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Victoria L. Brown-Douglas

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IS IT TIME TO REDEFINE THE NEGRO LAWYER?

VICTORIA L. BROWN-DOUGLAS*

In 1928, a young High School student wrote to W.E.B. DuBois about the use of the word “Negro.”¹ DuBois wrote back to him:

Do not at the outset of your career make the all too common error of mistaking names for things. Names are only conventional signs for indentifying things. Things are the reality that counts. If a thing is despised . . . you will not alter matters by changing its name. If men despise Negroes, they will not despise them less if Negroes are called ‘colored’ or ‘Afro-Americans’ The name merely evokes what is already there And then too, without the word that mans us, where are all those spiritual ideals, those inner bonds, those group ideals and forward strivings of this might army of 12 millions? . . . Your real work, my dear young man, does not lie with names.² It is not a name – it’s the Thing that counts. Come on Kid, let’s go get the Thing!³

Standing in the courthouse just after the close of the case involving the murder of Sean Bell⁴, a young Black⁵ father of two, I heard Anthony Ricco⁶, the lawyer representing the Black Latino detective charged with the

* Victoria L. Brown-Douglas is an Assistant Professor of Clinical Education and Assistant Director of the Center for Professional Skills at St. John’s University School of Law. I would like to thank Prof. Lawrence Joseph for the DuBois letter, Associate Provost Jeffrey Olsen for our talks about Charles Hamilton Houston, Anthony Ricco for inspiring this article and Akilah Folami for her comments on an earlier draft of this piece.

¹ W.E.B. DuBois, *The Name “Negro”*, (1928), <http://teachingamericanhistory.org/library/index.asp?document=1153>.

² *Id.* The deleted portion reads:

Your real work as a Negro lies in two directions: First, to let the world know what there is fine and genuine about the Negro race. And secondly, to see that there is nothing about that race which is worth contempt; your contempt, my contempt; or the contempt of the wide, wide world. Get this then, Roland, and get it straight even if it pierces your soul: a Negro by any other name would be just as black and just as white; just as ashamed of himself and just as shamed by others, as today.

Id.

³ *Id.*

⁴ See Times Topics, People, Sean Bell, N.Y. TIMES, available at http://topics.nytimes.com/top/reference/timestopics/people/b/sean_bell/index.html?scp=1-spot&sq=sean%20bell&st=cse.

⁵ Although this article explores the labels ascribed to a “race” of people, I have chosen to use the word Black when referring to the ethnic group or community also referred to as African American, Negro or colored.

⁶ Anthony Ricco is a prominent criminal defense attorney who is also Black. Mr. Ricco earned a

murder, exhort “I think its time we redefined the Negro Lawyer.” I hadn’t heard the word Negro since I visited my grandparents regularly in the 1970’s. They were in their 80’s and refused to use the word Black to describe “Negro” people. What did Ricco mean “Negro Lawyer?” Exploring this question is more of a discussion about “The Thing” than it is about the label “Negro Lawyer.”

Initially in America we⁷ were described as Africans but by 1808 most “Africans” in America were American-born.⁸ By 1835 Black leaders determined the label would hinder the fight for full citizenship and fuel the repatriation movement so they called on the Africans to call themselves “Negroes.”⁹ Indeed, Dr. Martin Luther King Jr. used the word “Negro” 15 times and “Black” 4 times in his 1963 “I Have a Dream” speech.¹⁰ America used the term “Negro” and “Black” to describe “Black” people up until 1988 when Jessie Jackson pronounced that the term African-American was a better identifier because of the historical and cultural reference it described.¹¹

Black lawyers have been a part of the legal profession for a long time and throughout much of that history we¹² were described as the “Negro Lawyer.” The term then is a term of art describing those lawyers who are primarily descended from African slaves and their white masters.¹³ They are the step-children of the legal profession, who paved the way for the “lawyers of color” that came after them.¹⁴ The term recognizes those

Malcom X scholarship to Adelphi University. He then received a J.D. from Northeastern University in Boston. After clerking for Judge Bruce Wright and then working for the New York State Assembly Banking Committee, he began a solo practice. In a practice that has spanned almost 30 years, Mr. Ricco has represented numerous unpopular and notorious defendants, including capital defendants. Ricco is deeply committed to the Harlem community in which he has lived his entire life and is acutely aware of the challenges that African-Americans and other minorities have faced over the years.

⁷ I wrote this article because I am a Black woman lawyer in America and strongly identify the history discussed as my own.

