UNIVERSITY OF CALIFORNIA, SAN DIEGO

# Legal Subversives: African American Lawyers in the Jim Crow South

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by

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The Dissertation of David Kenneth Pye is approved, and it is acceptable in quality and form for publication on microfilm and electronically:

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TABLE OF CONTENTS

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## PUBLICATIONS

"Complex Relations: An African-American Lawyer Navigates Jim Crow Atlanta," *Georgia Historical Quarterly*, Winter 2008.

Review of *Black, Brown, Yellow, and Left: Radical Activism in Los Angeles*, by Laura Pulido, in *The Journal of San Diego History*, Fall 2009.

Review of *The Great Black Way: L.A. in the 1940s and the Lost African American Renaissance*, by R.J. Smith, in *The Journal of San Diego History*, Summer 2008.

Review of *I am a Man! Race, Manhood, and the Civil Rights Movement*, by Steve Estes, in *The Southern Historian, Spring 2007.*

Review of *White Women, Rape, and the Power of Race in Virginia, 1900- 1960*, by Lisa Dorr, in *The Southern Historian, Spring 2006.*

Review of *My Face is Black is True: Callie House and the Struggle for Ex-Slave Reparations*, by Mary Frances Berry, in the *Georgia Historical Quarterly*, Summer 2006.

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ABSTRACT OF THE DISSERTATION

Legal Subversives: African American Lawyers in the Jim Crow South

by

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Professor Michael E. Parrish, Chair

This dissertation addresses one major theme: the nature of African American lawyers' work during Jim Crow, when the very system that created the need for their existence relied upon the myth of the innate inferiority of the race. Rather than focusing on well-known lawyers, "Legal Subversives" seeks to include lesser-known figures and local lawyers into the historiography of African Americans and the law. The inability of African Americans to enjoy access to legal educations within their states created a chasm between the African American masses and the proper level of legal representation required to address the needs of a population not long emancipated from enslavement. Previous books on lawyers have focused exclusively on elite lawyers, perhaps because of

the easier availability of source material, and do not provide an adequate picture of the African American quest to attain professional credentials during Jim Crow.

African American lawyers employed strategies in the Jim Crow era that provide evidence of paths not taken by the National Association for the Advancement of Colored People (NAACP) and the mainstream, organized civil rights movement following *Brown v. Board of Education* in 1954. After *Brown*, civil rights became synonymous with Fourteenth Amendment equal protection claims. But local lawyers' legal approaches demonstrate a much broader conception of "civil rights" than would become the norm in later decades.

"Legal Subversives" is also an attempt to engage discussions of the role African American professionals, in general, held during the period of legalized discrimination based on race. Lawyers operated within a different situation than other professionals; they often had to compete directly with white adversaries. Most professionals could retreat into the segregated community, avoiding regular contact with hostile whites; in contrast, lawyers had to protect client interests in court before white judges and juries. Lawyers complicate our narrative of the professional because they held an ambivalent position among various factions, white and African American, in southern communities.

# Chapter 1 INTRODUCTION

This dissertation, *Legal Subversives: African American Lawyers in the Jim Crow South*, explores the lives and careers of African American attorneys. The goal is to use these African American professionals' experiences as a window into the nature of racial segregation. Segregation was less a means of excluding African Americans from southern life, than a way of incorporating them in a way suitable in the minds of most southern whites. I arrive at the conclusion that actually keeping the races separate was futile and there were contradictions that daily questioned the legitimacy of the system. By their very presence within the mainstream legal system, African American lawyers challenged the myth of innate black inferiority.

In general, *Legal Subversives* addresses one major theme: the nature of lawyers' work during Jim Crow, when the very system that created the need for their existence relied upon the myth of the innate inferiority of the race. The overall objective of this dissertation is to demonstrate, then, how these lawyers militated against the Southern social order from a position fraught with ambiguity. In the decades following the Redemption of the region by white Democrats in 1877, the law became a weapon used to subjugate the masses of people. African Americans faced the brunt of this legal assault in the form of Jim Crow laws that ostensibly kept the races separate but in fact did much more. The races were to remain not only physically separated by law but also unequal in fact. But within this social space, one clearly defined in each state through Jim Crow decrees, African American professionals found a place to prove a lie of the system.

Rather than focusing on well-known lawyers, *Legal Subversives* seeks to include lesser-known figures into the historiography of African Americans and the law. The inability of African Americans to enjoy access to legal educations within their states created a chasm between the African American populace and the proper level of legal representation required to address the needs of a population not long emancipated from enslavement. In chapter 2, "Becoming Black Lawyers," I examine the obstacles the majority of African Americans confronted aspiring to enter the legal profession and attempting to earn a living as lawyers. Members of the African American elite enjoyed benefits unavailable to other legal practitioners. To elites, having to attend law school in the North or the District of Columbia was less of a burden, if any, because their families could provide resources to sustain the experience. For most African American lawyers and legal aspirants, attempts to secure a legal education, join the bar, and earn a living, were more precarious. Previous books on lawyers have focused exclusively on elite lawyers, perhaps because of the easier availability of source material, and do not provide an adequate representation of the African American quest to attain professional credentials during Jim Crow.[1]

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[1] Richard Kluger *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Knopf, 1976); Genna Rae McNeil *Groundwork: Charles Hamilton Houston and the Struggle For Civil Rights* (Philadelphia: University of Pennsylvania Press, 1983); Aaron C. Porter, "The Career of a Professional Institution: A Study of Norris, Schmidt, Green, Harris, Higginbotham, and Associates," (unpub. Ph.D. diss., University of Pennsylvania, 1993); Mark Tushnet *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (New York : Oxford University Press, 1994); Juan Williams *Thurgood Marshall: American Revolutionary* (New York: Times Books, 1998); Mack, Kenneth. "A Social History of Everyday Practice: Sadie T. M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925-60," 87 *Cornell Law Review* 1405 (2002); Judith Kirkpatrick *There When we Needed Him: Wiley Austin Branton, Civil Rights Warrior*

African American lawyers, though relatively few in number, provide important insight into how African Americans militated against Jim Crow segregation and white supremacy in the South. Scholars have errantly relied too long on the DuBois-Washington dichotomy to explain the choices open for challenges to Jim Crow. In this paradigm, blacks either accepted DuBois's integrationist stance or embraced the accomodationist position of Washington. Lawyers add some complexity to this dichotomy because they, working within the white-dominated legal system, could challenge Jim Crow from the inside. Though living within the African American community, receiving their education largely at black schools, and serving a black clientele, these lawyers still had to perform their functions in the courts, jails, and boardrooms of southern white men.

Lawyers, perhaps more than any other professional class, employed in their dealings with the southern race problem what Leon Litwack refers to as "practical conservatism." Litwack opines that during Jim Crow, African American leaders, "often felt compelled to play the subordinate roles whites expected of them, embracing a practical conservatism designed to advance the interests of the race in a rigidly repressive society that offered few options."[2] This concept of "practical conservatism" attempts to alleviate the intrinsic problems contemporary scholars have with the politically-loaded term "accomodationism" traditionally employed to describe the black leadership during the Age of Booker T. Washington. "Practical conservatism" recognizes the restrictions African American leaders faced in the South, while acknowledging their agency in

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(Fayetteville: University of Arkansas Press, 2007).

[2] Leon Litwack *Trouble in Mind: Black Southerners in the Age of Jim Crow* (New York: Knopf, 1998), 355.

working within the system to affect change. This is not to argue that the lawyers were openly obsequious around whites, but that they operated within the legal system without affronting officials if possible.

