F.2d 611 (6th Cir. 1986).*

n13 See *id. at 626.*

n14 See id.

n15 See id.

n16 See *id. at 627.*

n17 See Sherrilyn A. Ifill, Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, *39 B.C. L. Rev. 95 (1997).*

n18 *New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).*

n19 As an example of racism's enormously destructive power and the uniqueness of the African American experience consider: No other ethnic group is (1) unable to identify with its particular country of origin and (2) forced therefore to identify with a continent. So, for example, the Irish may identify as Irish American, whereas African Americans identify with a continent in lieu of a particular country on the African content. African Americans' forced entry into this country has erased their history. In articulating the uniqueness of the African American experience, Justice Marshall stated: [T]he racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery

alone but also that a whole people were marked as inferior by the law. And that mark has endured. *University of California v. Bakke, 438 U.S. 265, 400 (1978)* (Marshall, J. dissenting). As further evidence of hegemony's ability to create a power imbalance between Whites and Blacks, the percentage of Blacks in poverty is twice that of Whites, as is the unemployment rate. And the median income for African-American households is $ 15,000 less than that for White households. Deirdre Shesgreen, This Family Exemplifies the Fight for Equality Series, St. Louis Post- Dispatch, Sept. 5, 1999, at A9.

n20 See supra note 2.

n21 In examining the ability of race to unite diverse White interests, Lillian Smith states: When taxicab drivers, and store owners, bankers, farmers, Christian ministers, doctors, politicians, patients in mental hospitals and their attendants, writers, university presidents, union members and mill owners, garbage collectors and Rotarians, rich and poor, men and women, unite in common worship and common fear of one idea we know it has come to hold deep and secret meanings for each of them, as different as are the people themselves. We know it has woven itself around fantasies at levels difficult for the mind to touch, until it is a part of each man's internal defense system, embedded like steel in his psychic fortifications. And, like the little dirty rag doll that an unhappy child sleeps with, it has acquired inflated values that extend far beyond the rational concerns of economics and government, or the obvious profits and losses accruing from the white-supremacy system, into childhood memories long repressed. Lillian Smith, Killers of the Dream 80 (W.W. Norton 1994) (1949), quoted in Anthony Paul Farley, The Black Body as Fetish Object, *76 Or. L. Rev. 457, 486 (1997).*

n22 The urge to dissociate oneself from the powerless- namely Black people-and to associate oneself with the powerful- namely White people-is not restricted to classes of White people. On the contrary, the same phenomenon lies at the heart of the immigrant experience and the assimilation process. In describing this magnetic gravitational pull toward power, and simultaneous disassociation with the powerless, comedian Richard Pryor stated that immigrants became American "by learning to how to say nigger." Richard Pryor, "That Nigger's Crazy" (Reprise MS 2241, 1974); see also Edward A. Delgado-Romero, The Face of Racism, J. of Counseling & Dev. 23-25 (Winter 1999) (stating that a recently arrived Columbian immigrant's process of erasing his past and becoming American involved learning the word "nigger"). As an example of how long this gravitational pull has endured for all immigrant groups, in 1920 W.E.B. Dubois wrote in "The Souls of White Folk:" America, Land of Democracy, wanted to believe in the failure of democracy so far as darker peoples were concerned. Absolutely without excuse she established a caste system . . . and she is at times heartily ashamed even of the large number of "new" white people whom her democracy has admitted to place and power. Against this surging forward of Irish and German, of Russian Jew, Slav and "dago" her social bars have not availed, but against Negroes she can and does take her unflinching and immovable stand . . . She trains her immigrants to this despising of "niggers" from the day of their landing, and they carry and send the news back to the submerged classes in the fatherlands. W.E.B. Dubois, The Souls of White Folks, from Darkwater: Voices from within the Veil (1920), reprinted in 1 The Seventh Son: The Thought and Writing of W.E.B. Dubois 500 (Julius Lester ed., 1971).

n23 John A. Powell, The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun, 15 Law. & Ineq. 99, 113 (1997).

n24 See Race, Reform, and Retrenchment, supra note 2, at 1358.

n25 Michel Foucault, The History of Sexuality 86 (1990).

n26 Derrick Bell has referred to this historical hegemonic pattern as the "Principal of Involuntary Sacrifice." Derrick Bell, Race Racism and American Law 2 (1990). Bell provides several examples of how slave holders from the seventeenth century onward used race to maintain non-slaveholding White support. For example, slavery, and its consequent cheap labor damaged non-slave holding Whites. However, non slave holding Whites restrained their challenge to slavery because they willingly embraced a common interest with the slave holders in Black subordination. Thus, the hegemonic power of race had convinced even poor Whites to support a system that disadvantaged them economically. As Bell put it, "racial privilege could and did serve as a compensation for class disadvantage." Id. at 31; see also J. Oakes, The Ruling Race: A History of American Slaveholders 141 (1982) (quoting the Richmond Enquirer a decade before the Civil War stating "[in] this country alone does perfect equality of civil and social privilege exist among the white population, and it exists solely because we have black slaves." And "[f]reedom is not possible without slavery."). As another example, the Tilden Hayes Compromise of 1877 demonstrates the ability of racism to transcend and resolve class and political antagonism between opposing groups of Whites through a compromise that victimizes and vilifies Blacks. Bell, supra, at 32-34. By 1876, the federal government had not stopped Whites from regaining political control over the South and much of the North; thereby, sounding the demolition of Radical Reconstruction. Scandal and differing views on economic issues had fragmented Republicans; however, their resolve to end their involvement in Southern affairs united them as long as those terms would insure continued development of business interests in the South. Samuel Tilden, a Republican, had won a plurality of votes and seemed to have won the electoral count by one vote. But the returns from three southern states, South Carolina, Florida, and Louisiana were challenged. After a recount failed to resolve the challenge, a special electoral commission was formed. Eight of the fifteen members were Republicans and each disputed issue was resolved in favor of the Republicans by a strict party vote of eight to seven. The Democrats did not dispute these resolutions because both Democrats and Republicans agreed that "if the Republican Hayes was elected, the national administration would withdraw the remaining federal troops from the South and would do nothing to prevent popularly elected Democratic governors from taking office in the three states (South Carolina, Florida, and Louisiana) which were still controlled by Republicans. Id. at 2.

n27 See Gail Collins, GOP's Summer of Love, N.Y. Times, Aug. 2, 2000, at A21.

n28 The following are two widely publicized examples of the GOP play of the "race card": (1) Ronald Reagan's condemnation of the "Chicago welfare queen;" and (2) George Bush's use of Willie Horton to represent the depraved criminal. See Kenneth O'Reilly, Nixon's Piano: Presidents and Racial Politics from Washington to Clinton 360, 381-88 (1995). "It is not coincidence that the images evoked are simultaneously abhorrent and Black." Powell, supra note 23, at 110.

n29 Neoconservative scholar Thomas Sowell, Senior Fellow at Stanford University's Hoover Institution, suggests civil rights policies, like affirmative action, have prompted the growing popularity of White hate groups. See Thomas Sowell, Civil Rights: Rhetoric or Reality? 90 (1984). Sowell observes that "[e]armarked benefits for Blacks provide some of these hate groups' strongest appeals to Whites." Race, Reform, and Retrenchment, supra note 2, at 1331 n.34 (citing Thomas Sowell).

n30 See Richard Goldstein, Whiney White Guys, The Village Voice, Mar. 1995, at 25.

n31 Race politics and the successful manipulation of wedge-issues have enabled the GOP to win five of the seven past presidential elections and, most importantly, to enact upwardly redistributive economic polices for its most influential constituency, the affluent. See Thomas Edsall, The Impact of Race, Rights, and Taxes on American Politics 172, 220-22 (1992).

n32 In summarizing a Federalist Society Meeting, Stanley Fish articulated the neoconservative credo as follows: [A]n emphasis on group rights (I am entitled to special treatment because I am black or Hispanic or female or gay) leads to the de-emphasis of individual achievement (my fate is the result of my sex, race, or ethnic affiliation and not of my abilities or lack of ability) and to a society in which one competes not for prizes but for the status of most victimized (my disadvantages are greater than yours and therefore my rewards, or spoils, should be greater too). It is because we now glorify victims rather than heroes and prize sensitivity over character that we live in a world of affirmative action (where you believe you deserve something before you have done anything); or multiculturalism (where universal and objective norms are replaced by the local norms of insular groups and anything you do is all right so long as everyone you hang out with does it too); of feminism (where, in a new form of paternalism, your gender gives you a leg up rather than an equal chance); of criminal rights (where the judiciary is more solicitous of the repeat offender than of the men and women he has robbed and killed); of welfare (where, by removing incentives for effort, the state destroys the spirit of self-improvement and produces an ethic of dependency); of political correctness (where you are penalized for calling a spade a spade and pressured to adopt a vocabulary that offends no one and says nothing); of runaway damage awards (where entrepreneurship is discouraged by a tort system that turns your every action into a potential lawsuit. Stanley Fish, At the Federalist Society, *39 How. L.J. 719, 719- 720 (1996).*

n33 Thomas Edsall argues that in 1983, when the Republicans realized they needed 70% of the White male vote to offset the Black majorities of the Democrats, Lee Atwater, who perfected the parade of Black horribles (i.e. quotas, taxes, special interests, welfare, Willie Horton, and the death penalty), outlined a plan for the Reagan-Bush reelection committee. According to Edsall, Atwater realized that although populists were liberal on economics, they were staunchly conservative on social issues. See Edsall, supra note 31, at 220- 22.

n34 See Ann Devroy, Clinton Orders Affirmative Action Review, At Stake: Principles and Political Base, The Wash. Post, Feb. 24, 1995, at A1. Devroy wrote "that the GOP will try to use the issues of racial preferences to slice into the multiracial coalition that traditionally has supported Democrats. White males in the last election generally favored the GOP, and Republicans want to keep them with arguments that the GOP is 'colorblind' while Democrats give minorities unfair advantages." Id.

n35 In a tragic note of irony, the gains made in both the First and Second Reconstruction have been systemically sacrificed in order to maintain ruling class interests through White solidarity. See Bell, supra note 26, at 31.

n36 Justice Oliver Wendell Holmes, The Common Law 1 (Little, Brown and Company 1923) (1881).

n37 Fish, supra note 32, at 735.

n38 David Arbram, The Spell of the Sensuous: Perception and Language in a More-Than-Human World (1996).

n39 Justice Stephen Breyer, Letter, 42 Wayne L. Rev. i (1996).

n40 Edward J. Littlejohn, Damon Jerome Keith Lawyer- Judge-Humanitarian, *42 Wayne L. Rev. 321, 323 (1996).*

n41 See id.

n42 See id.

n43 *Id. at 324.*

n44 See Linn Washington, Black Judges on Justice 113 (1994). One of Judge Keith's mentors, Charles Hamilton Houston, chief architect and engineer of the NAACP's legal strategy to dismantle Jim Crow, remarked on his similar experience of having served his country in war to return only to his country's segregated reality. Damon J. Keith, New African-American Trailblazers Needed, Det. Legal News, Sept. 15, 1993, at 1. Upon his return to civilian life, "Houston reflected upon the hostility expressed by a White patron who was forced to sit near him in a dinner car on a passenger train. See id. Houston stated: "I felt damned glad I had not lost my life fighting for this country." Id.

n45 Jim Dyer, Damon Keith Wins Honor Named for Friend, Hero, Det. News, May 7, 1997.

n46 Littlejohn, supra note 40, at 324-25.

n47 See id. at 325-26.

n48 See id.

n49 See Trevor W. Coleman, Judge Keith Takes the Law's Insight and Lets It Live Fairly for All, Det. Free Press, June 2, 1998, at 8A.

n50 Washington, supra note 44, at 113.

n51 Littlejohn, supra note 40, at 327.

n52 Mike Wowk, Urban League Hails Four "Distinguished Warriors," Det. News, Mar. 4, 1998, at 7S.

n53 Littlejohn, supra note 40, at 327.

n54 In describing the atmosphere in which Black lawyers practiced in the South, particularly Florida, Joseph Hatchett, former Florida Supreme Court Justice and Chief Judge of the United States Court of Appeals for the Eleventh Circuit, stated "[b]ack then black lawyers practiced in segregated courthouses. There were separate drinking fountains and separate bathrooms. . . . I remember going into the DeLand courthouse for the first time and looking around for my client's family. It was the first time that it dawned on me that black people-at that time, in that area-sat in a special mezzanine over the main courthouse." Gary Blankenship, Diversity in the Florida Bar, *74 Fla. B.J. 64 (Apr. 2000).*

n55 See Littlejohn, supra note 40, at 329.