⁸ See Isabel Wilkerson, *‘African American’ Favored By Many of America’s Blacks*, N.Y. TIMES, Jan. 31, 1989 (“The slaves called themselves Africans at first, but slave masters gave them English names and called them Negroes, the Portuguese word for black, historians say.”).

⁹ See JAMES T. CAMPBELL, *MIDDLE PASSAGES: AFRICAN AMERICAN JOURNEYS TO AFRICA, 1787-2005*, 63-4 (Penguin Group 2006) (stating that the new National Negro Convention movement called upon black Americans “‘to remove the title of African from their institutions’ . . . and replace it with Negro.”).

¹⁰ Martin Luther King Jr., *I Have A Dream – Address at March on Washington* (Aug. 28, 1963), available at <http://www.mlkonline.net/dream.html>.

¹¹ See Wilkerson, *supra* note 8 (noting that Rev. Jesse Jackson’s movement to call blacks African-Americans was met with both “rousing approval and deep-seated skepticism[.]”).

¹² In using the term “we” I chose to share my racial identity because it is through this lens that I wrote this article.

¹³ BART LANDRY, *THE NEW BLACK MIDDLE CLASS*, 23 (University of California Press 1987)(1988).

¹⁴ The term stepchild is best described in a poem by Langston Hughes, “I Too, Sing America.”

“spiritual ideals, those inner bonds, those group ideals and forward strivings of this might army[.]”¹⁵

This article discusses the history of the Negro Lawyer in the legal profession through the lens of the Negro lawyer, and then concludes with a discussion about whether it is now time to redefine the Negro Lawyer.

I divide and explore the history of the Negro Lawyer in four periods: The Macon B. Allen Period; The Charles Houston Hamilton Period; The Thurgood Marshall Period; and the Barack Obama Period, a period which I argue has not only redefined the Negro Lawyer but squarely questions his continued existence. The Macon B. Allen Period describes the firsts, the “Old Negro Lawyer.” The Charles Houston Hamilton Period introduces our social engineers, the “New Negro Lawyer.” The Thurgood Marshall Period describes the beneficiaries of the fight for Civil Rights, the “Black Lawyer.” Finally, the Barack Obama Period identifies the best and the brightest, “The Talented Tenth Man.”

I. MACON B. ALLEN PERIOD – THE FIRSTS

Even before the Civil War, Black people had entered the world of law.¹⁶ Before the Civil War descendants of African slaves and their white masters made up a significant portion of the free Black community.¹⁷ By virtue of this kinship, some were afforded opportunities to read and write and were successful in furthering their education or securing apprenticeships with white lawyers, particularly in Northern cities.¹⁸ Twenty years before the signing of the Emancipation Proclamation, the admission of the first Negro Lawyer in America, Macon Bolling Allen in 1844, presented the first challenge to an all white legal community – the mind of the Black man.¹⁹

At that time, there were no law schools in America.²⁰ American lawyers

Langston Hughes, *I Too, Sing America*, in *I AM THE DARKER BROTHER: AN ANTHOLOGY OF MODERN POEMS BY AFRICAN AMERICANS* 122 (Arnold Adoff ed., Simon & Schuster 2002)(1997).

¹⁵ DuBois, *supra* note 1.

¹⁶ See J. CLAY SMITH JR., *EMANCIPATION, THE MAKING OF THE BLACK LAWYER, 1844-1944*, 5 (University of Pennsylvania Press 1993)

¹⁷ See Landry, *supra* note 13, at 24 (“In some states, mulattoes clearly predominated among free blacks.”).

¹⁸ See *id.* (noting the advantages that were “often brought” to the offspring of mulattoes, who were primarily the offspring of slave women and white masters).

¹⁹ See Smith, *supra* note 16, at 2. Macon Bolling Allen was the first recorded licensed African American lawyer in the United States. Macon B. Allen was born A. Macon Bolling when he was born a free Negro in Indiana in 1816. He was actually a mulatto (a first generation offspring of a Negro and a white). However, mulatto was not listed as a race on early census forms. His first job in Indiana was that of a schoolteacher. He was a self-taught lawyer who gained his knowledge and legal skills by serving as an apprentice and law clerk to practicing white lawyers in the pre-Civil War era. *Id.* at 8.