Chapter 3, "Before Civil Rights Were in Vogue," explores some of the strategies used by lawyers in various localities. In sum, I show lawyers were somewhere in the middle of the accommodation-agitation dichotomy, employing a close approximation to Litwack's "practical conservatism." Lawyers were the ultimate tricksters using their wits to outsmart their oppressors. Their victories, and defeats in some instances, provide instruction on how African Americans survived Jim Crow society. Again, we will survey lawyers who have not been highlighted in the literature. We will also explore the strategies employed by attorneys in smaller urban and rural areas: Selma, Alabama; Jacksonville, Florida; and Elaine, Arkansas.

Lawyers also employed strategies in the Jim Crow era that provide evidence of strategies not taken by the National Association for the Advancement of Colored People (NAACP) and the mainstream, organized civil rights movement following *Brown v. Board of Education* in 1954. After *Brown* civil rights became synonymous with Fourteenth Amendment equal protection claims. Minorities and women came to perceive of their rights primarily in terms of their success in gaining access to mainstream institutions. In the Jim Crow era, perhaps out of necessity, lawyers and clients had a more expansive, less well-defined, idea of civil rights. Integrating mainstream institutions was not central to these concerns. For example, Arkansas sharecroppers had little immediate need to attend the University of Arkansas; their struggle was a daily one for mere existence.

Jacquelyn Hall has challenged historians to investigate the totality of movements, experiences, and battles, that preceded, included, and followed, the traditional civil rights era.[3] My work explores this "long Civil Rights Movement" and the role African American professionals occupied within Jim Crow society.[4] I look at legal cases that preceded *Brown v. Board of Education* (1954) to ascertain the arguments lawyers forwarded, the strategies employed, the consequences these cases had upon the subsequent litigation culminating in *Brown*, and the miscalculations ubiquitous to complex legal machinations. The intent is to begin to accent the specific African American legal culture that culminated in *Brown.* This legal culture was informed by and reacted to various alternative strategies open to the community in its struggle for racial equality--communism, legalism, accommodation, and integration, to name a few.

"Becoming Civil Rights Lawyers" also illuminates differences between southern communities. There is a consensus that the slaves created a semi-autonomous community complete with rules, customs, and sanctions. Emancipation furthered this community development with the founding of mutual aid societies, banks, churches, and schools. Historians have correctly demonstrated the agency African Americans held during and following their enslavement in the South. In this dissertation, I attempt to begin to investigate the differences among African American communities. First, I recognize the existence of Old South and New South cities; New Orleans being old and

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[3] Jacquelyn Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the Past," *The Journal of American History,* Vol. 91, No. 4 (Mar., 2005), p. 1233-1263.

[4] Hall was not the first to articulate a desire to investigate a long history of American civil rights. Others included, Robert Korstad and Nelson Lichtenstein, "Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement," *Journal of American History* 75 (December 1988), 786-811; Jeanne Theoharis, "Black Freedom Struggles: Re-imagining and Redefining the Fundamentals," *History Compass* 4 (Feb. 2006), 349-50.

Atlanta representing the new. In the Old South, whites and blacks lived intimately, on plantations or in towns. Meanwhile, in the New South cities, those that came to prominence after the Civil War, blacks and whites had less informal relations. In the New South, racial interaction occurred primarily during working hours. As a result, African American racial politics differed depending on the type of city in which they originated.

Lawyers, representing the interests of clients, promulgated legal narratives that white judges, and juries would hopefully find convincing. To achieve this objective, lawyers had to comprehend the local political context. It would not have been wise to forward an argument about racial equality to an early 20th century white male jury, for example. Instead, African American attorneys tailored legal narratives using their knowledge of the environment. "Becoming Civil Rights Lawyers" explores a few of these local strategies that differed depending on time and locale. This chapter engages a recent historiographical shift from the concept of community to neighborhood. Anthony Kaye best represents this new conceptual school that conceives of African American institutional development as more locally centered than previously thought.[5] In contrast to studies of black community development that portray African American institutions as basically similar, if not interchangeable, across the South, Kaye encourages us to consider how the historical actors perceived the world. To the slaves, argues Kaye, the world was their plantation and those similarly situated; slaves knew the people they lived with and those who lived in the proximity. Likewise, in the Jim Crow era, African

[5] Anthony E. Kaye *Joining Places: Slave Neighborhoods in the Old South* (Chapel Hill: University of North Carolina Press, 1997).

Americans lived their lives in particular locales and responded to white supremacy in a suitable fashion.

This dissertation also explores the complexity of the African American community that developed during the Jim Crow period. The South is an important site to study because it was here that African Americans had a concrete space to carve out their existence.[6] African American lawyers, in particular, had a central role in the community because they operated within a nexus between the African American community and the mainstream world. In the absence of a separate legal system for African Americans, lawyers, to a greater extent than did doctors and teachers, worked intimately among the white power structure in their locale. Lawyers also served as a bridge between the entrenched African American social elites, with their often contradictory goals, and the masses who lived more precarious lives. From this position, lawyers aided the successful prosecution of the southern Civil Rights Movement by speaking to and for the black masses and elites, while concomitantly making the legal system comprehensible to the entire community.

The ambiguous position some professionals held in southern society and the varied reception these professionals received among the community have not been recognized by historians. In Chapter 4, "We People Darker Than Blue," I explicitly begin the challenge to explore class differences within black America more fully. In my research on African American lawyers, it became apparent that lawyers were not automatically accorded social-political elite status despite their professional credentials.

[6] The North and West did include vestiges of racial segregation but the *de facto* segregation in these regions did not lead to the development of separate universities, banks, and insurance companies as occurred in the South.

In fact, it seems African American lawyers often experienced acute difficulties with entrenched elites in their communities. This elite was comprised of African Americans with similar social backgrounds, a group that in this post-*Brown* world has been somewhat supplanted by African Americans with ties to mainstream institutions and communities.

In chapter 5, "Things Fell Apart: The NAACP, Intra-Racial Interest Convergence and *Brown v. Board of Education*," I discuss the class conflict subtly present in a 1930s, NAACP murder trial in Loudon County, Virginia. I view this trial as a symbol of the failure of NAACP leaders to comprehend the need to unite their objectives with those of the poor black clients they found in the South. Instead, the NAACP focused on the professional objective of earning respect for African American lawyers, seemingly forgetting the goals of their clients. Later, in *Brown*, with Thurgood Marshall as head of the legal team, the NAACP would do better at representing client interests, or at least appearing to do so; but, in the early 1930s this was not the case. Scholars have ignored the unification of the black population around *Brown*, apparently assuming it a natural occurrence. By looking back at the early 1930s we gain a different perspective. Instead of a black community unified around racial integration, we witness the NAACP in some respects mishandling a criminal case because it did not have the full support of the community it sought to represent and it had goals contrary to the needs of its working class clients.

The chapter relies heavily on Derrick Bell's interest convergence theory that speculates the Civil Rights Movement owes a large part of its success to the convergence

of white liberal interests with those of the national government during the Cold War.[7] In "Things Fell Apart," I proffer we begin to consider the intra-racial convergence that aided this success, too. Africans Americans had to first unite around the issue of civil rights before white interests would become relevant.