n56 The original members were Nathan G. Conyers, President of Riverside Ford, Inc.; Herman J. Anderson, Senior Partner with the firm of Anderson & Associates, P.C.; Joseph N. Brown, Partner in the firm of Bodman, Longley & Dahling; and the late Judge Myron H. Wahls, Judge of the Michigan Court of Appeals. Judge Joseph N. Baltimore, Chief Judge, 36th District Court, Detroit, Michigan, and Administrative Law Judge Theodore Stephens, thereafter became partners in the law firm. Detroit Recorders' Court Judge Prentis Edwards and Wayne County Circuit Judge Claudia H. Morcom were associates in the firm for several years. Detroit Mayor Dennis W. Archer interned with the firm while a student at Detroit College of Law. The firm of Keith, Conyers, Anderson, Brown & Wahls produced more judges than any other law firm in Michigan.

n57 See Bonnie De Simone and Oralandar Brand-Williams, African-American Archive Gives Legal Giants a Place in History, Det. News & Free Press, at 14A.

n58 Id.

n59 Eric Pope, WSU Celebrates Creation of Keith Law Collection, Det. Legal News, Nov. 11, 1993.

n60 Id.

n61 See id.

n62 The members of the Judicial Conference of the United States Committee on the Bicentennial of the Constitution, of which Judge Keith was chair, included: the late Justice Harry A. Blackmun; Chief Justice Warren E. Burger; Judge Arthur L. Alarcon; Judge Frank X. Altimari; Judge Adrian G. Duplantier; Judge William Brevard Hand; Justice Edward F. Hennessey; Judge Patrick F. Kelly; Judge James H. Meredith; Judge Robert C. Murphy; Judge Helen W. Nies; Judge James E. Noland; Judge Jaime Pieras, Jr.; Judge Dolores Korman Sloviter; Judge Kenneth W. Starr; and Judge J. Harvie Wilkinson, III. The Committee was responsible for the placement of 300 Bill of Rights Plaques in federal courthouses around the country.

n63 Letter from Frank X. Altimari, United States Circuit Judge for the Second Circuit, 42 Wayne L. Rev. iv (1996). Rodney A. Smolla also recounts this incident, stating "Judge Keith turned this incident into a powerful homily later that afternoon at one of the conference's public presentations. 'A day does not go by,' he thundered, 'in which I am not reminded that I am an African American, and that this nation is still plagued by prejudice.'" Letter from Rodney A. Smolla, Professor of Law and Director, Institute of Bill of Rights Law, 42 Wayne L. Rev. viii (1996).

n64 Id.

n65 Benjamin N. Cardozo, The Nature of the Judicial Process 168 (1921).

n66 See Race, Reform, and Retrenchment, supra note 2, at 1341.

n67 In explaining the individualized notion of discrimination and its allure, Stanley Fish draws an interesting analogy between the Rodney King defense and the majority opinion in *Adarand v. Pena, 515 U.S. 200 (1995).* See Stanley Fish, How the Right Hijacked the Magic Words, N.Y. Times, Aug. 13, 1995. In answering how the Rodney King jurors could have acquitted the police, Fish states that part of the answer lies within the two part defense strategy: (1) the film depicting the beating was slowed down "so that each frame was isolated and stood by itself"; (2) "the defense asked the questions that treated each frozen frame as if everything in the case hung on it and it alone. Is this blow an instance of excessive force? Is this blow intended to kill or maim?" Id. In describing the effectiveness of this strategy Fish states: Under the pressure of such questions, the event as a whole disappeared from view and was replaced by a series of discontinuous moments. Looking only at individual moments cut off from the context that gave them meaning, the jury could not say of any of them that this did grievous harm to Rodney King. This strategy-of first segmenting reality and then placing all the weight on individual bits of it-is useful whenever you want to deflect attention away from the big picture, and that is why it has proved so attractive to those conservative Republicans who want to roll back the regulatory state. On every front, from environmental protection to affirmative action, large questions of ecology and justice are pushed into the background by the same segmenting techniques that made it easy for the jurors in Simi Valley to forget it was a beating they were seeing. Id. Linking the individualized connection to Adarand, Fish states: In Adarand v. Pena, the question was whether the policy of giving financial incentives to prime contractors who hire minority subcontractors is constitutional. Those in favor of the incentives justify them by invoking constitutional history and the history of discrimination in the contracting industry. They remind us, in Justice John Paul Stevens words, that the "primary purpose of the Equal Protection Clause to end discrimination of the former slaves," and they report that even today certain groups remain entrenched in the building trades while others are virtually shut out. Id. Those opposed to the incentives reject arguments from history and specifically reject the argument that historical patterns of discrimination have impaired the life chances of African-Americans as a group. They say it is individuals, not groups, that are protected by the Constitution, and they would allow remedies for discrimination only in cases where there has been "an individualized showing" of harm, a harm inflicted discreetly on a specific person by a specific agent at a specific time. See id.

n68 Crenshaw notes that the "Supreme Court stated this viewpoint with stark clarity in *United Air Lines v. Evans, 431 U.S. 553, 558 (1977):* 'A discriminatory act . . . which occurred before the [Civil Rights Act of 1964] was passed . . . . may constitute relevant background evidence [regarding past conduct] . . . but separately considered . . . is merely an unfortunate event in history which has no present legal consequences.'" Race, Retrenchment, and Reform, supra note 2, at 1342. This view was also endorsed by Judge Merritt in *Young v. Klutznick, 652 F.2d 617 (6th Cir. 1981),* "Obviously there are many unjust conditions and occurrences, natural and man-made, which federal courts do not have the strength, wisdom or power to remedy in a timely manner." *Id. at 625 n.8.*

n69 See Race, Reform, and Retrenchment, supra note 2, at 1342.

n70 Although the Supreme Court has acknowledged the effects of past and present societal discrimination, see *Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 613 (1990)* (O'Connor, J. dissenting) (stating "[i]n Croson, we held that an interest in remedying societal discrimination cannot be considered compelling"), the personal rights of Whites burdened by a particular remedial plan are more important than the state interest in eliminating the effects of racism. See Alexander Aleinikoff, A Case for Race-Consciousness, *91 Colum. L. Rev. 1060 (1991).* Justice Powell summarized this view in *Wygant v. Jackson Board of Education, 476 U.S. 267 (1986):* No one doubts that there has been serious racial discrimination in this country. But as the basis of imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future. *Id. at 276.*

n71 See Race, Reform, and Retrenchment, supra note 2, at 1342. Professor Sylvia R. Lazos Vargas suggests that the difference in understanding racism between Whites and Blacks emanates from the experience of the

viewer, such that Whites view discrimination as "conscious, casuistic, individualist, and culpable," whereas Blacks interpret "discrimination as a broad systemic practice, a social text concordant with how racial minorities experience discrimination, as unconscious, diffuse, systemic, and negligent." See Sylvia R. Lazos Vargas, Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity, *58 Md. L. Rev. 150, 169 (1999).*

n72 Vargas, supra note 71, at 197 (citing Jerome Frank, Law and the Modern Mind 100-18, 137-38 (1935)) ("arguing that judges come to cases with biases, and that the process of judging is a manifestation of the judge's individual personality and values, concealed by the language of 'compelling mechanical logic'").

n73 See Sherrilyn A. Ifill, supra note 17, at 141 (citing Richard Delgado & Jean Stefancic, Norms and Narratives: Can Judges Avoid Serious Moral Error?, *69 Tex. L. Rev. 1929, 1956-57 (1991)).*

n74 See Vargas, supra note 71, at 198.

n75 See Race, Reform, and Retrenchment, supra note 2, at 1345-46.

n76 See id. at 1344-45.

n77 As Alfred Blumrosen observes, "it [is] clear that a 'color-blind' society built upon the subordination of persons of one color [is] a society which [cannot] correct that subordination because it [can] never recognize it." Race, Reform, and Retrenchment, supra note 2, at n.60 (citing A. Blumrosen, Twenty Years of Title VII Law: An Overview 26 (Apr. 18, 1995)) (unpublished manuscript on file in the Harvard Law Library); see also Stanley Fish, When Principles Get In the Way, N.Y. Times, Dec. 26, 1996, at A27 (arguing that under an ahistorical approach, when a politically divisive issue like affirmative action is stripped of its historical conditions, "there no longer seems to be any moral difference between the two [conflicting] sides" of the argument).

n78 See Race, Reform, and Retrenchment, supra note 2, at 1342.

n79 See id. at 1353.

n80 See id. at 1387.

n81 Keith, supra note 44, at 1.

n82 *483 F. Supp. 930 (E.D. Mich. 1979).*

n83 *365 F. Supp. 87 (E.D. Mich. 1973).*

n84 *309 F. Supp. 734 (E.D. Mich. 1970).*

n85 *394 F. Supp. 1151 (E.D. Mich. 1975).*

n86 *16 F.3d 109 (6th Cir. 1994).*

n87 *956 F.2d 572 (6th Cir. 1992).*

n88 In *City of Richmond v. J.A. Croson Co., 488 U.S. 469, 502 (1989),* the Supreme Court invalidated a Richmond set- aside program for minority businesses. The Court held that color- blind principles would be used to evaluate state action. See id. Justice O'Connor's plurality opinion in Croson announced a prohibition on racial classifications: The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are infringed by a rigid rule erecting race as the sole criterion in an aspect of public decision making. *Id. at 493.* Justice Thomas has also echoed this sentiment stating "it is irrelevant whether . . . racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged." *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995)* (Thomas, J., concurring in part and concurring in judgment). In order for racial classifications in remedial programs to be "just as bad" as the history of discrimination against Blacks, one must assume, among other things, an equality of despair. See id.

n89 In Baker, the defendants further included the City of Detroit; Coleman A. Young, then Mayor of the City of Detroit; the Detroit Board of Police Commissioners and its individual members; and *Philip G. Tannian, Chief of Police. Baker v. City of Detroit, 483 F. Supp. 930, 937 (E.D. Mich. 1979).*

n90 See *id. at 936.*

n91 *Id. at 964.*

n92 Plaintiffs specifically alleged violations of Title VI of the Civil Rights Act of 1964, as amended March 24, 1972, *42 U.S.C. § 2000d;* Title VII of the Civil Rights Act of 1964, as amended March 24, 1972, *42 U.S.C. § § 2000e-17;* 706(f)(1) and (3), *42 U.S.C. § § 1981,* 1983, and 1985(3); and both the United States and Michigan Constitution. See *Baker, 483 F. Supp. at 937.*

n93 See *Baker, 483 F. Supp. at 930.*

n94 *Id. at 940-41* (citing Thurgood Marshall, Activities of Police During the Riots June 21 and 22, 1943, in White & Marshall, What Caused the Detroit Riot? An Analysis 29-30 (NAACP 1943)).

n95 See id.

n96 *Id. at 941* (citing White & Marshall, supra note 94, at 17).

n97 See id.

n98 See id.

n99 See id.

n100 Id. at 942.

n101 Id. at 996-97.

n102 See id. at 946.

n103 See id. at 952.

n104 See id.

n105 Id. at 1000.

n106 See id. at 1000-03.

n107 See id.

n108 See id.

n109 See id.

n110 See id.

n111 See id. at 940-79.

n112 See id.

n113 Id. at 992.

n114 See id. at 960.

n115 See John A. Powell, The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun, 15 Law & Ineq. 99, 125 (1997).

n116 Thomas Ross, Innocence and Affirmative Action, *43 Vand. L. Rev. 297, 300-01 (1990).*

n117 Justice Powell applied the rhetoric of White innocence in rejecting the affirmative action plan in *University of California v. Bakke, 438 U.S. 265 (1978).* Powell complained of the patent unfairness of "innocent persons . . . asked to endure [deprivation as] the price of membership in the dominant majority." *Id. at 294 n.34.* He wrote of "forcing innocent persons . . . to bear the burdens of redressing grievances not of their making." *Id. at 298.* By contrast, Justice Marshall's and Justice Brennan's dissenting opinions each challenged the premise of White innocence. See *id. at 324, 387.* Justice Brennan rejected the requirement of proof of individual and specific discrimination as a prerequisite to affirmative action. He wrote "[s]uch relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." *Id. at 363.* (Brennan, J. dissenting). Justice Marshall attacked the rhetoric of White innocence and the questioning of Black victimization directly: "It is unnecessary in the 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact." Id. at 400 (Marshall, J. dissenting).