²⁰ See *id.* at 8 (noting that by World War I, centralized boards of bar examiners existed in thirty-

were trained by experienced practitioners and reading the law in the offices of those practitioners. All that was necessary to receive an apprenticeship was an elementary education.²¹ In the year 1800 persons wanting to enter the legal profession were required to study law for a proscribed period of time but by the end of the Civil War only two states, North Carolina and Ohio, maintained even that requirement.²² Instead, by the end of the war, in most jurisdictions a person could be admitted to the bar upon a showing of good moral character and being a voter.²³

The founding of the American Bar Association in 1878 began a movement toward increasing the educational requirements to qualify for admission to the bar and the centralization of admissions standards to the Bar.²⁴ Approximately, thirty eight years later, in 1915 the ABA began to push increased standards for admission to the bar in both the North and the South and the imposition of these increased standards began to have an impact on the number of “Negroes” practicing law.²⁵ Even those that met the increased standards faced significant barriers.²⁶ By 1923 the number of Black people enrolled in law schools from Black colleges and high schools began to decline significantly.²⁷

Then in 1928, the image of the “Negro Lawyer” began to emerge as a product of the White Media giant. The Amos ‘n’ Andy show began to depict an image of the “Negro Lawyer” as inept, incompetent and dishonest which affected societal perceptions of the Negro Lawyer.²⁸ This show aired for many years and ultimately helped solidify the demeaning image of the Negro Lawyer.²⁹ Certainly with the declining numbers of Negro Lawyers and limited access to media the Negro Lawyer was powerless to fight back the mischaracterization of the Negro Lawyer by white media giants.

seven jurisdictions, but no state required attendance at law school).

²¹ *See id.* at 7 (“After the Civil War, there is little doubt, though there is no definitive study on the point, that blacks, like whites, entered the legal profession with grade-school educations.”).

²² *Id.* (listing North Carolina and Ohio as the only states “to retain the requirement [to study law for a proscribed period] even nominally.”).

²³ *Id.* at 9. (“In many Northern and Southern jurisdictions, a person could be admitted to the bar upon merely showing ‘good moral character [and] being a voter.’”).

²⁴ *Id.* at 8 (acknowledging the centralization of admission standards after the founding of the American Bar Association).

²⁵ *Id.* at 9 (noting the impact the admission standards had on the number of blacks practicing).

²⁶ *See id.* It was reported that “A black man ‘in the good graces of white folks . . . could get admitted,’” which suggested that blacks who spoke out against the status quo were not qualified applicants for admission to the Bar. *Id.* As African Americans were admitted to the bar they began to train other African Americans to practice law. *Id.*

²⁷ *Id.* at 6 (recognizing the decline in black student enrollees).

²⁸ *Id.* at 5 (noting that the character of Calhoun “stigmatized the black lawyer among both blacks and whites.”).

²⁹ *See id.* (“The ‘Amos ‘n’ Andy’ show aired for many years[.]”).

Despite declining numbers and mainstream media perceptions of the Negro lawyer, a number of Black law schools emerged during this time, as well as free standing law schools in urban areas that offered evening programs to Negroes and other ethnic minorities.³⁰ The Black law schools were graduating Negro lawyers who went on to have successful legal careers, while the evening programs that admitted Blacks allowed them the opportunity to work to support their families while earning a graduate degree.³¹

The American Bar Association and its auxiliary organization, the American Association of Law Schools, were critical of these programs.³² These “academic lawyers” stressed the need to “rid society of the night schools to ensure competent public-spirited and ethical lawyers.”³³ But other prominent members of the ABA were blunter about their objectives in closing down these urban law schools with their night programs. The legal profession according to them was “a means by which Jews, immigrants, and city-dwellers might undermine the American way of life.”³⁴

This was a lie; the Negro Lawyer had accomplished a great deal. For example, during the Reconstruction Years after the Civil War there were a significant number of educated Black Politicians.³⁵ Ten of the twenty-two Black politicians who served in Congress had attended college and five of them were lawyers.³⁶ But Negro lawyers faced being called “nigger” in the courtroom by Judges, denied law offices in any place other than our own community, and their clients were often poor, uneducated ex slaves who could not afford the fees.³⁷ They were also denied membership in state bar associations and therefore lacked the contacts helpful in getting things done.³⁸ After witnessing the disrespect perpetrated upon the Negro Lawyer, even within the Black community – the Negro Lawyer was often not

³⁰ See *id.* at 41–2 (listing some of the state and private night law schools).

³¹ See *id.* (stating that a number of night law school graduates “entered the legal profession and served the bar and black community with distinction.”).

³² See *id.* at 42 (“The ABA moved to close several urban freestanding law schools, which were attended by minorities in significant numbers.”).

³³ *Id.*

³⁴ *Id.*

³⁵ Lerone Bennett Jr., *Black Power in Dixie*, EBONY 88 (July 1962) (“[M]ost of the major Negro leaders during Reconstruction had more formal education than Abraham Lincoln.”).