Unlike their respect for ministers and physicians, African Americans did not always hold lawyers in high regard. Whether a result of the somewhat understandable belief that using an African American attorney could harm one's case, or the belief among African American elites that some lawyers were not members of their class, we must remember that lawyers have not traditionally been present in the highest echelons of African American leadership. In contrast to lawyers, ministers have always occupied positions at the top of African American society. During slavery, the black preacher could speak to the community with the blessings of the master bestowed upon him. Of course, the preacher was at times being clever, emphasizing sections of the Old Testament that dealt with the enslaved Israelites that made the master believe the sermon innocuous; meanwhile, the slaves would understand that the story ended with the Israelites getting freed through the hands of God. Any other black attempting to address groups of fellow slaves risked dire consequences. From the slavery era until the present, the community has perceived of ministers as leaders while lawyers have had to win the trust of African Americans and have only relatively recently done so. There are cases of lawyers, such as William Coleman, who have held some of the highest positions in American society, but their power does not arise out of the black community.

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[7] Derrick A. Bell, Jr., "*Brown v. Board of Education* and the Interest-Convergence Dilemma," 93 *Harvard Law Review,* v. 518 (1980).

*Legal Subversives: African American Lawyers in the Jim Crow South* is an attempt to enter discussions of the role African American professionals played during the period of legalized discrimination based on race. Currently, there have been studies of nurses, teachers, and physicians.[8] *Legal Subversives* adds lawyers to this scholarship with the belief that they provide a unique view of the world of Jim Crow America. In *Black Women in White: Racial Conflict and Cooperation in the Nursing Profession, 1890-1950,* Darlene Clark Hine demonstrates the gendered image of nurses during the late nineteenth and early twentieth century. African American nurses were to a large extent made necessary by white attempts to improve the health care of a community often perceived as lacking in basic knowledge of cleanliness. Nurses had support from the white community, which viewed the job as a subservient, domestic role that did not challenge Jim Crow ideals of African American inferiority. Meanwhile, Thomas Ward provides analysis on the privileged position physicians, mostly males, held in the community in *Black Physicians in the Jim Crow South.* Last, Adam Fairclough, in *A Class of Their Own: Black Teachers in the Segregated South*, provides a well-researched tome exploring how African American educators eradicated white teachers from Southern schools following Reconstruction and then maintained some degree of autonomy over the education of students prior to racial integration in the late twentieth century.

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[8] Darlene Clark Hine *Black Women in White: Racial Conflict and Cooperation in the Nursing Profession, 1890-1950 (*Bloomington, IN: Indiana University Press, 1989); Stephanie J. Shaw *What a Woman Ought to be and to do: Black Professional Women Workers During the Jim Crow Era* **(**Chicago: University of Chicago Press, 1996); Thomas J. Ward, Jr. *Black Physicians in the Jim Crow South* **(**Fayetteville, AK: The University of Arkansas Press, 2003); Adam Fairclough *A Class of Their Own: Black Teachers in the Segregated South (*Cambridge, MA: Belknap Press of Harvard University Press, 2007).

Lawyers operated within a different situation than these other professionals; they often had to compete directly with white adversaries. Most professionals could retreat into the segregated community, avoiding regular contact with hostile whites; in contrast, lawyers had to protect client interests in court in front of white judges and juries. The previous studies of professionals during the Jim Crow era have largely centered on the relationship of professionals with the African American masses and the white power structure. The masses were mired in poverty and it was the professional class that provided needed leadership in the form of racial uplift ideology. Meanwhile, the white power structure usually held an ambivalent attitude toward these professionals, but generally allowed them a certain degree of autonomy over the masses in exchange for ultimate white authority. Lawyers complicate this narrative because they held an ambivalent position among all of these factions.

This dissertation is also a work of legal history, so I would like to cover briefly the relevant shifts in the field. Legal history has undergone significant transformations since its inception as an academic discipline in the 1880s. Originally, lawyers dominated the field and they believed legal history was the linear progression of doctrines over time. There was apparently a box of all things legal from which historians were to draw the appropriate subjects of inquiry; anything outside this box being inappropriate.[9] We have since defined this formalistic legal history as internal legal history.

James Willard Hurst, writing primarily from the University of Wisconsin in the 1950s, questioned the utility of this internal legal history. Hurst believed that what

[9] Robert W. Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography," *Law and Society Review* vol. 10, no. 1, Fall 1975, 10.

distinguished American law had been our leaders' use of the law to facilitate national and regional progress, most prominently in the economic realm. As characterized by Michael Grossberg, Hurst and his Wisconsin-school of legal historians "created a new legal history by using empirical methods and behavioral theories to study the legal response to economic change."[10] The Wisconsin school sought to demonstrate that middle-class Americans could support the common weal through legal institutions. Hurst's works focused on state administrative law and used economic models, all the while demonstrating that "the law" was more than the traditional concepts accepted by legal formalists.

As is quite common in academia, no good scholarly approach goes unchallenged, and such was the case with the Wisconsin school. In the 1970s and 1980s there emerged neo-Wisconsin historians offering nuance to Hurst's theories. Central to this new perspective was the belief that Hurst failed to incorporate marginalized social groups and their issues into legal history. The young turks, influenced by the new social history, saw American legal culture as a byproduct of not only administrative agencies and formal rules, but also disparate, less recognized local agencies and informal customs. Neo-Wisconsin historians studied municipal courts, trial courts, criminal law, and private law, to locate people who did not often appear in the legislative records employed by Hurst.

The greater challenge to dominant legal discourse surfaced in the late-1970s when Marxist-deconstructionist legal scholars converged to create a movement to illuminate what they perceived as inherent inconsistencies in American legal doctrine. Labeling the

[10] Michael Grossberg, "Social History Update: "Fighting Faiths" and the Challenge of Legal History:" *Journal of Social History* 25 (Fall 1991) 191.

movement Critical Legal Studies (CLS), this group, mainly composed of white scholars from elite institutions, set out to "trash" the accepted forms of legal analysis. To CLS scholars the state created law to oppress the people; meanwhile, the people accepted the law to be inevitable, hence acquiescing in their subjugation. CLS attacked the notion of "rights" as absolutes, finding rights to be another creation by elites for the masses. Rights discourse, they believed, limited attempts to examine the infinite choices existing for people to express their needs and wants.

Minority scholars often took issue with what they interpreted as white, deconstructionist nihilism. To African American lawyers and legal historians, in particular, CLS failed to appreciate the concrete gains won by African American activists--Martin Luther King, Jr., comes to mind--employing traditional rights discourse. Moreover, minority scholars at elite institutions often believed their white liberal colleagues failed to appreciate the position of those at the societal bottom who could not afford to "trash" existing legal doctrine without providing ideas to supplant the system. Meeting in Wisconsin in the late 1980s, scholars of color decided to depart from the CLS camp and forge a separate movement that they thought reflected the needs of minority communities. This Critical Race Theory (CRT) movement embraced the idea that scholarship can be critical, especially in calling attention to the racial biases present in the law, while providing a framework to produce a more just future.

Today, legal historians fully embrace topics outside the traditional doctrinal box of "all things legal." This external historical approach has produced works that explore the effect of the law on racial minorities, women, children, and workers; we have also written about the role these same groups have had in transforming American law. This

dissertation attempts to build on the momentum of past historians by including in the literature, the story of African American lawyers in the Jim Crow South and their struggle to operate from an ambivalent position within their community.