n118 In articulating the dangers of the ahistorical approach, which permits drawing a false symmetry, Stanley Fish states "[i]t is just like saying (what no one would say) that killing in self-defense is morally the same as killing for money because in either case it is killing you're doing. When the law distinguishes between these scenarios, it recognizes that the judgment one passes on an action will vary with the motives informing it. It was the express purpose of some powerful, White Americans to disenfranchise, enslave, and later exploit Black Americans. It was what they set out to do, whereas the proponents of affirmative action did not set out to deprive your friend's cousin's son of a place at Harvard." Fish, supra note 77, at 733.

n119 In *Shaw v. Reno, 509 U.S. 630 (1993),* Justice O'Connor uses the false symmetry between the victimization of Whites through remedial redistricting efforts and the institutionally sanctioned disenfranchisement of Blacks. She wrote "appellants' claim that the state engaged in unconstitutional racial gerrymandering . . . . strikes a powerful historical chord: It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past." Id. at 525.

n120 *Baker, 483 F. Supp. at 1002-03.* Judge Keith has similarly denounced the construction of "White innocence" in other cases. See, e.g., *Aiken v. City of Memphis, 37 F.3d 1155, 1181 (6th Cir. 1994).* In the dissenting opinion, Judge Keith stated "In 1994, equality is far from won. In fact, today we are faced with a new oxymoron-the notion of reverse racial discrimination. This outrageous notion is nothing but inflammatory fodder designed to discourage taking race into account even where such accounting promotes fundamental fairness, equality and justice."

n121 *Baker, 483 F. Supp. at 980.*

n122 *Id. at 985* (citing *Franks v. Bowman Trans. Co., 424 U.S. 747, 772-78 (1976); EEOC v. AT&T Co., 556 F.2d 167 (3d Cir. 1977)).*

n123 Id. at 919.

n124 *42 U.S.C. § 2000e*-2000f (1994).

n125 See *Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973).*

n126 See *id. at 102-03.*

n127 See *Baker, 483 F. Supp. at 946.*

n128 See *Stamps, 365 F. Supp. at 93.*

n129 See id.

n130 See *id. at 102.*

n131 See *id. at 108.*

n132 See id.

n133 *Id. at 115.*

n134 See *id. at 112.*

n135 See *id. at 115.*

n136 *Id. at 94.*

n137 *Id. at 109.*

n138 *Id. at 119.*

n139 Id.

n140 See *id. at 124.*

n141 Carl T. Rowan, Just Between Us Blacks 53 (1974).

n142 Id. at 53.

n143 *309 F. Supp. 734 (E.D. Mich. 1970).*

n144 See Allan Lengel, Judge Keith Will Cut Back to Part-Time, Det. News, Nov. 8, 1994.

n145 *347 U.S. 483 (1954).*

n146 See *Davis, 309 F. Supp. at 735.*

n147 See id.

n148 See *id. at 737.*

n149 *Id. at 741.*

n150 *Id. at 737.*

n151 *Id. at 743.*

n152 *Id. at 736.*

n153 *Davis v. School Dist. of Pontiac, 374 F. Supp. 141, 145 (E.D. Mich. 1974).*

n154 *Davis, 309 F. Supp. at 740* (citing Sen. Ribicoff, Feb. 9, 1970).

n155 *Davis v. School Dist. of Pontiac, 443 F.2d 573, 575 (6th Cir. 1971)* (citing *Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1996)).*

n156 See *Davis, 309 F. Supp. at 741-42.*

n157 *Davis, 374 F. Supp. at 144.*

n158 *Id. at 145* (citations omitted). On appeal, the Sixth Circuit upheld Judge Keith's holding and further suggested that the United States Supreme Court followed Judge Keith in *Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).* See *Davis, 443 F.2d at 577 n.1* (stating "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

n159 See Melvin "Butch" Hollowell, When Courage Stared Down Bigotry, Det. News, Aug. 27, 1992, available at *1992 WL 6097734.*

n160 The United States Supreme Court "let stand" Judge Keith's massive bussing plan. See Supreme Court Refuses to Upset Keith Ruling on Pontiac Bussing, Det. News, Oct. 26, 1971, at 1; see also *School District of the City of Pontiac, Inc. v. Davis, 404 U.S. 913 (1971)* (denying certiorari).

n161 See Hollowell, supra note 159.

n162 See id.

n163 See id.

n164 Id.

n165 *Garrett v. City of Hamtramck, 335 F. Supp. 16 (E.D. Mich. 1971); Garrett v. City of Hamtramck, 357 F. Supp. 925 (E.D. Mich. 1973);* and *Garrett v. City of Hamtramck, 394 F. Supp. 1151 (E.D. Mich. 1975).*

n166 *Garrett, 335 F. Supp. at 17.*

n167 See *id. at 21.*

n168 See *id. at 21-22.*

n169 See *id. at 21.*

n170 See id.

n171 See id.

n172 *Id. at 25.*

n173 *Id. at 25.*

n174 *Garrett, 394 F. Supp. at 1152.*

n175 *Id. at 1154.*

n176 See id.

n177 See *id. at 1156.*

n178 Judge Orders Housing in 33-Year Old Civil Rights Suit, Det. Legal News, July 6, 2001, at 1.

n179 *Garrett, 394 F. Supp. at 1151.*

n180 *483 F. Supp. 930 (E.D. Mich. 1979).*

n181 *365 F. Supp. 87 (E.D. Mich. 1973).*

n182 *309 F. Supp. 734 (E.D. Mich. 1970).*

n183 *956 F.2d 572 (6th Cir. 1992)* (Keith, J. dissenting).

n184 *16 F.3d 109 (6th Cir. 1994)* (Keith, J. dissenting).

n185 See *Taylor, 956 F.2d at 582.*

n186 *Id. at 586* (enumeration omitted).

n187 *Id. at 587.*

n188 *Harvey, 16 F.3d at 113.*

n189 Id.

n190 Id.

n191 *Taylor, 956 F.2d at 572.*

n192 *Id. at 581-82.* In joining Judge Keith's dissent, Judge Martin, now Chief Judge of the Sixth Circuit, stated When I travel, I am typically attired in a suit and tie and behave in a conventional manner. I doubt that I attract much attention from the airport police, even though I may exhibit signs of nervousness or agitation due to turbulence during a flight or a difficult connection. I face little, if any, possibility of being stopped. Perhaps it is my dress and manner; I believe that it is these factors combined with the fact that I am white. In stark

comparison, Mr. Taylor's deplaning begins a long journey down the slippery slope to the past. The police officers testified that Mr. Taylor exhibited signs of nervousness and agitation. It is apparent that because of his race and his clothing in addition to his nervousness, Taylor was singled out as he deplaned. *Id. at 590.*

n193 *Harvey, 16 F.3d at 114-15* (citing Sam Meddis, Suburbs 'Have Gotten Off Easy,' Whites' Drug Activity Often Better Hidden, USA Today, July 26, 1993, at 6A.)

n194 *805 F.2d 611 (6th Cir. 1986).*

n195 See *id. at 622.*

n196 *Id. at 623.*

n197 See Deborah Zalense, The Intersection of Socioeconomic Class anf Gender in Hostile Housing Environment Claims under Title VIII: Who is the Reasonable Person?, *38 B.C. L. Rev. 861, 864 (1997).*

n198 *Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1527 (M.D. Fla. 1991).*

n199 See id.

n200 The majority opinion in Rabidue has been severely criticized by commentators, courts, and the EEOC. See, e.g., *Ellison v. Brady, 924 F.2d 872, 877 (9th Cir. 1991)* ("We do not agree with the standards set forth in . . . Rabidue."); *Lipsett v. University of P.R., 864 F.2d 881, 905 (1st Cir. 1988)* (quoting the dissent in Rabidue with approval); *Robinson v. Jacksonville Shipyards, 760 F. Supp. 1426, 1525 (M.D. Fla. 1991)* (concluding "that the reasoning of these cases (including Rabidue) is not consistent with the Eleventh Circuit precedent and is otherwise unsound"); Policy Guidance on Current Issues of Sexual Harassment, EEOC Compl. Man. (BNA) No. 137, at N:4048 (Mar. 19, 1990) (hereinafter EEOC Policy Guidance) (rejecting the Rabidue rationale regarding obscene materials in the workplace).

n201 *Rabidue, 805 F.2d at 624.*

n202 See id. "The district court below dismissed these perks and business activities as fringe benefits." Id.

n203 Id.

n204 *Id. at 615.*

n205 *Id. at 624.*

n206 Id.

n207 See *id. at 615* (critically describing the plaintiff as "a capable, independent, ambitious, aggressive, intractable, and opinionated individual)." Id. "It is arguable that these characteristics would not have been so offensive to the court if they had been attributed to a male officer manager." Deanna Weisse Turner, Civil Rights-Employer's Beware: The Supreme Court's Rejection of the Psychological Injury Requirement in *Harris v. Forklift Systems, Inc., 114 S.Ct. 376 (1993),* Makes It Easier for Employees to Establish a Claim for Sexual Harassment Based on a Hostile Working Environment, *17 U. Ark. Little Rock L.J. 839, 857 n.153 (1995).*

n208 See *Rabidue, 805 F.2d at 615.*

n209 See *42 U.S.C. § 3604*(b) (1994).

n210 Several commentators have argued that the "reasonable person" standard is a male defined norm masquerading as objectivity. See, e.g., Cynthia A. Dill, The Reasonable Woman's Standard in Sexual Harassment Litigation, 12 Me. B.J. 154, 155 (1997) (stating "this so called 'reasonable person' standard, when used in hostile environment cases, has the effect of imposing a male bias and therefore prejudices the rights of female plaintiffs. The argument, in sum, is that we live in a patriarchal society where men are the measure of all things and women are evaluated according to their correspondence with men. When the factfinder is asked to determine whether or not a reasonable person would consider the environment sufficiently severe or abusive to be actionable under Title VII, the reasonable person is, in fact, the reasonable man.").

n211 See Zalesne, supra note 197, at 871 (stating "[s]tudies show that because women have not historically held power positions, men and women often have different perspectives regarding what conduct constitutes sexual harassment. According to a joint survey by Redbook managazine and the Harvard Business Review on sexual harassment in the workplace, '[m]ost people agree on what harassment is. But men and women disagree strongly on how frequently it occurs.' The study showed that actions deemed harassment by women were often perceived as harmless by men. The report concluded that '[f]rom the comments in the returns, a visitor from another planet might conclude that men and women work in separate organizations.'" (citations and footnotes omitted)).

n212 Inspired by Judge Keith's dissent in Rabidue, the Ninth Circuit adopted the reasonable woman standard in *Ellison v. Brady, 924 F.2d 872, 878-90 (9th Cir. 1991).* Writing for the majority, Judge Breezer explained "because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without full appreciation of the social setting or the underlying threat of violence that a woman may perceive." *Id. at 879.* In addition, the court concluded that the reasonable woman standard was an essential tool for defeating ingrained sexist stereotypes and prejudices. See *id. at 881.* The Sixth Circuit itself, in Hixson v. Norfolk Southern Railway Co., held that a constructive discharge due to sexual harassment occurs if "working conditions [are] so difficult or unpleasant that a reasonable [woman] in the employee's shoes would [feel] compelled to resign." *No. 94-5832, 1996 U.S. App. LEXIS 15421,* *15 (6th Cir. June 10, 1996) (unpublished) (citing *Yates v. Acco Corp., 819 F.2d 630, 636-37 (6th Cir. 1987)).* As another advantage of the "reasonable woman" standard, "[i]n cases involving violence against women, the reasonable woman standard serves to change the woman's subordination by increas[ing] the potential for effective enforcement of laws against subordinating behavior. Specifically, the reasonable woman standard includes women's experiences in a system with asymmetrical power relations that has historically excluded women's participation." Zalesne, supra note 197, at 871 (internal citations and footnotes omitted).

n213 See Deborah B. Goldberg, The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harassment Cases, *2 Cardozo Women's L.J. 195, 200-01 (1995);* Penny L. Cigoy, Comment, Harmless Amusement or Sexual Harassment?: The Reasonableness of the Reasonable Woman Standard, *20 Pepp. L. Rev. 1071, 1079 (1993).*

n214 *Rabidue, 805 F.2d at 627* (internal citations omitted).

n215 See Zalesne, supra note 197, at 876.