³⁶ *Id.*

³⁷ See Smith, *supra* note 16, at 15 (“Word of mistreatment of black lawyers by whites naturally reached the black community and caused potential clients to doubt the efficacy of black professionals.”).

³⁸ See *id.* at xi (recognizing Macon Bolling Allen’s admission to the bar in 1844 as overcoming “widespread discrimination among state bar associations.”).

accepted.³⁹

The Negro Lawyer, though striving, was disrespected and disenfranchised. In 1928 the average income of the Negro Lawyer was \$1500 a year while the average salary of the Negro dentist was \$2000 and \$2500 for the Negro doctor.⁴⁰ The income of the Negro Lawyer was so low that he often had to hold a second job.⁴¹

Alain Locke⁴² recognized that in order to communicate persuasively with the majority race, the New Negro had to state its claim for assistance from liberators, friends and benefactors by beginning from their frame of reference: the traditional and stereotypical view of the “Old Negro.”⁴³

II. CHARLES HAMILTON HOUSTON PERIOD – “THE NEW NEGRO LAWYER”

And so, the “New Negro Lawyer” distanced himself from the Old Negro Lawyer, critical of their methods and professional standards.⁴⁴ Charles Hamilton Houston⁴⁵ said:

³⁹ See *id.* at 4 (noting that Black lawyers occupied a “less-favored position within the social structure” of the Black community as a whole).

⁴⁰ Landry, *supra* note 13, at 51 (listing the average incomes of Black lawyers, Black dentists, and Black doctors in 1928).

⁴¹ *Id.* (characterizing the fact that Black lawyers frequently had to hold second jobs in 1928 as “not surprising.”)

⁴² A professor of philosophy whose theory of “cultural pluralism” valued the uniqueness of different styles and values available within a democratic society. He was a Black intellectual and leading promoter and interpreter of the artistic and cultural contributions of Blacks to American life. His father had obtained a degree in law from Howard University, and then became a mail clerk in Philadelphia. See Encyclopedia of World Biography, Alain Locke, <http://www.notablebiographies.com/Ki-Lo/Locke-Alain.html#1xzz0pZRmtRHY> (last visited July 15, 2010).

⁴³ ALAIN LEROY LOCKE, *THE NEW NEGRO*, 3-16 (Touchstone 1997) (1925). Alain Locke said of the plight of the Old Negro and the birth of the New Negro:

The Old Negro, we must remember, was a creature of moral debate and historical controversy. His has been a stock figure perpetuated as an historical fiction partly in innocent sentimentalism, partly in deliberate reactionism. The Negro himself has contributed his share to this through a sort of protective social mimicry forced upon him by the adverse circumstances of dependence. So for generations in the mind of America, the Negro has been more of a formula than a human being—something to be argued about, condemned or defended, to be ‘kept down,’ or ‘in his place,’ or ‘helped up,’ to be worried with or worried over, harassed or patronized, a social bogey or a social burden. The thinking Negro even has been induced to share this same general attitude, to focus his attention on controversial issues, to see himself in the distorted perspective of a social problem. His shadow, so to speak, has been more real to him than his personality. Through having had to appeal from the unjust stereotypes of his oppressors and traducers to those of his liberators, friends and benefactors he has had to subscribe to the traditional positions from which his case has been viewed. Little true social or self-understanding has or could come from such a situation.

Id. at 3-4.

⁴⁴ See Preliminary Report from Charles Hamilton Houston, Tentative Findings Re Negro Lawyers (Feb. 1928), available at <http://www.law.cornell.edu/houston/survey.htm> (“In general the younger men have a higher conception of the privileges and responsibilities of the lawyer than the older men.”).

⁴⁵ Dean of Howard University Law School. *Id.*

The truth is that the older Negro lawyer is not a student. What practice he has does not require that he should be. The major portion of his work involves only a few, very definite, stereotyped situations[.]⁴⁶

The self-titled “New Negro Lawyer” began defining themselves. Distinguishing themselves from their predecessors by doing “sustained civil rights work [and] by establishing successful courtroom-based practices” instead of attempting to use political office and political friends to soften the blows of racism and discrimination.⁴⁷ They saw themselves as representatives of the aspirations of their people.⁴⁸

Houston became the Dean of Howard University School of Law. At the time of his deanship there was pressure from the American Bar Association and the Association of American Law Schools to increase admission standards. Howard University Law School survived the imposition of new ABA standards but that survival came at a price.⁴⁹