## Methodology

This dissertation is not an exhaustive study of all African American lawyers in the South; we fortunately have J. Clay Smith's encyclopedic *Emancipation: The Making of the Black Lawyer* as a resource to locate African American lawyers from 1844-1944. But, as Paul Finkelman accurately describes it, *Emancipation* is research in search of a theme.[11] *Legal Subversives* is the first publication to present a history of African American lawyers thematically and focused on one particular region. This dissertation covers the role of lawyers in the South. On Northern lawyers, Kenneth Mack has produced some of the most informative articles on African American lawyers north of the District of Columbia.[12]

Evidence is always a problem for those attempting to write the stories of marginalized people. Historians privilege the written source above all others and there is a hierarchy even amongst written source material. African Americans traditionally have not held positions of power and wealth in the United States and thus much of their history

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[11] J. Clay Smith, Jr. *Emancipation: The Making of the Black Lawyer, 1844-1944* (Philadelphia: University of Pennsylvania Press, 1993); Paul Finkelman, "Review: Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers," *Stanford Law Review* vol. 47, No. 1 (Nov., 1994), p. 203-209.

[12] Kenneth Mack, "A Social History of Everyday Practice: Sadie T. M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925-60," 87 *Cornell Law Review* 1405 (2002); "Rethinking Civil Rights Lawyering and Politics in the Era Before Brown," 115 *Yale Law Journal* 256 (2005).

has not been recorded. Until the civil rights era, one could find African American research repositories only at historically-black colleges. Today this trend is changing, especially in the South as various cities and mainstream universities maintain African American research centers, but the mission is not complete. For historians of African American lawyers, there is the double burden of lawyer-client confidentiality that keeps most attorneys from ever providing access to their papers.

Writing this story of African American lawyers in the Jim Crow South required a degree of ingenuity. I had to cull African American newspapers to find informative articles. I would then, if possible, compare the version of events presented in the African American press with that of the mainstream press. Most prominent among the newspapers used here was the *Chicago Defender*. This paper was a nationally syndicated daily with coverage of local stories. The *Defender* is a most adequate source because it received regular news stories from southern locales via the Associated Negro Press wire.[13] Thus, historians can rely on the *Defender* as a source on events occurring throughout the African American community.

Autobiographies provided another source of information. Both lawyers and their clients often wrote about their lives, seeking to tell their stories of progress, defeat, and hope. As V.P. Franklin writes, "From the publication of the *Narrative of the Life of Frederick Douglass* in 1845…the autobiography has been the most important literary

[13] On the African American Press see, I. Garland Penn *The Afro-American Press and its Editors* (Springfield, Mass: Willey & co., 1891); Martin E. Dann *The Black Press, 1827-1890: The Quest for National Identity* (New York: G.P. Putnam's Sons, 1971); Todd Vogel *The Black Press: New Literary and Historical Essays* (New Brunswick, NJ: Rutgers University Press, 2001).

genre in the African-American intellectual tradition in the United States."[14] The problem with autobiographies is that they do not have the verisimilitude of some contemporary sources, such as court records. Kathryn L. Nasstrom recently noted how knowledge of prevalent narratives of the civil rights movement could affect the memory of events among participants; they would remember things in a manner harmonious with the master narratives regardless of evidence to the contrary.[15] When available, I did study court records but they often incorporate societal prejudices and silence certain narratives. Hence, when covering court cases I used all available sources, including autobiographies, privileging none over others.

There were some private papers used in this research. Lawyers in general did not make their legal correspondence open to the public very often. The Atlanta History Center allows access to the Papers of A.T. Walden, who practiced in the city for almost fifty years. Walden's papers provide a portrait of a Deep South legal practice and his involvement in community affairs. In New Orleans, the Amistad Research Center houses the A.P. Tureaud Papers. I began researching the Tureaud Papers in 2004 but the Center closed its doors following Hurricane Katrina for nearly six months and travelling to New Orleans was difficult for nearly three years.

Oral History collections were another valuable resource. Though oral histories are not contemporary sources, we must rely on them to a large degree for the voices of those who may not have left a paper trail. Since this dissertation attempts to cover local

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[14] V.P. Franklin *Living Our Stories, Telling Our Truths: Autobiography and the Making of the African-American Intellectual Tradition* (New York: Scribner, 1995), 11.

[15] Kathryn L. Nasstrom, "Between Memory and History: Autobiographies of the Civil Rights Movement and the Writing of Civil Rights History," *The Journal of Southern History*, vol. LXIIV, no. 2, May 2008, 325-364.

and less well-known lawyers, there was less paper documentation available than is even normally the case. But oral history interviews can provide researchers with valuable information on those whom history may ignore. For example, the Southern Historical Collection at the University of North Carolina at Chapel Hill provided transcripts of Gilbert Ware's interview of Conrad Pearson, the lawyer who brought the first NAACP lawsuit against a graduate school. Pearson has been largely left out of historical works in favor of those who left more traditional documentation, especially members of the national office of the NAACP. Also used extensively was the Georgia Government Documentation Project (GGDP), headed by Clifford Kuhn at Georgia State University, an oral history project aimed at capturing the voices of those involved in the struggle for civil rights. Without knowing the views of all the participants in the fight against Jim Crow, we will not know the full story or appreciate the varying perspectives present in the African American community.

## Chapter 2: Becoming an African American Lawyer

In 2000, the Atlanta, Georgia, minority-owned law firm of Thomas, Kennedy, Sampson & Patterson signed on as counsel for the Coca-Cola Corporation in a high-profile racial discrimination lawsuit brought against the company by 2,200 current or former employees. Most of the claimants were African Americans and they accused the soft drink producer of discrimination against employees of color in compensation, promotions, and performance review.[1] When initially approached by Coca-Cola executives, the law firm wavered, unsure of the response from the African American community about an African American law firm representing a large corporate interest in a discrimination suit. After long discussion with other prominent attorneys, the partners believed the Atlanta legal community understood the value of having minority voices at both sides of the mediation table. Eventually, there was a record settlement for a racial discrimination case, with reports that each individual plaintiff would receive close to $38, 000.[2] Andrew Patterson, one of the partners, said he was, "pleased that his firm accepted Coca-Cola's case and that they reached a settlement beneficial to both sides in an important case for Atlanta's business community."[3]

One problem African American attorneys during the Jim Crow era did not have was the one presented the partners of Thomas, Kennedy, Sampson & Patterson. Earlier generations of lawyers had little chance of representing the mainstream institutions. In

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[1] *Atlanta Journal* 12 July 2001, p. E1.

[2] Ibid.

[3] Andrew Patterson interview with David Pye, June 4, 2001.

fact, the odds that an African American could join the legal profession prior to the civil rights era were not very high. That American society has come so far since the days of overt racism is laudable; yet, even when a global corporation requested the assistance of an African American law firm, which some would argue was a post-racial action, race still informed the decision of the firm to take the case for Coca-Cola.

Along with the rising emphasis in academia upon multiculturalism and diversity have come questions about what role, if any, lawyers' identities should have upon their legal practice. Law professor Sanford Levison refers to the belief amongst lawyers that minorities and women should disregard their social identities when performing professional roles "bleached out professionalism," an impossible goal to reach provided the treatment of minorities and women in the past within the professions. To Andrew Patterson and Sanford Levison, and many others, there is continued salience in the term, "African American," lawyer, which has its roots in the long history of discrimination at the bar.

Western societies often make claims to justice. According to John Rawls, justice constitutes the "first virtue of social institutions."[4] This virtue assumes that equality is a given and that the institutions within the society should not impinge upon this right to full equality. Any institution that does not live up to this promise of justice must be remodeled or purged and can only be acceptable in its flawed form if no other alternative is acceptable.[5] Hence, Western societies often accept implicitly that their institutions are

[4] John Rawls *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1999), 3.