n216 As another example of how genderless standards implicitly assume the male-oriented distribution of power and paradigm, Jeanne L. Schroeder uses the example of women and self- defense. Initially, "women who killed men in self-defense often had to plead insanity. . . . because their actions did not meet the prevailing legal elements of self-defense. These elements were based on the male perspective and the paradigm of the bar room brawl between two men of relatively equal strength . . . . Male judges and legislatures initially could not accept the theory proposed by women-that it is self-defense for a small woman to use a gun against a large, drunken, but unarmed man- because it is not the theory that would initially occur to men who are differently situated. Consequently, to defend themselves, women had to adopt the dominant characterization of their thought as irrational in the literal, pejorative sense and had to characterize their behavior as insane." Jeanne L. Schroeder, Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination, *70 Tex. L. Rev. 109, 119 n.29 (1991)* (citing Elizabeth M. Schneider, The Dialectic of Rights and Politics: Perspectives from the Women's Movement, *61 N.Y.U. L. Rev. 589, 606-10 (1986)).* When feminist legal activists exposed the assumptions behind the dominant theory and gave voice to the female perspective, "male as well as female lawyers began to see the rationality not only of the new theory, but of women as well." Id.

n217 *Rabidue, 805 F.2d at 620.*

n218 *Id. at 626.*

n219 *Id. at 625* (Keith, J., dissenting).

n220 *Id. at 621.*

n221 *Id. at 626-27* (Keith, J., dissenting).

n222 *321 F. Supp. 1074 (E.D. Mich. 1971),* aff'd sub nom, *United States v. United States District Court, 444 F.2d 651* (6th Cir.), aff'd, *407 U.S. 297 (1972).*

n223 See id.

n224 As a result of his ruling in Sinclair, Judge Keith is one of the few sitting jurists ever to be sued by a United States president. See Washington, supra note 44, at 113.

n225 See Melvin "Butch" Hollowell, Jr., Judge Damon Keith's Wiretap Case, Mich. Bar J. 1202 (1987).

n226 See Bob Talbert, Current Crisis Has Echoes in Wiretap Ruling, Det. Free Press, Jan. 30, 1998, at 3C.

n227 *Sinclair, 321 F. Supp. at 1079.*

n228 See Hollowell, supra note 225, at 1201.

n229 As the Sixth Circuit recognized on appeal, "[a]t issue in this case is the power of the Attorney General of the United States as agent of the President to authorize wiretapping in internal security matters without judicial sanction. This case has importance far beyond its facts or the litigants concerned." *United States v. United States District Court, 444 F.2d 651, 653 (6th Cir. 1971).*

n230 *Sinclair, 321 F. Supp. at 1077* (citations omitted).

n231 Id. (citations omitted).

n232 *Id. at 1078.*

n233 J. Bamford, The Puzzle Palace 291 (1982).

n234 Bob Talbert, Current Crisis Has Echoes in Wiretap Ruling, Det. Free Press, Jan. 30, 1998, at 3C (quoting Jeff A. Hale).

n235 Washington, supra note 44, at 115.

n236 J. Goulden, The Benchwarmers, The Private World of the Powerful Federal Judges 351 (1974).

n237 Roshonda Hatley, Plaque Honoring Damon Keith Recalls Sterling Time in Judicial History, Det. News, July 9, 1997.

n238 *719 F.2d 815 (6th Cir. 1983)* (Keith, J. dissenting).

n239 See *id. at 817.*

n240 *Id. at 846* (Keith, J. dissenting).

n241 See Donna Abu-Nasr, Clinton Allies Call for Investigation to Cease, Starr to Go, Assoc. Press Political Serv., Mar. 2, 1998 (quoting Sen. Patrick Leahy, D-Vt., "Starr has gotten totally out of control. He has this fixation of trying to topple the president of the United States. He's doing everything possible to do it.").

n242 *593 F.2d 749 (6th Cir. 1979).*

n243 *Id. at 749.*

n244 *Id. at 753.*

n245 *Id. at 754* (quoting *Donnelly v. DeChristoforo, 416 U.S. 637, 648-49 (1974)* (Douglas, J. dissenting)). As yet another example of Judge Keith's compassion for the wrongfully abused, regardless of race, gender, religion, or class, Judge Keith wrote the following dissent in response to a police barricade that left a man, O'Brien, paralyzed: Describing the unacceptable and outrageous actions taken by officers in this case as "reasonable" offends the competency and professionalism practiced by the overwhelming majority of officers across the nation. Recognizing O'Brien presented "no overt, hostile threat" and there was no probable cause to believe he committed any crime, only unreasonable and overzealous officers would harass and persecute O'Brien by surrounding his home and breaking its windows. In this case, the officers' refusal to obtain a warrant from a neutral and detached magistrate, despite the passing of several hours, resembles the self-righteous arrogance of a lynch mob. Unfortunately, the officers' overactive imaginations, irrational paranoia and aggressive conduct incited a scenario which left O'Brien paralyzed. *O'Brien v. City of Grand Rapids, 23 F.3d 990, 1006 (6th Cir. 1994).*

n246 See Carl Tobias, Increasing Balance on the Federal Bench, *32 Hous. L. Rev. 137, 140 (1995)* (citing Steve McGonigle, Clinton's Judges Changing the Face of Federal Judiciary, Baton Rouge Advoc., Sept. 5, 1994, at 7B (noting that President Carter is "credited with being the first president to stress diversity on the federal bench")).

n247 See Ifill, supra note 17, at 118.

n248 *458 F. Supp. 374 (E.D. Mich. 1978);* see supra Part V.A.

n249 *Baker, 458 F. Supp. at 377.*

n250 Id.

n251 Id.

n252 *Id. at 378* (quoting 10 Bars & Stripes July 1975, at 1-2).

n253 In articulating the "feminist standpoint" theory, Nancy Hartsock suggests that because men and women occupy different material existences, the female standpoint is more adequate than that of males and better situates women to anticipate the consciousness of the next stage in the development of material society. See Nancy L. M. Hartsock, The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism, in Feminism & Methodology (Sandra Harding ed., 1987). Hartsock's analysis is based on the Hegelian-Marxian analysis of classical Greek slave-holding society. The material existence of the master and

slave enabled the slave to acquire a consciousness more adequate than the consciousness of the master. Slave-consciousness made the contradictions of the slave-holding society apparent. Slave-consciousness (stoicism) eventually became the universal consciousness of the next stage in the development of society, Roman Imperialism. See Jeanne L. Schroeder, Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination, *70 Texas L. Rev. 109, 210 n.296 (1991)* (citing G.W.F. Hegel, The Phenomenology of the Mind 234-40 (J.B. Baille trans. 2d ed. Harper & Row 1967) (1807)) (stating "[i]n the master, the bondsman feels self-existence to be something external, an objective fact; in fear self-existence is present within himself; in fashioning the thing, self-existence comes to be felt explicitly as his own proper being, and he attains the consciousness that he himself exists in its own right and on its own account . . . ."). Hartsock's material reality assumes the material reality of privileged white men, not underprivileged men of color. In Hartsock's analysis "power" is mislabeled "male" when what is meant is white male. However, with that critique aside, arguably the experience of material subordination at the hands of dominance, whether male, white, or both, creates a greater awareness of injustice. It is this awareness, informed by hegemony, that Judge Keith brings to the bench.

n254 See Ifill, supra note 17, at 141 (citing Richard Delgado & Jean Stefancic, Norms and Narratives: Can Judges Avoid Serious Moral Error?, *69 Tex. L. Rev. 1929, 1956-57 (1991)).*

n255 See Vargas, supra note 71, at 197-98.

n256 See id.

n257 See id. at 155 (citing Affirmative Action: Republicans Praising Supreme Court's Ruling, Atlanta J. Const., June 13, 1995, available at *1995 WL 6529562* (reporting that close to 80% of [W]hites expressed the view that "qualified minorities should not receive preference over equally qualified [W]hites")); see also Dinesh D'Souza, The End of Racism Principles for a Multiracial Society 215 (1995) (arguing that affirmative action is equivalent to group quotas); Daniel Yankelovich, How Changes in the Economy Are Reshaping American Values, in Values and Public Policy 16, 29-33 (Henry J. Aaron et al. eds., 1994) (advocating that because Americans value individualism and meritocracy highly, policy makers should reconsider affirmative action policies)).

n258 See Vargas, supra note 71, at 156 (citing Orlando Patterson, The Ordeal of Integration: Progress and Resentment in America's "Racial" Crisis 147-69 (1997)) (examining poll data on affirmative action programs); Susan Sturm & Lani Guinier, The Future of Affirmative Action: Reclaiming the Innovative Ideal, *84 Cal. L. Rev. 953, 953 (1996)* (describing a broad-based assault on affirmative action).

n259 See Vargas, supra note 71, at 155-56 (1999) (citing John Gray, Men Are From Mars, Women Are From Venus at 59- 91 (1992)) (teaching couples how to communicate better in light of gender differences); Malcolm Gladwell, Listening to Khakis; What America's Most Popular Pants Tell Us About the Way Guys Think, The New Yorker, July 28, 1997, at 54 (discussing how Levi Strauss & Co. marketed its Dockers collection by focusing on the way men talk to each other): Deborah Tannen, How to Give Orders Like a Man, N.Y. Times, Aug. 28, 1994 (Magazine), at 46 (challenging the assumption that talking in an indirect way, which is characteristic of women's mode of communication, reveals character flaws); Carol Giligan, In a Different Voice: Psychological Theory and Women's Development (1982) (analyzing through psychological research and literary texts the different modes in which men and women describe the relationship between self and other)).

n260 See Vargas, supra note 71, at 197-98.

n261 The FEDERALIST NO. 39 at 112 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981).

n262 See generally Ifill, supra note 17, at 119.

n263 See generally id. at 120.

n264 See generally id. at 121-22.

n265 See generally Sheldon Goldman, Should There Be Affirmative Action for the Judiciary?, 62 Judicature 488, 494 (1979).

n266 Littlejohn, supra note 40, at 329.

n267 Robert Ankeny, Judge Keith Praises Giacalone the Trial Jurors, Det. News, May 7, 1976, at 4A. As another example of Judge Keith's demeanor on the bench, Cynthia Grant, a juror, wrote the following to Judge Keith: As a recent federal court juror, I found the experience both stimulating and enlightening. . . . Although I learned a great deal about our federal court system, the highlight of my service was the opportunity to serve as a juror in your court. . . . Your sense of fairness, respect and consideration for all concerned was evident throughout the proceedings. Having seen you in action it is not difficult to understand why you are Chief Judge of the Federal District Court. Yours is an example all can learn from. Letter from Cynthia J. Grant (July 8, 1976).

n268 Ankeny, supra note 267, at 4A.

n269 Littlejohn, supra note 40, at 329.

n270 As another example of Judge Keith's commitment to equality, one of his prized letters is from Ginger Kent. On June 18, 1997, Ms. Kent wrote to thank Judge Keith for his ruling in a case, which the Sixth Circuit later affirmed, *Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973).* In Morris, two high school girls challenged a Michigan regulation, which prohibited them from playing in interscholastic athletic contests with boys. *Id. at 1207.* In response, Judge Keith enjoined the state agency promulgating the regulation from: "Preventing or obstructing in any way the individual plaintiffs or any other girls in the State of Michigan from participating fully in varsity interscholastic athletics and athletic contests because of their sex." *Id. at 1208.* The Sixth Circuit modified Judge Keith's order to exclude contact sports. *Id. at 1209.* In response to Judge Keith's ruling, Ms. Kent wrote the following: I am writing this letter to invite you to lunch to thank you for a judgment you made 25 years ago in Detroit. You may not remember it, but you enforced Title IX with respect to two of my friends in Ann Arbor whose high school did not have a girls' varsity tennis team. They sued, under Title IX, to be allowed to play on the boys varsity team and won in your court. You later approved making it a class action judgment. I attended the class action hearing in downtown Detroit which was my first experience in a courtroom. To make a long story short, after much pressure, my high school, Grosse Pointe South, allowed me to play on the boys varsity team where I earned my varsity letter. I later went to Wellesley College, University of Michigan for business school and today am President of Global Marketing and Product Development of Hasbro Corporation, a toy company. Letter from Ginger Kent, President of Global Marketing and Product Development, to Honorable Damon J. Keith (June 18, 1997).