Dean Houston’s goal upon becoming Dean was to increase the admission standards at Howard and to close the evening law program and discontinue the special and unclassified admissions categories.⁵⁰ Public outrage followed and these moves were highly controversial among students and alumni.⁵¹ By 1930, Howard University School of Law had made the shift from the part-time or mixed group to exclusively full-time work.⁵² This meant that the law school no longer operated a part time evening program. And in 1930 the benevolent Committee on Legal Education recommended, and the American Bar Association approved and elected, the Howard University School of Law to membership, largely at the expense of those urban dwellers who so desperately needed the evening program.⁵³

Although Houston distanced himself and his institution from the urban

⁴⁶ *Id.*

⁴⁷ Kenneth W. Mack, *Representing the Race: The Transformation of Civil Rights Lawyering and Politics, 1920-1955* Chapter Two (Draft 2006), available at <http://cdn.law.ucla.edu/SiteCollectionDocuments/workshops%20and%20colloquia/mack.pdf>.

⁴⁸ *Id.* (“These New Negro lawyers began to think of themselves as not only representing clients, but also as representatives of the aspirations of an entire race.”).

⁴⁹ See Smith, *supra* note 16, at 49 (noting that Houston’s new admission requirements may have been “too ambitious,” because the supply of black applicants did not match the law school’s demands, which led to admission practices that appeared to be instituted solely for purposes of generating revenue).

⁵⁰ *Id.* (discussing Houston’s preparations).

⁵¹ *Id.* (“Even the white press opposed Houston’s changes[.]”).

⁵² *Id.* (recognizing that this “shift” meant that the law school no longer operated a part-time evening program).

⁵³ *Id.* (discussing Howard University School of Law’s membership).

dwellers who would be lawyers he had positioned the Negro Lawyer to hold a more respected status within the legal community. Arguably the most significant distinction between the old and the new Negro Lawyer is that the new Negro Lawyer began to define not only himself but also the strivings of his people within the legal community. The Civil Rights Movement was the vehicle that gave the Negro and the Negro Lawyer the opportunity to be redefined. Houston is often referred to as the architect of this movement. He became the head of the legal division of the NAACP and in 1934, engineered a legal strategy that attacked the Plessy v. Ferguson's⁵⁴ separate but equal legal doctrine by showing instances where schools were separate but not equal.⁵⁵ But Houston was more than Dean of Howard Law School, or the architect of the civil rights movement, he represented the first opportunity for Negro Lawyers to define themselves.⁵⁶

In redefining the Negro Lawyer Houston said:

In general the younger men have a higher conception of the privileges and responsibilities of the lawyer In every city visited they are making attempts for closer mutual association They are combining together in firms for better service and strength in the practice. They are looking all their problems squarely in the face and are not minimizing one bit the difficulties in front of them, but one has to be struck by their confidence and enthusiasm. On the whole they are studying and accumulating experience.⁵⁷

The new Negro Lawyer was to be educated to consider the lawyer as the defender of rights and an officer of the court for the protection of the community. These men were to take up the cause of civil rights one case at a time, attacking cases of discrimination and oppression with or without a

⁵⁴ 163 U.S. 537, 540 (1896).

⁵⁵ *Missouri Ex Rel Gaines v. Canada*, 305 U.S. 337, 339 (1938). Gaines was the first major victory won in the U.S. Supreme Court by the National Association for the Advancement of Colored People in its campaign against racial segregation in public education.

⁵⁶ *See id.* In October 1934, Houston recommended to the NAACP board that it concentrate its legal efforts on ending discrimination in education and focus first on segregation in the graduate and professional schools of state universities. The complete absence of graduate and professional opportunities in many states made the inequality dramatic and impossible to dismiss. Justice Charles Evans Hughes struck down a Missouri scheme whereby the state excluded African Americans from its state university's law school and paid their tuition to attend a public law school in a contiguous state (there was no law school at Lincoln University, the state's black public college). *Id.* at 350. Hughes held that this violated the Fourteenth Amendment's guarantee of equal protection of the law. *Id.* The *Gaines* case thus became a pivotal event in the NAACP's campaign to overturn the separate but equal standard. While the Court did not repudiate segregation, the case signaled a new urgency in evaluating the standard. *Id.* at 349–52.