[5] Ibid., 4.

the best possible solutions to societal needs. Believing that their institutions are the best, they avoid the uncomfortable inference that there are parts of society that are unjust, but that exist nonetheless.[6]

In the opening decades of the twentieth century the political and intellectual leaders of the United States sought to advance the vision of a just society by promoting the ideal of opportunities open to all citizens to improve their lives.[7] Through education, hard work, and faith each citizen could progress from humble beginnings to the heights of professional power. The United States has not been unique in this national myth-making. Other American nations, particularly those in Latin America, expounded similar myths. For example, Brazil and Cuba often envisioned themselves as racial democracies where skin color did not inhibit the ability of a talented person to achieve success.[8]

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[6] This thinking relies on the belief in a founding moment in society in which there is an agreement, or social contract, among those to be governed providing for the birth of the nation-state, as Jean-Jacques Rousseau wrote in his 1762 treatise on government. See Jean-Jacques Rousseau *Discourse on Political Economy and the Social Contract* (New York: Oxford University Press, 1994).

[7] Barton J. Bledstein *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (New York: Norton, 1976); Samuel Haber *The Quest for Authority and Honor in the American Professions, 1750-1900* (Chicago: University of Chicago Press, 1991).

[8] The most well known national myth-making book in Latin America is still *Casa-Grande e Senzala: Formação da Familia Brasileira Sob o Regimen de Economia Patriarchal* (Rio de Janeiro: Schmidt, 1936) by Gilberto Freyre. Freyre purported that Brazilian society did not exhibit the racism toward blacks found in N. America because of its centuries –long history of contact between Portuguese whites and African blacks that predated Brazilian slavery. Slaves in Brazil presumably were never dehumanized, argued Freyre. Brazil, thus, became a racial democracy where all people of the same class standing were treated equally. In the United States, Columbia professor William Archibald Dunning produced a school of thought with support all the way to the White House by proclaiming the Reconstruction era in the South a national disgrace that proved black political pathology. See *Reconstruction, Political and Economic, 1865-1877* (New York: Harper and Brothers, 1907) and *Essays on the Civil War and Reconstruction and Related Topics* (New York: Macmillan Company, 1898). The Dunning

Historians have since destroyed the idea of racial democracies, though many Brazilians in the upper middle class refuse to admit the existence of racial discrimination in the face of increasing studies noting income and educational disparities along racial lines.[9]

Many Americans continue to endorse the vision of their society as a democratic meritocracy in education and professional certification. One has only to read the platform of various political candidates in the 1980s and 1990s, especially, but not exclusively, those on the right of the political spectrum, to find attacks on affirmative action programs that usually advocate color-blind alternatives as solutions to present socio-economic inequalities. This color-blind approach asks people not to challenge systemic inequalities in any way that threatens the core belief in an open meritocracy.[10] Legal institutions play an integral role in this national myth making. The legal system of the United States places emphasis on the rule of law that the guarantee of formal equality to all participants regardless of background factors. The rule of law is best exemplified in

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School of Reconstruction would dominate historical thought through the civil rights movement in the South.

[9] Carl Degler in *Neither Black nor White: Slavery and Race Relations in Brazil and the United States* (New York: Macmillan, 1971) refuted the racial democracy myth by demonstrating how Brazilians exhibited racial prejudice despite the absence of formal racial segregation laws. W.E.B. Du Bois's *Black Reconstruction: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880* (New York: Russel and Russel, 1935) began the questioning of the Dunning School. Ironically, because Du Bois was an African American man his book was not taken as seriously as it eventually would until the 1960s. Today, no serious scholar accepts the conclusions of the Dunning School. On the life of Dr. Du Bois see David Levering Lewis's two Pulitzer Prize winning books *W.E.B. Du Bois: Biography of a Race* (New York: Henry Holt and Company, 1993) and *W.E.B. Du Bois: The Fight for Equality* (New York: Henry Holt and Company, 2000).

[10] Critical Race Theory (CRT) has a long-standing debate with other scholars on this issue. See Duncan Kennedy, "A Cultural Pluralist Case for Affirmative Action in Legal Academia," *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995), 159-176.

the Due Process Clause of the Fifth and Fourteenth Amendments to the national Constitution that ensure the government must not impinge on a citizen's rights. Furthermore, when the state must curtail these rights, for example, by taking real property during a time of war, the individual has the right to expect the process to be fair, transparent, and common. Finally, there must always be just compensation for these infringes in all cases not related to some form of punitive taking, such as for a criminal infraction.

The history of African American lawyers in America challenges these historical claims to meritocracy. This chapter provides an overview of the experiences of African American lawyers in the Jim Crow South, by focusing on organized bar associations and legal training to demonstrate the contradictions present in the meritocracy myth. In this chapter, I show that the American bar originated at a time when certain men dominated the professions and that these men dictated what became the standards of these professions. The concept of what it meant to be a good lawyer originated in the late 19th-early 20th centuries under the domination of elite, white males who dictated the institutional canons that defined the profession and continue to do so to the present day. Thus, the legal system is an important site to study the idea of meritocracy and justice because American law has in the past and still does possess a formalist perspective that perceives of laws, legal institutions, and legal concepts as facially neutral.[11] But if those

[11] The legal realists were the first school of thought to question the supposed inherently objective nature of legal doctrine and the interpretation of the law by judges. See Laura Kalman *Legal Realism at Yale, 1927-1960* (Chapel Hill: University of North Carolina Press, 1986).

employing and interpreting the legal concepts, for example, are themselves products of a racialized and gendered profession then legal objectivity is seriously compromised.[12]

Furthermore, this chapter demonstrates the possibility of expanding the definition of "victim" to include African Americans experiencing harm in contemporary times resulting from past injustices. Mari Matsuda's writing on reparations is instructive.[13] Matsuda opines in "Looking to the Bottom: Critical Legal Studies and Reparations" that the unique experiences of racial minorities in Western societies presents histories that rebuke the rigid, formalistic framework at the root of American legal definitions of "victims and perpetrators."[14] Traditionally, American legal culture accepts claims for redress only when a distinguishable claimant provides sufficient evidence linking a distinguishable other as the actor in a recent wrongdoing. This judicial philosophy has prevented calls for reparations for African Americans because not all of the members of the victim class are similarly situated, nor are all members of the perpetrator class directly connected to the actual harm against the alleged victim.[15] Matsuda encourages us to consider the perspective of racial minorities who historically have all suffered from

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[12] This is a central claim of both the Critical Legal Studies (CLS) and Critical Race Theory (CRT) movements. CLS scholars use history as a weapon against formalist legal concepts that they perceive as tools of the capitalist order to use to legitimate its control in a specific historical context. See Robert Gordon, "Critical Legal Histories," *Stanford Law Review* vol. 36 (1984), 101-102. CRT scholars ("crits") use history in a similar manner to expose the racial and gender subtext hidden within legal doctrine. See, in general, *Critical Race Theory: The Key Writings That Formed the Movement*, edited by Kimberle Crenshaw (New York: The New Press, 1995).

[13] Mari Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations," 22 Harvard Civil Rights-Civil Liberties L. Rev. 323 (1987); reprinted in Kimberle Crenshaw, et. Al *Critical Race Theory: The Key Writings That Formed the Movement*, 63-79.

[14] Matsuda, "Looking to the Bottom," *Critical Race Theory*, 70.

[15] Ibid.