n271 See Reginald M. Turner, Judge Damon J. Keith Honored with American Bar Association Thurgood Marshall Award, *76 Mich. B.J. 790, 791 (Aug. 1997).* In addition to Professor Lani Guinier, the first tenured African American female Professor at Harvard School of Law, Judge Keith's former clerks also include Judge Eric L. Clay, who currently serves with Judge Keith on the Sixth Circuit Court of Appeals; and Jennifer Granholm, Attorney General for the State of Michigan.

n272 See id.

n273 Lani Guinier, Lift Every Voice: Turning a Civil Rights Setback Into a New Vision of Social Justice (1998).

n274 See Trevor W. Coleman, Judge Keith Takes the Law's Insight and Lets It Live Fairly for All, Det. Free Press, June 2, 1998, at 8A.

n275 See id.

n276 See id.

n277 See id.

n278 Daily Briefing, Det. Legal News, Mar. 25, 1998. In yet another accolade, civil rights leader and recipient of the Presidential Medal of Freedom, Oliver W. Hill, Sr., writes the following of Judge Keith in his autobiography The Big Bang Theory: I have enjoyed a close and longstanding friendship with Judge Damon Keith of the United States Court of Appeals for the Sixth Circuit. For example, one of his early judicial opinions which was affirmed by the court of appeals and the U.S. Supreme Court contributed to Nixon's exit from the Presidency. In 1998, Damon won the prestigious Edward J. Devitt award conferred by federal judges upon their colleagues. His forceful, thoughtful and direct approach to legal issues confronting him as a jurist has made him one of the greatest judges of this century. Oliver W. Hill, Sr., The Big Bang 276 (2000).

n279 The collection, which has raised well in excess of $ 2 million and has its own archivists and director, is the only one of its kind in the country.

n280 Rhonda Bates-Rudd, Law Collection Honors Detroit Judge, Det. News, Nov. 22, 1993, available at *1993 WL 6060136.*

n281 De Simone and Brand-Williams, note 57, at 14A.

n282 In reflecting on Judge Keith's support of the Soviet Jewish Refusniks, Natan Sharansky, a Refusnik leader and organizer, wrote "[y]our help and support ever since we first met in Moscow all those years ago has been a vital part of the campaign which has now succeeded in bringing me home." Letter from Natan Sharansky, July 16, 1986.

n283 Littlejohn, supra note 40, at 335.

n284 Id.

n285 Id. at 336.

n286 Judge Collects Legal Honors For Everyone To See, Service, Det. Free Press, May 11, 1997, at 5E.

n287 On February 3, 1999, the exhibit opened at the Thurgood Marshall Federal Judiciary Building in Washington D.C. President Bill Clinton, Mrs. Thurgood Marshall, and Rosa Parks were all in attendance. It then traveled to New York City, New York; Philadelphia, Pennsylvania, and Newark, New Jersey. In 2000, it traveled to Harvard University in Cambridge, Massachusetts and Cleveland, Ohio. Also in 2000, it toured both Los Angeles and San Francisco, California. In 2001, the exhibit toured Chicago, Illinois at the Museum of Science and Industry; Topeka, Kansas; Dallas, Texas; Kansas City, Missouri; Milwaukee, Wisconsin; and St. Croix, Virgin Islands. On May 17, 2002, the exhibit opened at Vanderbilt University.

Judge of character

From Guinier to Granholm, Keith's clerks have gone far

BY ROBERT ANKENY
CRAIN'S DETROIT BUSINESS

What do a Michigan governor, a Connecticut banker, a New Jersey auto dealer and a California civil-rights attorney have in common?

All clerked for **U.S. 6th Circuit Court of Appeals** Judge Damon Keith and consider him a mentor and friend.

Keith, who has been a federal judge for 37 years, has had some 80 law clerks working in his office in both the Appeals Court in Cincinnati, and before that **U.S. District Court** in Detroit.

"It's a legacy," Keith said, as he perused photos and documents related to his former clerks.

That view was echoed last month by **University of Michigan** President Mary Sue Coleman during an event at the **Detroit Institute of Arts** observing the 50th anniversary of the landmark public schools desegregation case, *Brown v. Board of Education*.

Saying that Keith personifies civil-rights lawyer Constance Rice, co-director of **The Advancement Project**.

Detroit business lawyer Alex Parrish at **Honigman Miller Schwartz & Cohn L.L.P.** clerked for Keith in 1981.

"It was a tremendous experience as my first job after law school to work in the second-highest court in the country," Parrish said.


Parrish

"I not only learned a lot about law and how courts operate, but got a real education watching how he carries on his life, does good works for the community and uses his wisdom for everyone's good.

"This has carried forward in my career. I remember Judge Keith saying that you won't be respected in the world at large without being respected in your own community; you must be doing good, as well as doing well."

Parrish said he traces his desire to help minority businesses to being exposed to Keith's philosophy.

Some have moved into other fields.

Gailon McGowen is owner of **Hunterdon BMW** in New Jersey.

A graduate of Columbia University Law School, McGowen clerked for Keith before working as staff

WPP Group to move Ford ad agencies to Dearborn site

BY JEAN HALLIDAY
CRAIN NEWS SERVICE

In a shift that reflects the rise of the holding company as a single marketing resource, **WPP Group** will consolidate its key advertising agencies and staff handling accounts for **Ford Motor Co.** in the same building in late 2006 just blocks north of the automaker's world headquarters in Dearborn.

"This is not a Ford directive" to move **J. Walter Thompson**, **Young & Rubicam Brands** and **Ogilvy & Mather** into the same building, said a spokeswoman at the carmaker. WPP "felt they should do it to better serve the client."

The agencies' back-room service departments, likely to include finance, human resources and production, also will be consolidated in Dearborn, according to four executives close to the matter. The Ford spokeswoman said she's unsure which of the agencies' operations would be combined but said "there are efficiencies to be had." Added benefits, she said, are "richer communication" and easier travel for meetings

"He has produced an entire generation of legal experts. He has made his clerkships available to the very best lawyers, to men and to women. To the top lawyers of all races. To clerks from Lani Guinier to Jennifer Granholm. He has appointed more minority clerks than any federal judge in history."

In fact, Keith, who will be 82 on July 4, has given clerkships to more than five dozen African-American, Asian, Hispanic, Arab and American Indian lawyers and more than 30 women over the years.

"I've been asked how I select such outstanding law clerks, and I believe it's seeing potential in people and giving them a chance. It's about teaching, not only about the law, but about how to treat people and handle problems," Keith said.

Keith said he's learned at least as much from his clerks as he's taught.

"Each of my law clerks teaches me something," Keith said. "Their personalities, insights, temperaments and especially their commitment to equality, each in his or her own way. I have been enriched and benefited by them personally, and the law that they've interpreted and taught me."

In turn, Keith said, "I continually remind them of our job as jurists to use the law and constitution to live up to those four important words engraved in front of the highest court in the country: 'Equal justice under law.' "

Gov. Granholm said she sought a clerkship with Keith because of what she knew about his feelings of equal justice.

"Judge Keith is an icon in Detroit and Michigan. He has battled forces that can tear us all down, and I was impressed by his pursuit of justice for all," she said.

As did many of those who worked for Keith as fledgling lawyers, Granholm recalled that the judge "was always inviting clerks to highfalutin events."

"He'd drag us along and then single us out for attention," she said. The practice put young lawyers into the spotlight in important social, legal and academic settings, giving them both experience and exposure.

"I couldn't think of anyone better to serve with because of his passion for quality and service," she said.

Granholm

Canadian-born Granholm calls Keith her "Michigan father," and the judge sometimes refers to her as "my fourth daughter."

She chose the judge to administer her oaths of office when she was sworn in both as attorney general and governor.

Along with Granholm and Harvard Law School Professor Lani Guinier, Keith law clerks include his current colleague, Appeals Court Judge Eric Clay; Minnesota Appeals Court Judge Wilhelmina Wright and Wayne County Circuit Judge Edward Ewell.

Keith's hand is felt in academia, too. Professors James Coleman Jr. at **Duke University Law School**, Myles Lynk at **Arizona State University Law School**, Spencer Overton at **George Washington University Law School** and William Volz at the **Wayne State University School of Business Administration** all clerked for Keith.

Others went on from their Keith clerkships to a wide range of legal careers, from litigator Ernest Greer, a partner in Atlanta's **Greenberg Traurig L.L.P.**, to Los Angeles attorney for the Voting Rights section of the U.S. Justice Department's Civil Rights Division and litigating for the **NAACP Legal Defense and Educational Fund Inc.**

Banker Peter Hurst Jr. clerked for Keith in 1981-82 and calls it "the most important professional experience in my life."

Beyond that, Hurst said, it created a personal relationship that has lasted more than 20 years. "How many of his former clerks stay in touch is a real testament to the judge's influence," he said.

Hurst is founder, board chairman, CEO and president of the **Urban Financial Group**, a holding company that controls **The Community's Bank** of Bridgeport, Conn., the first minority-owned bank in the state.

He also serves on the board of Detroit-based **United American Healthcare Corp.**, a health maintenance organization and management company.

"As a young African-American lawyer, it was an incredible opportunity to learn from a federal judge," he said. Under Keith's tutelage, law clerks receive constructive criticism without "inappropriate considerations," Hurst said. "It was an incredible way to start a legal career."

Hurst said Keith was a leader and role model for him beyond anyone except his parents.

Now, while not actively practicing law, Hurst said he finds himself reviewing every major decision in his life by thinking about Keith's "courage and compassion, traits often difficult to find in the same man."

Robert Ankeny: (313) 446-0404, bankeny@crain.com

Judge Damon Keith has given clerkships to more than five dozen African-American, Asian, Hispanic, Arab and American Indian lawyers, and more than 30 women over the years and says he has learned as much from his clerks as he has taught.

ILLUSTRIOUS ALUMNI

U.S. 6th Circuit Court of Appeals Judge Damon Keith's former law clerks include:

- Michigan Gov. Jennifer Granholm.
- His current colleague, Appeals Court Judge Eric Clay.
- Minnesota Appeals Court Judge Wilhelmina Wright.
- Wayne County Circuit Judge Edward Ewell.
- Constance Rice, co-director of **The Advancement Project** in Los Angeles.
- Lani Guinier of **Harvard Law School**.
- James Coleman Jr. of **Duke University Law School**.
- Myles Lynk of **Arizona State University Law School.**
- Litigator Ernest Greer, a partner in Atlanta's **Greenberg Traurig L.L.P.**

Nearly 1,000 staffers of WPP agencies will move to a building owned by affiliate **Ford Motor Land Development Corp.**: about 600 from JWT; 300 from Young & Rubicam and 75 from Ogilvy.

Ford is WPP's biggest client, and the two signed a deal last year that strengthened their ties. The automaker said then that it expected cost savings in exchange for giving WPP the chance to win more of its business. But WPP is combining agency offices for Ford only in Detroit, not in other parts of the world, the automaker's spokeswoman said.

Although the ad agency holding company has encouraged its networks to "play nice" with each other in regard to Ford's U.S. accounts, there has been friction, the same executive said. A second agency executive admitted there had been friction but said "now there's total collaboration."

Executives from the three agencies weren't available for comment. Satesh Korde, president of WPP's Ford Motor Group, was also unavailable.

JWT Detroit handles Ford Division's U.S. account, backed in 2003 by $768 million in measured media, according to **TNS Media Intelligence/CMR**. Y&R in Dearborn and its **Wunderman** unit have Lincoln and Mercury, which CMR reports spent a combined $260 million last year. Ford's Quality Care parts and services, handled by Ogilvy in Dearborn, received $26 million in measured media in 2003.