⁵⁷ Houston, *supra* note 44.

fee.⁵⁸

But while the “New Negro Lawyer” was making a name for himself, there were many urban dwellers; Negro Lawyers who may not have been Harvard, Yale or Howard educated but they were fighting against oppression one case at a time. And these lawyers still weren’t being treated well. Most Black lawyers entering into the profession were still renting office space in a Black business section of town, developing a clientele and establishing a method of self training.⁵⁹ Entry into law practice was difficult because of the limited economic potential of their clients. Their “bread-and-butter” in the legal community was criminal defense.⁶⁰ These lawyers also handled personal injury cases, domestic relations, real estate, wills and estates, and debt collection.⁶¹ But they weren’t handling corporate, tax and commercial litigation.

III. THE THURGOOD MARSHALL PERIOD - THE BENEFICIARIES

By the 1950s American law schools were still approximately 99% White.⁶² Out of a total of 221,605 lawyers there were an estimated 1,450 Black attorneys in 1950.⁶³ This means that 0.65% of the legal profession was Black. In 1960, out of a total of 285,933 lawyers there were 2,180 Black lawyers or 0.76% of the profession.⁶⁴ From 1964–1965 Black people made up 1.3% of national law school enrollments.⁶⁵ Prior to 1968, there were “about 200 Black people graduating from law school annually.”⁶⁶

In the 1950s and early 1960s, barriers to racial and ethnic inclusion in legal education were formidable. But the Civil Rights Movement was “at its height,” and the Civil Rights Act of 1964 had just been approved by

⁵⁸ See *id.* (“There has never been a case of discrimination or oppression brought to the attention of these men which they have not attacked with or without fee.”).

⁵⁹ Mack, *supra* note 47, at 7 (describing this as what “entry into the profession” meant for most black lawyers).

⁶⁰ *Id.*

⁶¹ *Id.* (listing the areas of law black lawyers handled during the late 1920s).

⁶² William C. Kidder, *The Struggle for Access from Sweat to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 6 (2003) (stating that it is “safe to conclude” that American law schools were approximately 99% White during this period).

⁶³ *Id.* (citing Ralph R. Smith, *Great Expectations and Dubious Results: A Pessimistic Prognosis for the Black Lawyer*, 7 BLACK L.J. 82, 85 n.8 (1981) and CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995, at 1 tbl. 1 (1999)).

⁶⁴ *Id.* (citing Harry T. Edwards, *A New Role for the Black Law Graduate—A Reality or an Illusion?*, 69 MICH. L. REV. 1407, 1410 (1971) and CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995, at 1 tbl. 1 (1999)).

⁶⁵ *Id.* at 7 (citing Harry Groves, *Report on the Minority Groups Project, in Ass’n of Am. Law Schools, 1965 ANNUAL MEETING PROCEEDINGS PART I* 171 (1965)).

⁶⁶ *Id.*

Congress and signed into law by President Johnson.⁶⁷ Even before LSAT scores determined who got into which law school, American law schools, especially elite schools, were still almost completely segregated.⁶⁸

The 1967 revolts in Detroit and Newark and the riots that swept the nation after Martin Luther King, Jr. was killed in 1968 “ruptured long-established practices of exclusion in legal education and other institutions.”⁶⁹ “Strong” affirmative action in the form of race-conscious admissions took shape.⁷⁰ Affirmative action never implied admitting “unqualified” and “unprepared” students or the relaxation of academic standards. Even prior to affirmative action when White men maintained virtually total control over access to legal education admission standards were historically more relaxed.⁷¹ At the same time that affirmative action programs were taking root at American law schools, other demographic trends led to a law school application explosion.⁷²

Prior to this application explosion only a few law schools, including Ole Miss and Tulane, relied “extensively” on the LSAT in law school admissions decisions.⁷³ After the explosion many more law schools began using the LSAT extensively.⁷⁴ These schools likely adopted such policies as a pretense for maintaining segregation.⁷⁵ The more common practice had been to rely more heavily on the undergraduate GPA.⁷⁶

Justice Douglas in his dissenting opinion in the *DeFunis* case wrote that racial bias in standardized testing might be an adequate justification for affirmative action and opined, “The key to the problem is consideration of such applications [Black applicants] in a racially neutral way. Abolition of the LSAT would be a start.”⁷⁷

The idea of the Negro Lawyer was slipping away. These people weren’t

⁶⁷ *Id.* at 9.

⁶⁸ *Id.* (acknowledging the segregation during this time).

⁶⁹ *Id.* at 12.

⁷⁰ *Id.*

⁷¹ *Id.* at 19 (“[A]dmission standards were relatively more relaxed during the 1950s and early 1960s[.]”).

⁷² *Id.* at 14 (noting that affirmative action programs were simultaneous with trends to transform the structure of opportunity to attend law schools).