Western racism regardless of station in society. In this regard, all African Americans are victims because the very notion of "blackness" as a separate racial conception relative to "whiteness" developed from attempts to provide societal resources for some while denying them to others. The legal profession's treatment of African Americans provides a concrete case study of the denial of resources necessary for group survival. Without adequate legal representation African Americans could not hope to defeat the intricate system of white supremacy that created generations of wealth for many whites, while simultaneously creating generations of poverty for many African Americans.

In the United States a national, organized bar did not develop until late in the nineteenth century. Instead, the country had a diverse set of bars in each state and within specific county units.[16] Even during the colonial period Americans failed to establish an organized bar. We see the initial cause of this development in the founding colonial charters. The Stuart dynasty that ruled England in the early 1600s sent its citizens to the New World with legal charters demanding that any laws passed in the colonies must be "consonant to reason, and be not repugnant or contrary (so far as conveniently may be) agreeable to the Laws, Statutes, Customs, and Rights of this Our Kingdom of England".[17]

Two general features of these charters had important implications for American legal institutions. First, laws had to be written as close as possible to English law, but they could deviate when necessary to meet local conditions. We have specific examples of shifts from the English common law interpretations of legal concepts in both the law

[16] British constitutional law began as early as 1215 when subjects forced King John to sign the Magna Carta limiting his powers under law. Without the centuries of experience the British had acquired, the American colonists shaped their laws to fit circumstances in the New World.

[17] Charter to the Massachusetts Bay Company (1632).

of enclosure and the law of capital offenses. Beginning in the 16th century, the common law placed the burden of trespassing animals upon the owner of livestock, not the landowner. This rule of property law originated at a time when the population of England was increasing to such an extent that open areas became scarce. So the cattle grazer who failed to secure his herd was charged by another for damages incurred by wayward cattle had no recourse but to recompense the plaintiff. It was the duty of herders to prevent cattle from damaging land used by humans. In colonial America, where there was seemingly an indispensable amount of land, there was a reinterpretation of this law of enclosure. American herders could allow animals to run free while any landholder desiring peace from these animals had to erect fencing to prevent incursions on the land. In the absence of adequate fencing, the landowner who suffered entry of his premises by the cattle of another had no recourse under American law. Thus, in America, the English common law was accepted as law of the land, but, there were alterations adopted to meet unique local situations.

American legal practitioners continued this tendency to follow English traditions albeit with a few changes. One prime example of this preference for Anglo customs was in the area of legal training. In England there had developed over the centuries the Inns of Court where lawyers received their professional educations. The Inns were actual lodging and bar sites located in close proximity to the Westminster courts. Because of an aversion to the medieval dominance of Roman civil law, which was taught in universities, the British tended toward a system that would be Anglo in nature.[18]

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[18] James Willard Hurst *The Growth of American Law: The Law Makers* (Boston: The Little, Brown and Company, 1950), 266; Alfred Z. Reed *Training for the Public Profession of the Law:*

Students gravitated toward the inns where lawyers lived, drank, and socialized. Here the law could be learned in a practical manner. Most important for American law was the establishment of the custom that favored apprentice-patron forms of legal training over formal, university instruction. Americans, often suspicious of formal legal education, refused to send their sons to the Inns of Court in England to learn the law. Instead, colonial Americans relied upon local lawyers to educate the next generation. Only in the southern colonies, especially Virginia with its aristocratic heritage, did there develop an emphasis upon training in the English Inns of Court.[19]

Had a large-scale, national bar originated earlier, then perhaps the bar would have been more democratic. This is not a quixotic proposition when one considers the leveling of the bar during the Jacksonian era of the 1830s. Instead, smaller, localized bars developed under the influence of the social environment around them. In the South, for example, bars tended to be dominated by a white, property-owning elite. As Michael Grossberg has shown the nineteenth century bar was conscious of and jealously protected its image as a manly profession.[20] Admirable legal arguments, for example, were those that did not exhibit literary flourishes common in nineteenth century speech. Instead,

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*Historical Development and Principal Contemporary Problems of Legal Education in the United States with Some Account of Conditions in England and Canada* (New York: Charles Scribner's Sons, 1921), 15-16.

[19] Hurst *The Growth of American Law*, 253; Alfred Z. Reed *Training for the Public Profession of the Law*, 36.

[20] Michael Grossberg, "Institutionalizing Masculinity: The Law as a Masculine Profession," *Meanings for Manhood: Constructing of Masculinity in Victorian America* edited by Mark C. Carnes and Clyde Griffen (Chicago: University of Chicago Press, 1990), 133-151.

lawyers valorized the argument that was practical and thereby useful.[21] A man must be about his business, the thinking went, and not waste time with art and letters that could not advance society and provide daily sustenance for his family. The South, even more than the remainder of American society, had a society in which races, genders, and classes inhabited defined social spaces.[22]

Almost from the beginning southern society conceived of only white men could practice law. Most African Americans were slaves by the late 1600s and thus unable to attain the status necessary to be considered legal advocates. It was in this world, in which social groups held seemingly innate positions on a hierarchical scale, that southern bars came of age. Prevailing conceptions of white manhood prevented African American men and all women from entering the bar. And only some white men could successfully pass the tests, both social and professional, necessary to gain acceptance as early American lawyers. It was in this period that the basic structure of the American bar took shape.

By starting the history of African American lawyers in the Reconstruction era after the Civil War, many scholars have separated this history from the birth of bar. These works reify the bar as it developed while trying to argue against the subjective rules keeping African American aspirants out of the profession. Though it is true there were few African American lawyers in the antebellum South, when African Americans

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[21] Ibid., 136.

[22] Lorri Glover *Southern Sons: Becoming Men in the New Nation* (Baltimore, MD: The Johns Hopkins University Press, 2007), 9-22; Anya Jabour *Scarlett's Sisters: Young Women in the Old South* (Chapel Hill: University of North Carolina Press, 2007), 86-88; Kathleen Brown *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (Chapel Hill: University of North Carolina Press, 1996); Black slaves had lives proscribed by their gender as well, see, Deborah Gray White *Ar'n't I a woman?: Female Slaves in the Plantation South* (New York: Norton, 1985).

did enter the profession they dealt with the issues that originated in this earlier period. This chapter makes note of this formative era to set the proper context for Reconstruction and the emergence of African American bars in the twentieth century.

Macon B. Allen was the first known African American lawyer in the United States. Allen joined the Maine bar in 1844. As did most lawyers in the years prior to the Civil War, Allen received his professional training via an apprenticeship with a practicing attorney. He spent a proscribed amount of time learning the trade under the supervision of his benefactor. Usually this apprenticeship consisted of running errands, reading law books, and watching trials. Many young men found it difficult to locate an established lawyer willing to undertake this responsibility and could not then enter the law. For African Americans, this problem was exacerbated by the fact that many Americans identified African Americans with slave status and could not countenance African Americans entering the legal profession. If they could persuade a lawyer to help them, then the aspiring African American lawyer would then, after completing the agreed upon time of service, petition for membership in the state, county, or local bar. A group of sitting judges would administer some sort of exam, most likely oral, to ascertain whether the applicant possessed sufficient knowledge of state law. Achieving all of these prerequisites was difficult, if not impossible, for most African-Americans prior to the Civil War.