From Advertising Age

Detroiter of the Year

METROPOLITAN DETROIT'S MONTHLY MAGAZINE

HOUR DETROIT

Throughout his career, Judge Damon J. Keith has raised the bar of justice

JOHN MCCAIN STRAIGHT TALK FROM THE REFORMER

SIP TRIP MICHIGAN WINE ARRIVES

HEAVY MEDAL SHEILA TAORMINA'S OLYMPIC RUN

ADOPTION A GLOBAL FAMILY AFFAIR

AN ENTERTAINING LAKE MICHIGAN GETAWAY

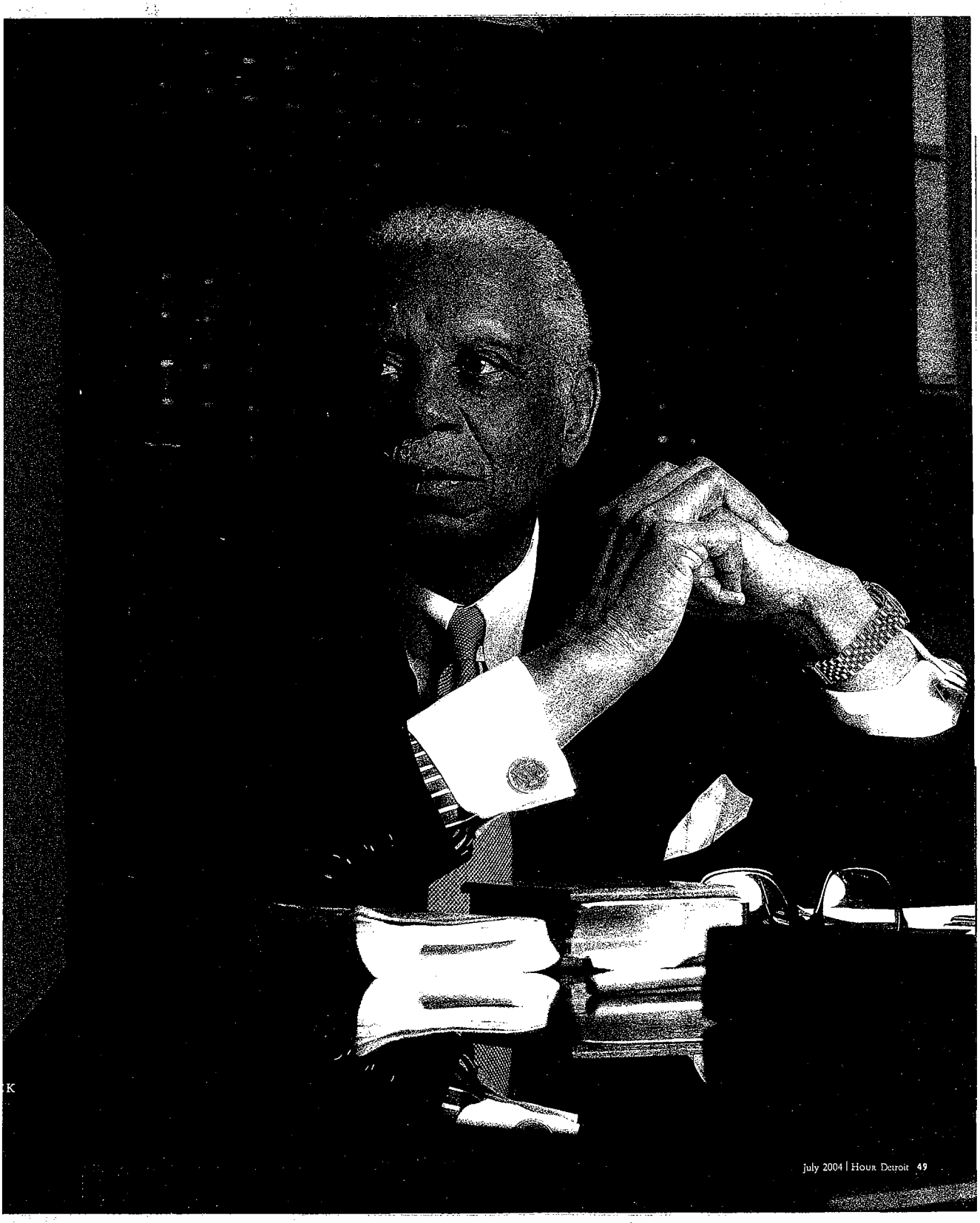
DETROITER *of the* YEAR

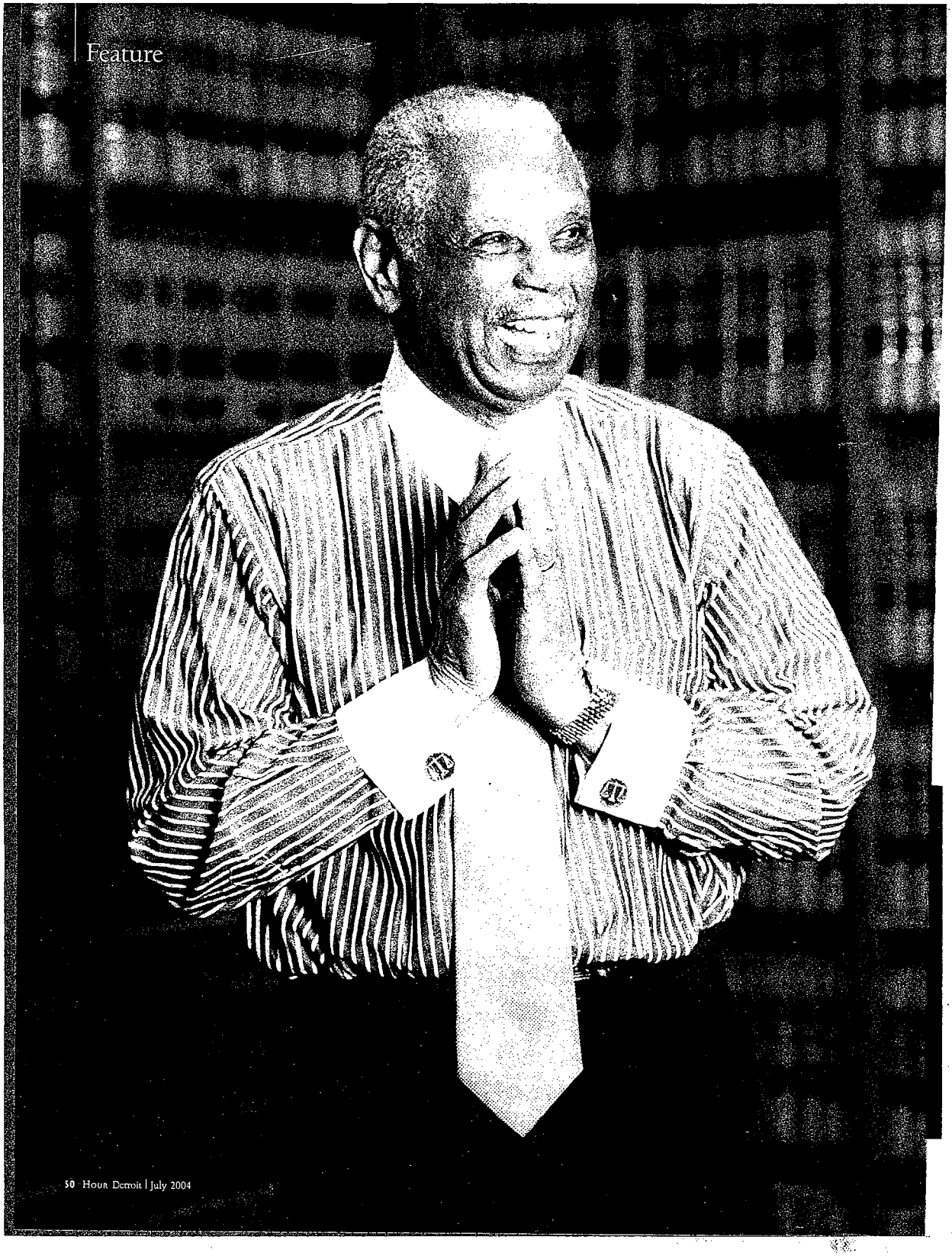
JUDGE DAMON J. KEITH

Driven by principle and passion, the Detroit native has made some landmark decisions in his long and distinguished career — and they weren't exactly popular in some quarters. The judge has faced down the specter of racism, labored to uphold the Constitution, and, as he puts it, 'worked hard to make a difference.'

By Sheryl James

Portraits by John Nathan Urbanek





DETROITER *of the* YEAR

JUDGE DAMON J. KEITH

2004

Detroit seems to produce at least one good crisis a year, and 2004 is no exception. A few months ago, word got out that the Charles H. Wright Museum of African American History — the largest museum of its kind in the world and a point of pride in Detroit — was in dire financial straits. If something wasn't done, the place would close, temporarily at best, maybe worse. That would hurt the city and its already tarnished image. Imagine visitors to such enormously magnetic host events as the Ryder Cup and the Super Bowl driving by the gleaming, domed and yet shuttered place wondering, how did this happen?

Several of the city's leading African-Americans decided they couldn't let it happen. One of them, William Pickard, Chairman and CEO of VITECH in Detroit, called Arthur Johnson, NAACP leader and an old friend of U.S. Court of Appeals Judge Damon Keith. Pickard knew that Keith, as a sitting judge, was prohibited from conducting a public fundraising campaign. But he also knew that Keith, and perhaps only Keith, could persuade enough people privately to help out. "He called me and said, 'I want you to ask the judge to lead this,'" Johnson says. "I spoke with Damon about it. He didn't hesitate."

Keith called to his chambers about 40 of the city's African-American entrepreneurs. "He said, 'This is our museum, it has to be saved,'" Johnson says. Within a fortnight, Keith obtained commitments of $1 million — about $600,000 of it up front. "I think it was one of his finest hours," Johnson says.

His finest hour? There's a tough decision for anyone. Damon Keith, who turns 82 on Independence Day, has had so many fine hours, it's almost impossible to rank them, much less elevate one.

Was it when he stopped President Nixon from subverting the U.S. Constitution in 1970? Was it when he stopped President George W. Bush from subverting the Constitution in 2002? Was it when he told Pontiac in 1972 to desegregate its schools — and stood by that order despite death threats?

Or when he told Hamtramck city officials their so-called urban renewal was really "Negro removal," and ordered restitution? Older African-Americans probably most appreciate the efforts of young lawyer Damon Keith, who defended them in the 1950s against an all-white, often brutal establishment as a partner in the city's first black law firm with offices west of Detroit's great racial dividing line, Woodward Avenue.

But we're talking 2004. And for every year's crisis, Detroit also seems to produce a hero tailor-made for that crisis. Tales of museum mismanagement notwithstanding, Keith understood the larger picture; he always does. The museum itself was too good to let die, he kept repeating to various audiences. "We African-Americans have to stop begging for what we need and go out and buying what we want." Because of his leadership, the City of Detroit has advanced to the museum part of next fiscal year's allocation, and boosters are vowing to tighten the ship, increase membership and improve exhibits. The showcase of slave ships to civil rights lives on.

Congratulations to HOUR Detroit's 2004 Detroiter of the Year.

Here's a landmark truth about Damon Keith: People love this man. They love him because he raises the bar, not his voice, in the courtroom. In all his years on the bench, he's never held anyone in contempt. They love him because he treats all people with a certain old-fashioned dignity. "He's so focused on civility and decency and people's humanity," says Gov. Jennifer Granholm, one of many now-prominent Michiganians who started their careers as a law clerk for Keith. The judge's portrait hangs prominently in Granholm's office, and she routinely calls herself his fourth daughter.

People love Keith, too, because he pitches in. He has a 50-plus year history of civic involvement. This is something his quiet, low-profile wife, Dr. Rachel Keith, discovered right after marrying him in 1951. "I found out early that this man was going to be active in the community, and there was nothing I could do about it," she says. "Almost every week there was something in the *Michigan Chronicle* about he did this, he did that." He was also Most Eligible Bachelor, which really got her attention. "I understood that it was part of his life's commitment. This was the fire in his belly, and it was driving him. And it was manifested in such a good way, I was pleased about it."

"I found out early that this man was going to be active in the community, and there was nothing I could do about it. I understood that it was part of his life's commitment. This was the fire in his belly, and it was driving him. And it was manifested in such a good way, I was pleased about it."

— DR. RACHEL KEITH

Notable honors

1974 —The Spingarn Medal, NAACP. "In tribute to his steadfast defense of constitutional principles ... his trail-blazing Pontiac decision, which virtually eliminated the distinction between de jure and de facto school segregation; in recognition of his lifetime of distinguished public service on behalf of his city, state and nation, and particularly of his race..."

1974 — Damon J. Keith Elementary School named for Keith.

1981 — Doctor of Laws Honorary Degree, Yale University (one of 40 honorary degrees awarded him by universities). "In your long career as civic leader, lawyer and judge in your beloved Detroit, you have come to stand not only for the rule of law but also for common sense in its application. You were a pioneer in fashioning the central role of the courts in ensuring equal justice and you had the courage to face and resolve as a judge the most divisive issues of our time. You have championed the causes of Black Americans, of working people, of dissenters, and of the poor."

1985 — Appointed by Chief Justice William Rehnquist as National Chairman of the Judicial Conference Committee on the Bicentennial of the Constitution. This group honored Keith by putting only his name on a commemorative plaque that hangs in more than 300 federal courthouses.