⁷³ *Id.* at 17.

⁷⁴ *Id.* (describing the LSAT as “the centerpiece of the admissions process because schools were looking for an efficient method for sorting thousands of applications.”).

⁷⁵ *Id.* This statement “is consistent with other pro-segregation maneuvers by Southern universities during that period.” *Id.*

⁷⁶ *Id.* (“[A]t that time . . . schools weigh[ed] undergraduate grade point averages (UGPA) more heavily than the LSAT”).

⁷⁷ *DeFunis v. Odegaard*, 416 U.S. 312, 340 (1974)(Douglas, J., dissenting) (alteration added) (emphasis in original).

Negroes anymore. Demanding admission into the legal community as beneficiaries of the work of the “New Negro Lawyer,” they were saying it loud: “I’m Black and I’m Proud.” This was the height of the Marshall Period. The Black Lawyer had been birthed.

IV. THE OBAMA PERIOD – THE TALENTED TENTH

While the legal profession for Black lawyers has changed dramatically some aspects of the profession have just as dramatically stayed the same. In the 1970s at the height of the Black Power movement there were about 3,000 Black lawyers. Although we now number 20,000, those numbers are dwindling and the legal profession is still approximately 90 percent white.⁷⁸

Today the scope of our expertise has broadened, from “social justice to defending corporate executives to negotiating multimillion-dollar business deals.”⁷⁹ We are law school professors and the U.S. Attorney General, we are in the United States Supreme Court and finally, the Whitehouse.⁸⁰

Yet as we stood up before the millions of Americans from the lofty perch of the Halls of Congress one cried out “You lie” and as if to remind us of our step-child status, the prominent and Black, Henry Louis Gates, Alphonse Fletcher University Professor and the Director of the W.E.B. DuBois Institute for African and African American Research at Harvard University, while protesting being accused of breaking into his own home was arrested and charged with disorderly conduct.⁸¹ And after suffering the stripes of disrespect was called upon to forgive, work it out and have a drink with the very symbol of our oppression.

In fact, in the year 2000, of the 4,400 partners in New York’s seventy seven largest firms, only 34 were Black, in Chicago of the 2,990 partners in Chicago’s forty biggest firms 46 were Black and in Washington DC approximately 35 partners out of 2,000 were Black.⁸² A 2006 survey of

⁷⁸ SOC’Y OF AMERICAN LAW TEACHERS, DISCRIMINATION IN THE LEGAL PROFESSION, RESPONSE TO THE SECOND REPORT OF THE UNITED STATES TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, 2 (2008) (“Specifically, the ABA reports that minority representation among lawyers is about 9.7 percent[.]”).

⁷⁹ Editors of Black Enterprise, *America’s Top Black Lawyers*, BLACK ENTERPRISE Nov. 1, 2003, available at <http://www.allbusiness.com/specialty-businesses/minority-owned-businesses/677022-1.html>.

⁸⁰ See *id.* (providing a list of “some of the most coveted [black] attorneys on earth”).

⁸¹ Lawrence D. Bobo, *Obama and the Burden of Race*, FOCUS, Nov. 2009, at 4, available at http://www.jointcenter.org/publications_recent_publications/focus_magazine/2009__1/november_december/obama_and_the_burden_of_race (discussing the racial challenges Obama has faced on the path to, and during, his Presidency). See also <http://www.fas.harvard.edu/~amciv/faculty/gates.shtml>.

⁸² Edward Rogoff and Derryl Zimmerman, *The Trials of Black Lawyers* AMERICAN LEGACY, 44,

1,500 law firms revealed that of the 60,000 partners at these firms only 1.5 percent were Black.⁸³ In 2005 Black enrollment in law school dropped “more than 10% from the previous year.”⁸⁴

Some blame this on the attack on affirmative action. Others say that the reasons can be traced back to slavery, segregation, economic restrictions and unequal access to quality education.⁸⁵ While any one of these factors represents insurmountable odds some of us are still getting through. These represent our “Talented Tenth.”