During Reconstruction, the number of African Americans entering the legal profession increased significantly. In the South, where the majority lived, opportunities opened in the law and its sister occupation, politics. Northern white missionaries founded “freedom schools,” throughout the South, providing former slaves a chance at

formal education.[23] These schools, the goodwill of some Northern and Southern whites, and the determination of African Americans to alter their status in post-war America, all served as catalysts to growth of the first generation of African American lawyers, from 1870-1900. These lawyers would experience the egalitarian promises of Reconstruction, the disappointments incurred under conservative Democratic rule, and the stultifying imposition of Jim Crow segregation throughout the South by the first decades of the twentieth century. These experiences were varied, however, as state and local socio-political environments dictated the treatment of African American lawyers.

The Howard Law Department in Washington, D.C. opened in 1869 to educate freed slaves. From the beginning the school was racially integrated, but its primary objective was to serve the African American population of the South that remained barred from mainstream law schools in their respective states.[24] In fact, Howard Law sought to be a universally inclusive school, hoping to draw qualified students of all races, a vision advanced by its first dean, John Mercer Langston.[25] Howard Law practiced not

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[23] On African American education in the Reconstruction South, see Adam Fairclough *A Class of Their Own: Black Teachers in the Segregated South* (Cambridge, MA: Belknap Press of Harvard University Press, 2007), 27-58.

[24] On Howard Law Department as first school dedicated to serving African American students see Genna Rae McNeil, "Justiciable Cause: Howard University Law School and the Struggle for Civil Rights," in *Race, Law, and American History, 1700-1990: African Americans and the Legal Profession in Historical Perspective*, edited by Paul Finkelman (New York: Garland Publishing, 1992), 285; Kellis Parker and Betty Stebman, "Legal Education for Blacks," 407 *Annals of the American Academy of Political and Social Science, no. 1, 145 (1973).* On Howard Law's initial success see Robert Stevens *Law School: Legal Education in American From the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 81.

[25] John Mercer Langston *From the Virginia Plantation to the National Capitol or the First and Only Negro Representative in Congress From the Old Dominion* (Hartford, CT: American Publishing Co., 1894), 297.

only racial but also gender equality, to some extent.[26] In 1872, Charlotte Ray, an African American woman from an abolitionist family, graduated from Howard, the first woman to graduate from an American law school.[27] Although the school allowed Ray to attend and graduate with a degree, she initially misled the admissions staff by applying under the name "C.E. Ray," with no reference to her gender.[28] Nevertheless, there is no evidence that the school would have declined to admit Ray based on her gender, since it had already accepted a prior female applicant. Relative to other law schools at the time, Howard presented enlightened policy with respect to both race and gender. Moreover, Howard practiced racial inclusion as noted by the success of some of its early white alumni. Emma Gillett, for example, graduated from Howard in 1882 and went on to establish the Washington College of Law, now part of American University School of Law in the nation's capital, and George Atkinson (Howard 1891) won the governorship of West Virginia.[29]

Howard became the primary institution training lawyers for the African American community. Prior to the civil rights era, the majority of African American lawyers

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[26] Virginia Drachman would disagree with the statement that Howard Law practiced gender equality from the onset. Drachman has located information implying that Mary Ann Shadd Cary entered the law school in 1869 but was not allowed to graduate because she was a woman. See Virginia Drachman *Sisters in Law: Women Lawyers in Modern American History* (Cambridge, MA: Harvard University Press, 1998), 45. Nevertheless, Cary did receive her diploma from the law school in 1883, calling into question the reason for her dismal by the school. Since Howard Law allowed Cary to enter into program and subsequently presented her with a diploma it is questionable whether her dismissal resulted from outright gender discrimination.

[27] McNeil, "Justiciable Cause," 285.

[28] Drachman, *Sisters in Law,* 45.

[29] McNeil, "Justiciable Cause," ibid.

received their education at Howard Law, graduating 381 of the 780 African American lawyers practicing in 1903, for example.[30] The school served as an example of the African American community using its resources to combat racial and gender discrimination. These sites were crucial for African American survival because Jim Crow segregation excluded African Americans from mainstream institutions. Jim Crow was the poisoned root of southern progressivism that sought to modernize the region by, among other things, controlling the races. White elites rationalized racial segregation as necessary to prevent conflict between the two races. What have not been emphasized historically are the costs and benefits of this system to people living in the South. While the states expended resources, primarily in tax dollars, to fund separate institutions for the races, they also created structural inequality by not equitably distributing funds amongst African Americans and whites. One has only to consider the establishment of major flagship research universities that excluded African American residents to realize the tangible inequality southern states engendered.

Southern state governments refused to admit African American students to its mainstream law schools well into the 1960s. Even when African American plaintiffs in lawsuits challenging the constitutionality of segregation in legal education won, state entities would often challenge these rulings. When there were challenges, African American aspirants had to wait years for a resolution of the case. Such was the case in Georgia, when Horace T. Ward applied for admission to the University of Georgia School of Law in 1950. Despite Ward's sufficient academic credentials, the school denied Ward admission based on his race. Ward challenged the ruling but faced with

[30] McNeil, "Justiciable Cause," 236.

numerous delays, he decided to enter Northwestern University School of Law where he graduated in 1959. While at Northwestern, the court heard Ward's case but ruled for the segregated Georgia law school because Ward no longer had standing since he was a matriculating student elsewhere.[31]

When challenged in court, states advanced arguments intended to deny the inequality pervasive in the segregation system. Thurgood Marshall, who would become the first African American to sit on the United States Supreme Court in 1967, contested the racial segregation policy of Maryland, his home state in 1936. Marshall had graduated from Howard Law School just three years earlier having first sought admission to the University of Maryland Law School in Baltimore, his hometown. Recalling how he was unable to attend Maryland Law School because of state segregation laws, Marshall, along with support from the National Association of Colored People (NAACP) and his mentor Charles Hamilton Houston, took on the case of Donald G. Murray, an African American law school applicant. The law school turned Murray down, too, based on state segregation laws and what education officials referred to as "public policy." There was, apparently, no comprehensive statute regarding racial segregation in public education in Maryland in the 1930s. At the outset of the initial trial in Baltimore City Court, Judge O'Dunne enquired as to the basis for denying admission to African Americans to the law school at the University of Maryland. Assistant Attorney General Charles T. LeViness stated that, "It is the public policy of this state to exclude coloreds

[31] Robert A. Pratt *We Shall Not Be Moved: The Desegregation of the University of Georgia* (Athens, GA: University of Georgia Press, 2002), 61-62.

from schools attended by whites and to maintain a separate system of education."[32] There had been, LeViness added, until recently no real demand amongst African Americans for advanced education. Apparently, those who did desire advanced degrees did so in other states, incurring added costs. In 1931, Maryland, facing increased demands from the African American community instituted a scholarship lottery program to provide financial aid for selected African American applicants. When asked where African American law aspirants attended school, given their exclusion from the state law school, LeViness replied, "They go to other states and Howard University."[33]

In 1935, Marshall asked the Baltimore City Court to issue a writ of mandamus compelling the state to admit Murray to the law school of his choice since the only reason for his rejection was race. The Baltimore City Court sided with Marshall and issued the writ, declaring the tuition scholarship insufficient to defray costs of board and lodging.[34] But the state, via the Board of Regents of the University, refused to accept this ruling and instead filed an appeal to the state Court of Appeals.

The following year, the state, on the appellate level, continued to deny Murray, a life resident of Baltimore, access to a legal education within its state lines. First, the state claimed that the law school was a private entity and thus the Fourteenth Amendment to the Constitution, which prohibited state-sanctioned discrimination, was not applicable.[35] The law school had, in fact, been a private school until it was consolidated with the

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[32] *Baltimore Afro-American*, June 22, 1935, p. 2.