1997 — Thurgood Marshall Award, American Bar Association. "Judge Keith represents the best in the legal profession. His work reflects incisive analysis of issue, principled application of laws and the Constitution, passionate belief in the court's role in protecting civil rights, a commitment to community service and, most significantly, an independence of mind to do what's right that is at the core of his view of professional responsibility."

1997 — The Damon J. Keith Law Collection is dedicated at Wayne State University. The collection is devoted to accomplishments of African-American lawyers and judges.

1998 — Edward J. Devitt Distinguished Service to Justice Award, given annually to one outstanding federal judge in the U.S. selected by a panel consisting of a Supreme Court Justice, a Court of Appeals judge and a federal district judge. Keith is the only African-American to receive it.

INSET BY JOHN NATHAN URBANEK

JUDGMENT CALLS: 1. The Keith family, left to right, front row: P.A. Keith, Damon J. Keith, Annie L. Keith, sisters Marie and Annie. Back row: brothers Luther, Perry and Napoleon. 2. Keith with one of his mentors, former Supreme Court Chief Justice Thurgood Marshall in the 1970s. 3. Keith's childhood home on Hudson Street on Detroit's west side. Keith was born in this house and lived there until leaving for college. 4. Damon J. Keith in 1945 with fellow soldiers Wilbur B. Hughes, and Calvin Porter, in Detroit. 5. Former law partners Joe Brown, Mike Wahls, Damon J. Keith and Nate Conyers celebrate Keith's 20th year on the bench in 1987. The former partners' law firm was Detroit's first black firm to locate west of Woodward back in the early 1960s. 6. Young lawyer Damon J. Keith joins a small group of African-American lawyers invited by JFK to the White House for Emancipation Day, Feb. 22, 1963.

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And it was manifested in such a good way, I was pleased about it."

Keith is so well-respected in his realm, he must hold the world's record for swearing-in ceremonies. He administered the oath to Coleman Young many times, Detroit Mayor Kwame Kilpatrick, Wayne State University President Irvin Reid, nearly every African-American judge in Michigan, including Conrad Mallett, former Chief Justice of the Michigan Supreme Court. Dennis Archer alone kept the judge busy with the big Bible.

"He swore me in when I became mayor," Archer says, "he swore me in when I became a lawyer, he swore me in when I became head of the American Bar Association, he swore my son in when he became a lawyer, he swore my wife in ... ." More recently, Keith administered the oath of office to Granholm.

That photo has found its way onto the Wall of Fame, as Edsel Ford II calls it, in Keith's office in the Theodore Levin U.S. Courthouse downtown on Lafayette. Almost everyone else calls the place unbelievable. There are no fewer than 357 photographs, most of them featuring Keith with everyone from Colin Powell, Nelson Mandela and Thurgood Marshall to John F. Kennedy, Bill Clinton, Oprah and Aretha Franklin. There are hundreds more still in boxes, says Mae Doss, Keith's administrative assistant. Also on those crowded walls are 83 certificates, many of them honorary degrees from the likes of Yale, and an equal number of plaques. It takes a couple of hours to review this museum.

And that is just the antechamber. In the judge's main office is even more material — prestigious awards, signed photographs and hundreds of books. Some of them are memoirs — including those of celebrated attorneys William Kuntsler and Johnnie Cochran — whose authors credit the judge's influence.

On the oblong table he most often uses are two

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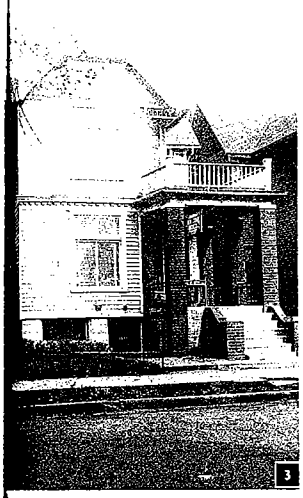
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books that he reads for one quiet hour every morning in the huge room of high ceilings — the Bible and another book of meditations on the Proverbs.

The focal point of the office beyond that, and Keith's favorite item, is an original portrait of Coleman Young, Sammy Davis Jr., John Johnson (*Jet Magazine, Ebony Magazine*), Rosa Parks — whom Keith calls "Mother Parks" — and Keith. All have won the NAACP'S highest honor, the Spingarn Medal.

The accolades continue. Harvard University recently sent word that Keith will be among 600 people featured in a new compilation of the most famous African-Americans.

Keith, who has a habit of treading in mid-conversation from one corner of his office to another fetching documents and photographs, is at times a little uncomfortable with all this praise. He defers to what others have said or written about him or his decisions. He says simply, "I worked hard to try to make a difference."

But he also stresses he knows the work is never done — especially when it comes to racial discrimination. Just a few years back, he and another black federal judge were at a judges' meeting in a swank hotel. As they left the building, a white man roared up in his big car and yelled, "Boy, park my car."

Keith has been unduly scrutinized by hotel clerks as his white counterparts pass unnoticed. Once, he and a Harvard-educated young black lawyer walked into a mostly empty restaurant. The waitress sat them in the back by the noisy, smelly kitchen. Four boisterous white motorcycle riders in blue jeans and boots tramped in and got the best seats in the house. Remember this, he told the young man. For this judge, the law and life are inseparable.

But Keith, who says he's been blessed with an especially even temperament, does not let such experiences sour him. "I don't let anyone define me. I define myself. And these very unpleasant experiences immunized me from being unkind to anyone else."

> *"I don't let anyone define me. I define myself. And unpleasant experiences immunized me from being unkind to anyone else."*
>
> — Damon J. Keith

When the good judge retires — stepping down is not on the docket yet — it might behoove Detroit to preserve his office as a kind of annex to the Wright museum. Keith's story is extraordinary because he has accomplished so much, but also because it illustrates the struggle that is the African-American experience.

His grandparents, Thomas and Melissa Keith, were slaves in Georgia. His father, Perry, came to Detroit around 1920, after Henry Ford announced his $5 day. By then, Perry and his wife, Annie, had five children, all born in Georgia. Damon, their sixth child, was the only Keith born in the North, in their Detroit home on July 4, 1922, an apt birthday for a man who would come to revere and defend the Constitution, Bill of Rights and Declaration of Independence.

Perry Keith worked where most African-Americans did — in the hellish foundry at Ford's Rouge plant. He suffered but rarely complained. He managed to buy a nice two-story frame home on Detroit's west side, not far from Olympia Stadium. He taught his son to be proud, fair and positive.

Keith attended 12 years of school in Detroit, usually among few blacks in his classes. He graduated from Northwestern High School in 1939. His was the last generation of African-Americans for which, as he recently wrote, "segregation and racism were not ugly words." Yet. They were just the way life was.

Keith had no black teachers. He knew no black lawyers, judges or other professional role models. He was not allowed to use the whites-only YMCA by his high school. When his parents went to the South for visits, they packed fried chicken lunches and sat in the back of the train.

Keith was the only member of his family to go to college, and he was never the same. At the historically black West Virginia State College, Keith saw the letters Ph.D. behind the names of dignified black professors and visitors. Adam Clayton Powell. Mary McLeod Bethune. Carter G. Woodson.

Keith graduated with a B.A. in history and sociology in 1943, passionately inspired. Then he was drafted into the Army — a more bitter education. This time, segregation was ugly, and Keith knew it. It was high school all over again — all the soldiers were black, all the officers white. But he served three years all over the European theater with distinction.

In 1946, Keith decided that if the law ever were to change, he had to help. He enrolled in Howard University School of Law in Washington, D.C. The nation's capital was as segregated as the rest of the country. "The only public places I could eat was the Supreme Court cafeteria and Union Station," he says.

But at Howard were some "legal giants," in Keith's words, who were plotting Jim Crow's overthrow. Thurgood Marshall, Charles Hamilton Houston, James Nabrit and others. Keith was reborn. He learned to fight back, but he also learned to love the law. Two of his favorite sayings then and now are: "Equal Justice Under Law." — the words inscribed on the Supreme Court building — and John Adams' "We are a nation of laws, not men."

Back in Detroit Keith practiced law with various

PAYING COURT: 1. Gov. Granholm takes the oath of office from her old boss. 2. Keith with another NAACP Spingarn Medal winner, Oprah Winfrey. 3. When Nelson Mandela visited Detroit in 1990, Keith was among those who welcomed him. 4. Keith and his administrative assistant, Mae Doss, with former law clerks Edward Kang, Ola Sebanjo and Praveen Madhiraju. 5. Damon J. and Rachel Keith, 2001. 6. Keith watches the Tigers with granddaughter Camara Keith Brown in 1999.

firms before co-founding Keith, Conyers, Anderson, Brown & Wahls in 1964. He also threw himself into the burgeoning civil rights movement. He and Arthur Johnson helped co-found the NAACP Freedom Fund Dinner, a major fundraiser. Membership in the organization was modest, and no one had much money. But Keith sold $10,000 worth of tickets, says Johnson, who was a minimally paid but dedicated executive director.

One of those early years, Johnson stopped by Keith's office to review final details for the big dinner. "When I was finished with that briefing and got up to leave," Johnson says, "he said to me, 'Arthur, you should have a nice suit.' I looked at him and said, 'I can't buy a new suit, I just don't have the money.'" Johnson's voice breaks as he finishes the story. "He said, 'I have an account at Hughes & Hatcher. Go there — I arranged for you to buy one on my account.'"

Johnson says that illustrates one of Keith's best qualities. "He wants for his friend what he wants for himself. He has a strong and good heart, and you don't have to search for it."

Granholm agrees. Keith never failed to include and introduce his law clerks at any functions he attended, she says. That continued at a recent Wolverine Bar Association luncheon.

Keith was a busy man in the courtroom and outside of it. He volunteered to be a driver for Wade McCree, the state's first black judge, during his campaign for Wayne County Circuit Court Judge. Both men were members of the Wolverine Bar, a black organization founded because the American Bar Association didn't admit blacks.

Keith says McCree's wife, Dores, "was positive — a booster, a spirit-raiser. I remember the kind of aura he had around him." Keith also joined former Sen. Phil Hart's campaign and became a friend.

Keith and his wife, an internist born to missionary parents in Liberia, met when she was doing her residency — admitting polio patients — at Herman Kiefer Hospital in Detroit. A fellow doctor brought Damon to the hospital, supposedly randomly, and introduced them. "It was a setup, I guess," Rachel Keith says. "It worked."

Their first date was a Detroit Lions game — and a lesson for Rachel. "He tells everybody this: I had just come up to Detroit from Richmond, Va., and I knew this guy was from Detroit and I was rooting for the Detroit team. He told me, 'Look, I'm not rooting for the Detroit team; they don't have any blacks on their team.' The other team, I think, had two."

The Keiths reared three daughters — Cecile Keith-Brown, Gilda Keith and Debbie Keith. His family was his priority on weekends, he says. He never learned to play golf, for instance, because he wanted to be with his daughters. Today, his routine is equally devoted. He buys flowers for Rachel every weekend from Eastern Market, and on Sundays his daughters come for dinner. They share stories of the Sunday sermons they heard and discuss the issues of the day.

Keith's growing reputation led in the 1960s to his appointment to the Detroit Housing Commission and the Michigan Civil Rights Commission. When Detroit exploded into its 1967 riot, Keith called Johnson.

"He said, 'Arthur, the people downtown in charge are all white — the governor, the mayor, the chief of police. There's no black voice, and there should be. Arthur, we should go downtown,'" Johnson says.

Mayor Jerome Cavanagh's small group had not intentionally overlooked Keith or other African-Americans. They were warmly received when they

Landmark cases

1970 — Davis v. School District of City of Pontiac. Keith rejects district's excuse for segregated schools and orders busing to achieve integration.

1971 — United States v. Sinclair ("The Keith Decision"). Keith tells President Richard Nixon and Attorney General John Mitchell they cannot use electronic surveillance to gather evidence without a warrant, even if they claim national security concerns.

1971 — Garrett v. City of Hamtramck. Keith rules city is guilty of "Negro removal" in its urban renewal project, and orders the city to build new housing as restitution.

1972 — Morris v. Michigan High School Athletic Association. Keith rules in favor of female tennis players qualified but barred from playing on boy's tennis team at Huron High School in Ann Arbor, a key pre-Title IX case.

1973 — Stamps v. Detroit Edison Co. Keith rules Edison had practiced racial discrimination, orders an affirmative-action plan and fines the company more than $4 million.

2002 — *Detroit Free Press* v. Ashcroft. Keith tells President George W. Bush and Attorney General John Ashcroft they can't hold secret deportation hearings.