Henry Lyman Morehouse⁸⁶ first suggested the concept of the “Talented Tenth Man” when the focus on industrial education for the Negro was being hotly discussed.⁸⁷ Morehouse spoke of this Talented Tenth man as an “uncrowned king in his sphere[,]” one who is a “recognized leader in his profession and the leader of public opinion.”⁸⁸ This man, Morehouse said, was one whom “many look [to] for suggestion and advice in important matters.”⁸⁹ In discussing what was required by society in educating this talented tenth man Morehouse said, “not to make proper provision for the high education of [this] man . . . is to dwarf the tree that has in it the potency of a grand oak.”⁹⁰ The term The Talented Tenth was used to describe the best and the brightest of the Negro community but the term has never been static.⁹¹

W.E.B. DuBois constructed the theory of the Talented Tenth, describing him as the exceptional Negro man who would save the Negro race.⁹² According to DuBois these men would become group leaders, who were able to shape the ideals of their community by directing its thoughts and

46 (Winter 2000) (listing the statistics of black law partners in big cities).

⁸³ Posting of HelpMe123 to <http://temporaryattorney.blogspot.com/2007/09/jim-crow-legal-profession.html> (Sept. 18, 2007, 17:40 EST) (stating the statistics from the 2006 survey of the private law firm workforce, conducted by the National Association for Legal Career Professionals).

⁸⁴ See Soc’y of American Law Teachers Report, *supra* note 78.

⁸⁵ See Rogoff and Zimmerman, *supra* note 82 (“The reasons for the paucity of African-American partners, its causes, and future trends are complex.”).

⁸⁶ Morehouse was a liberal white Northerner and Secretary for the American Baptist Home Missionary Society.

⁸⁷ See Henry Lyman Morehouse, *The Talented Tenth*, in 50 THE AMERICAN MISSIONARY 182-83 (June 1896), available at <http://www.webdubois.org/MorehouseTalentedTenth.html> (“Morehouse’s essay was intended to counterbalance what some at the time believed was a predominant focus on industrial education for African Americans.”).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* (stating that “a mere common education” will not disclose the “uncommon powers” of Talented Tenth men, but that they need the “test of the best.”).

⁹² See W.E. BURGHARDT DUBOIS, THE SOULS OF BLACK FOLKS: ESSAYS AND SKETCHES 105 (A.C. McClurg & Co. 1907) (stating that wasting the Talented Tenth’s energy could not be spared if the South was “to catch up with civilization.”)

social movements.⁹³

Then Alain Locke expanded the idea of the Talented Tenth positing that the talented tenth would rise as an intellectual group of minorities that would lead white America to accept their Black counterparts as equals through the arts, specifically literature and music.⁹⁴ He broadened the definition of the talented tenth away from Black Nationalism to Multiculturalism and brought that concept to the world stage.⁹⁵

In later years after witnessing the rise of the talented tenth and the Black middle class DuBois retooled his original construct of the Talented Tenth. Of this Talented Tenth Man he said:

A Negro of talent, education, and money may not live in a Negro ghetto; he may not attend a Negro church, and he may welcome whites to his home and table He may be elected to public office with the help of white votes and be referred to in the public press without being carefully designated as 'colored.' But such cases will be exceptional.⁹⁶

It is exceptional and the exception. Having a President of the United State of America who is Black allows us to demonstrate to the world the capacity of a Black man. The danger, though, is that it convinces others that we are now in a post racial America and that Black people are no longer underserved and unrepresented. This poses a particular threat within the legal profession because lawyers of color still have many challenges to overcome. Our numbers are dwindling, students desiring to become lawyers still face the racial obstacle of the LSAT exam and major financial hurdles and upon becoming lawyers, we are still not hired into mainstream law firms in respectable numbers. Today the Black Lawyer far surpasses the vision of those that came before him. Limited by racism we dared to think that he could uplift his race. Today he uplifts the Nation. Yet the work is not finished, "the Thing" is yet unattained.

⁹³ W.E.B. DuBois, *The Talented Tenth* (Sept. 1903) available at <http://teaching.americanhistory.org/library/index.asp?document=174> ("He is, as he ought to be, the group leader, the man who sets the ideals of the community where he lives, directs its thoughts and heads its social movements.")

⁹⁴ See Ernest D. Mason, *Alain Locke on Race and Race Relations*, in 40 *PHYLON* 342, 350 (1979) ("As a race group we are at the critical stage where we are releasing creative artistic talent in excess of our group ability to understand and support it.")

⁹⁵ Alain Locke's promotion of the Harlem Renaissance was the practical application of the Talented Tenth theory and propelled the careers of Black American authors and poets such as Langston Hughes, Claude McKay, Countee Cullen and Zora Neale Hurston. Langston Hughes was the first Black author to make a living solely from his writing.

⁹⁶ W.E.B. DuBois, *Negroes and the Crisis of Capitalism in the United States*, 54 *Monthly Rev.* Apr. 2003, available at <http://www.monthlyreview.org/0403dubois.html>.