PHOTOGRAPHS COURTESY DAMON J. KEITH | GRANHOLM COURTESY THE DETROIT FREE PRESS

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2004

walked into the room unannounced. But the overlooking is the point, Keith believes.

Keith became a federal district judge in 1967 — and strangely enough, Rachel says, he didn't like it. "He was very lonely sitting up there all by himself. He was used to being an advocate. He just wanted to get into the arguments. For about eight or nine months, he was struggling with it. But then he got these big cases, one after another. That just lit him up."

The biggest, arguably, was United States v. Sinclair, now known as the Keith Decision. Members of the radical White Panthers party were accused of the 1968 bombing of a CIA recruitment office in Ann Arbor. President Richard Nixon and Attorney General John Mitchell argued that wiretap evidence gained without warrants is legal when national security is at stake.

Judge Talbot Smith drew the case in 1971, but he stepped aside because he lived in Ann Arbor and was concerned about his family, Keith says. Smith suggested bringing in a judge from another circuit. "I was one of the newest judges on the court at that time, and I said, 'That's not right,'" Keith says. "'We took an oath to try difficult cases, all cases.'" It was decided to have all but Smith put their names in a blind draw. The new judge drew the case.

The potential repercussions in the decision were profound. Before this case, presidents had always claimed inherent executive power to use electronic surveillance in cases affecting national security. That these subjects were Americans seemed not to matter. One day during the case, the judges argued its merits among themselves, Keith recalls.

"They said, 'Damon, you know if the president of the United States and the attorney general in their high positions cannot determine what's in the best interests of our national security, then who could?' I said, 'Look, we're a country of laws and not of men. And the president and the attorney general just cannot unilaterally make this determination. They have to go to a magistrate or a judge and show probable cause as to why people are a threat to national security.'

"They said, 'Oh, I think he has that inherent authority.' No one said, 'Damon, I think you're right.' And then, of course, after the Supreme Court unanimously affirmed me, it was, 'We knew you were right all along.'"

The decision helped pave the way for the Watergate investigation. Keith handled several other landmark cases — so many that Keith worried someone was somehow stacking the deck. (They weren't.)

The most significant case for metro Detroiters was Davis v. School District of City of Pontiac — known as the Pontiac busing case. The 1970 class-action claim by Pontiac's black schoolchildren alleged the district's schools were segregated by design. Pontiac officials said the schools merely reflected housing patterns. Keith disagreed, citing evidence of de jure segregation, and ordered the district to bus children to achieve integration.

A few days before the plan was to take effect, 10 buses were dynamited. Keith was shocked. "I couldn't conceive of anyone burning all those buses," he says. "I was just flabbergasted at the hatred and the feeling to disobey a court order, that they were that violent that they would deprive the children of buses." But he refused to stay his order.

It was about this time, Rachel says, that she noticed strange cars parked on the street near their home. She later learned there had been death threats against her husband. The cars held federal law enforcement officers assigned to protect the judge. Keith says he never was afraid. "I don't live my life that way. As I say, I've never taken a sleeping pill in my life. I just go about it. You do the things you have to do." The Pontiac busing decision helped lead to a later judicial order for cross-district busing throughout metro Detroit, which never was implemented. Whether busing was successful is not the point, Keith says.

Three decades later, the battles are the same; only the names have changed. In 2002, Keith again faced a U.S. president. In *Detroit Free Press* v. Ashcroft, Keith rejected the Bush administration's policy of holding deportation hearings against alleged terrorists in secret. It was Nixon and Mitchell all over again, and in this late stage of his career, Keith wrote what probably will be his most famous words: "Democracies die behind closed doors." He went on to write that "selective information is misinformation. The framers of the First Amendment did not trust any government to separate the true from the false for us ... . They protected the people against secret government."

The similarities between the Nixon and Bush cases reinforces Keith's deep concern about the ever-present danger of power abused in the name of national security — and the judiciary's role in checking it.

"When I pass off of the scene, I hope that I have touched enough blacks and whites to keep the pursuit of equal justice under law moving. That young men and women will have the courage to do what has to be done to protect the Constitution, the Declaration of Independence and the Bill of Rights."

If they follow Keith's lead, as he did that of Thurgood Marshall and others, they may also fly the banners of "Equal Justice Under Law" and "We are a nation of laws and not of men."

And because of Judge Damon Keith, 2004 Detroiter of the Year, they may add a newer but equally worthy one:

"Democracies die behind closed doors." ■

James is Hour Detroit's *senior staff writer. E-mail: sjames @hourdetroit.com.*

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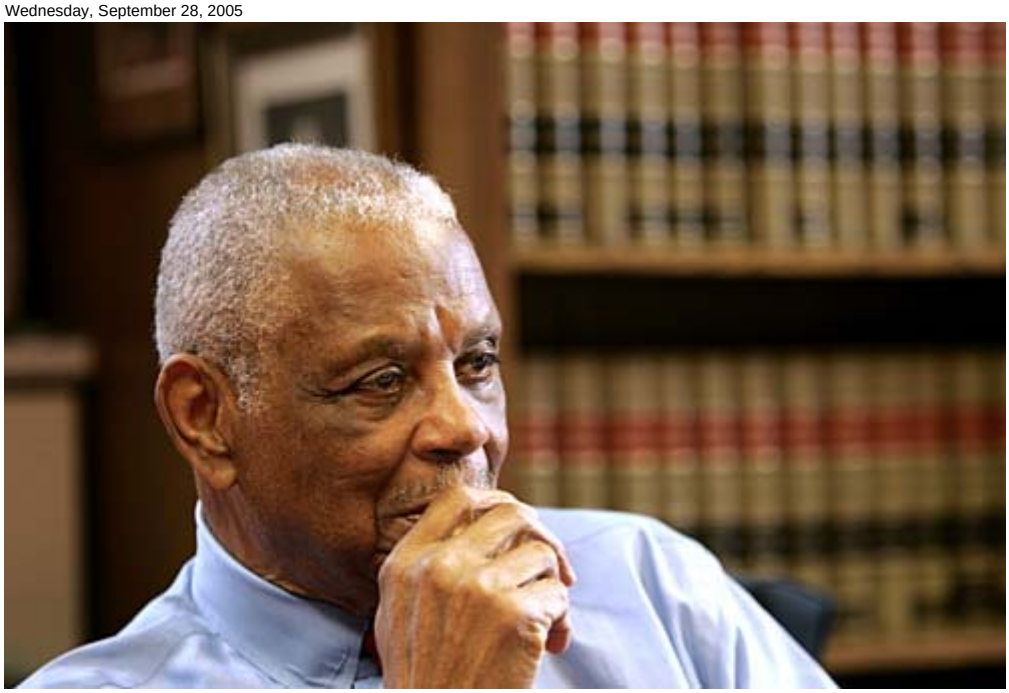

Robin Buckson / The Detroit News

"This is a real high honor, coming in my hometown, and at Wayne," Judge Damon Keith says about the law school addition. The three-story law center will have an auditorium and classrooms. The center will have a scholarship chair established in Keith's name.

Saluting a Legend

WSU building honors civil rights leader Judge Damon Keith

By Norman Sinclair / The Detroit News

From humble beginnings as the grandson of slaves, Judge Damon Jerome Keith rose to the second highest level of courts in the land by devoting his life to promoting social justice.

Keith's 38-year career and the landmark decisions he wrote will be recognized by Wayne State University with a $16.5 million addition to the university's law school, the Damon J. Keith Center for Civil Rights.

The center will salute the 83-year-old federal judge's

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accomplishments, but Keith said he hopes it also will provide a learning environment that will motivate future lawyers to adopt his passion for the Bill of Rights.

"This is a real high honor, coming in my hometown, and at Wayne, where I received my master's degree and we already have the Damon J. Keith Collection of African-American legal history," he said.

"It is especially gratifying because the faculty and the collection will be training young students of the Constitution, the Bill of Rights and civil rights."

The three-story law center will contain a 125-seat auditorium with classroom space for 100 students. The center also will have a scholarship chair established in Keith's name. The vast collection of photographs, plaques, award trophies and certificates that line nearly every wall and shelf in his chambers in the downtown federal courthouse will be on permanent display in the center.

A multimillion-dollar gift to the university to kick off a fund-raising drive for the center has been committed by Detroit-area shopping mall developer and philanthropist A. Alfred Taubman.

"Judge Keith has been a great friend of mine and to Detroit," Taubman said in a statement to The News. "I am very pleased to be able to provide this support and believe this facility is fitting recognition for one of the nation's leading jurists and exemplary citizens."

One of the most cherished acknowledgements of Keith's career is the collection of more than 300 large brass plaques inscribed with the Bill of Rights made for the nation's bicentennial that hang in lobbies of courthouses, including the U.S. District Court in Detroit, and in law schools and federal buildings across the country.

Even though more famous jurists like Supreme Court Justices Warren Burger and Harry Blackmun served on the bicentennial panel, the members only had Keith's name inscribed on the plaques celebrating the Constitution.

His career as a federal judge began in 1967 when he was appointed to the U.S. District Court in Detroit by President Lyndon B. Johnson.

Keith was appointed to the Cincinnati-based 6th Circuit Court of Appeals, which includes Michigan, by President Jimmy Carter in 1977. Although he

Associated Press

Damon Keith's career as a federal judge began in 1967 when he was appointed to the U.S. District Court.

Career highlights

1939: Graduates from Northwestern High School in Detroit

1943: Bachelor of Arts, Virginia State College

1946: Law degree, Howard University

1956: Second law degree specializing in labor law, Wayne State University

1964-67: Chairs Michigan Civil Rights Commission

1967: Appointed to federal bench in Detroit

1977: Appointed to 6th Circuit Court of Appeals

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activities

took semi-retired senior status at age 72 in 1994, he continues to hear cases.

The many landmark cases with national and local impact that he decided include:

• The 1970 Pontiac public schools desegregation case, in which he ordered the busing of white children to integrate the schools. It was the first federal court order to integrate schools in the North.

• The 1971 ruling that rebuked President Richard Nixon and then-Attorney General John Mitchell for approving wiretaps of citizens without prior court approval. The ruling, which was upheld by the U.S. Supreme Court, became known as the Keith Decision.

• The 1971 case involving the city of Hamtramck in which he ordered officials to cease an urban renewal program that victimized blacks. The ruling also forced the city to build public housing.

• A 1973 case in which he ruled that Detroit Edison and a utility worker's union were guilty of racial discrimination and ordered an aggressive affirmative action program. He ordered fines of $4 million against the company and $250,000 against the local.

• His 1979 order to the Detroit Police Department to carry out Mayor Coleman Young's program to integrate the force, including one-for-one promotion of black and white officers.

During those years, the lawyers he influenced when they worked as his clerk include Gov. Jennifer Granholm and ex-Detroit Mayor Dennis Archer, among others.

"Judge Keith has embodied the very notion of public service. ... The impact that he has had on this state, and on this nation, and frankly, on me, is immeasurable," Granholm said.

Another of his former clerks is Chief Judge Edward Ewell Jr. of Wayne Circuit Court.Ewell said his own experience is an example of Keith's willingness to reach out to everyone.

"I went to Wayne, and a lot of judges would only pick law clerks from the Harvards and schools of that reputation," he said. "But Judge Keith believed in giving everyone willing to work hard a chance, and he gave me a chance when a lot of people in his position, quite frankly, wouldn't."

Keith, one of seven children, was born on Independence Day in Detroit in 1922. His parents, Perry and Annie, had moved north out of segregated Georgia to the Motor City. Perry Keith went to work at the Ford Rouge Plant for $5 per day.

Perry Keith encouraged his son to get a good college education.

"My father carried himself with such dignity and respect that even his friends called him Mr. Keith. I never heard anyone call him Perry. He was the finest man I have ever met, and I still think of him every day," said Keith, who keeps a portrait of his mother and father directly behind his desk.

He said he never wanted to let his father down. "I was never late and I never missed a day in 12 years of school," Keith said.

As he prepares for the new session of the 6th Circuit Court, Keith said he wishes there was less partisanship in the U.S. judiciary.

He recalled when the late Sen. Philip Hart, a Democratic Party icon, recommended him to President Johnson for the district bench, Sen. Robert Griffin, a staunch conservative from northern Michigan, not only supported his nomination, but also testified on Keith's behalf.

"In June, I had the pleasure of swearing in Senator Griffin's son, Richard, when he was named to the 6th Circuit bench," Keith said.

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