[33] Ibid.

[34] *Baltimore Afro-American*, June 22, 1935, p. 2.

[35] *Pearson v. Murray* 169 Md. 478 (1936), 480.

Maryland State College of Agriculture by official state law in 1920, a simple fact obviously known by the state's attorneys.[36] Second, Maryland argued, correctly, that under prior decisions, the Fourteenth Amendment, if found applicable, allowed for the segregation of races as long as the facilities were of equal standards.[37] In its third claim, Maryland argued that Murray could get relief through the usual channels open to African American graduate school applicants in Maryland. African American residents deemed competent to attend law school could apply for a share of a lottery in which the state set aside for 50 African American graduate students $200 to defray the cost of tuition at a school in another state.[38] Even if the court did find the Fourteenth Amendment applicable, the state thought the scholarship provision was sufficient to satisfy equal protection requirements. And, finally, if all else failed, Maryland agreed that it would build a separate law school for African Americans to prevent Murray from attending the white school.[39]

The legal stances taken by the state of Maryland in 1936 highlight some of the difficulties African Americans had gaining a legal education. The initial course for southern states governments was to use the state action doctrine that first became a hedge against 14th Amendment claims during the Reconstruction era. This doctrine prevented people, especially African Americans in the South, from assisting upon protection under

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[36] Ibid.

[37] Ibid.

[38] Ibid.; Mark Tushnet *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1987), 57.

[39] *Pearson v. Murray* 169 Md. 478 (1936), 480.

the Constitution unless they could prove that the state government had taken positive action to harm them. Maryland denied that it operated the white law school so Murray should have no claim to damages except, perhaps, in a civil suit against the school. But, obviously, absent some action by the state via its officers, Murray had no right to redress. Another useful tactic of the southern states was to emphasize that the Supreme Court had upheld racial segregation in principle since 1896.[40] Since states could constitutionally segregated races, then, under the police powers doctrine, the courts should display deference to most laws passed with the intent to segregate the races. As long as there was a rational basis for the segregation law, then it was constitutional. Courts had accepted this logic since 1819.[41] Thus, African American aspirants seeking a legal education had to overcome precedent strongly favoring the state.

Donald Murray's case underscores the extra resources required of a southern African American person hoping to attend law school. Along with the proper educational credentials, one still had to possess enough money to supplement the $200 he or she might receive if they were fortunate enough to win one of the 50 scholarships for out-of-state study. In 1935, the yearly tuition to attend Howard Law School was $135; meanwhile, the University of Maryland applied a $203 fee on its in-state residents in lieu of tuition. But as the *Baltimore Afro-American* reported: "To attend Howard the petitioner, living in Baltimore, would be under the necessity of paying the expenses of daily travel to and [sic] fro."[42]

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[40] *Plessy v. Ferguson*, 163 U.S. 537, (1896).

[41] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[42] *Baltimore Afro-American*, June 22, 1935, p.1.

The tuition scholarship always presented extra difficulties for African American law students. In some places, as in Alabama, the tuition grant came in the form of a reimbursement rather than a payment prior to attendance. Fred Gray of Alabama realized he could not attend the whites-only University of Alabama Law School, as he desired. In 1951 when Case Western Reserve University in Cleveland, Ohio, accepted him into its law school, the State of Alabama placed him in its tuition assistance program for African Americans. From the Alabama government Gray was to receive one roundtrip travel ticket each school year, the difference in tuition, and the difference in room and board costs between Case Western and Alabama State, an African American college.[43] However, Gray had to pay all costs upfront before receiving reimbursement at a later date.[44] Southern African Americans had to pay more, at least upfront, to attend law school than did white southerners who had access to the relatively inexpensive state schools.[45] Once in law school this disadvantage continued because usually one had to attend Howard Law School, located in the District of Columbia, or a school in the North. Pauli Murray, an African American woman from North Carolina (UNC), suffered such a fate when the University of North Carolina at Chapel Hill refused to admit her because of

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[43] The southern states were reacting to the *Missouri ex rel. Gaines v. Canada* 305 US 337 (1938) decision. The states had to acknowledge a black could theoretically attend a white university in the state, hence the comparison between the tuition at the flagship and that at the out-of-state school. Yet, state authorities refused to accept the theory that a black could ever live on a white campus in the South. Hence, the comparison with the dorm fees of the all-black Alabama State University.

[44] Fred Gray *Bus Ride to Justice: Changing the System by the System, The Life and Works of Fred D. Gray Preacher Attorney Politician* (Montgomery, Alabama: The Black Belt Press, 1995), 17-19.

[45] "Emory Leads U.S. in Drive to Train Negro Lawyers," *Atlanta Journal*, July 24, 1967, p. 9 A.

her race. In 1938, Murray applied to enter the law school at UNC. Murray met rejection and faced the ire of some whites at the University as well as Dr. James E. Shepherd, the president of the North Carolina College for Negroes.[46] Unable to fund a legal challenge to her rejection for admission, Murray instead continued working for the Works Progress Administration (WPA), a Roosevelt New Deal program. Eventually, Pauli Murray graduated from Howard Law School where she paid tuition fees and the cost of living in Washington, D.C. unlike white residents of her native North Carolina.[47]

There were less tangible costs southern African Americans incurred by not attending the flagship law school in their home state. For example, there was a prestige factor attached to certain white law schools. In each southern state there was usually one law school whose graduates dominated the bar. Graduates of that school possessed an advantage within the legal community over those who attended elsewhere. One advantage was the diploma privilege in which graduates of the preferred law school received automatic entry to the state bar. Unlike others, these graduates could bypass the bar exam by proving completion of the juris doctorate degree. Though the bar exam burden fell upon most lawyers, irrespective of race, all African American lawyers automatically had to take the exam because they could never attend the favored law school. Furthermore, as the Supreme Court noted in *Sweatt v. Painter* (1950), even when a law school for African Americans was substantially equal, the fact that the student had

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[46] Pauli Murray *The Autobiography of a Black Activist, Feminist, Lawyer, Priest, and Poet* (Knoxville, TN: University of Tennessee Press, 1987), 117-119.

[47] Ibid., 182-185. Murray also makes it known that while she was at Howard Law in the early 1940s there were few women in the program. She was the only woman in her entire law school class for three years after another women dropped out during the first school year, Ibid. at 183.

not attended the flagship law school that over decades had developed influence within the profession and state politics denied him or her of intangible advantages.[48]

The diploma privilege accorded white law school graduates in southern states became an issue in Alabama in 1947. Because there was no law school inside the state that admitted African American students, there was no opportunity for them to enjoy the diploma privilege. Emory O. Jackson, a journalist in Birmingham, wrote in a newspaper article that, "three young law graduates here are not engaged in practice. One works in a law office, another manages a market and a third is still otherwise occupied. In Washington, D.C., two Birmingham natives would like to return home."[49] Of the two lawyers living in Washington, D.C., Jackson learned that one was actively practicing law while the other drove a taxi.[50] The solution to this problem was, according to Jackson, "for Negroes to break into state law schools, for with a state degree the graduate obtains a practicing license provided he pays his [sic] fees."[51]

White law students had an added advantage because many southern bar associations possessed well-stocked libraries and study courses to help them prepare for the always difficult bar exam. Given the expense necessary to maintain a well-stocked library many lawyers depended upon those offered by bar associations even after entering practice. African American attorneys, however, had instead to make do without this highly beneficial service. The exclusion of African Americans from law libraries often

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[48] *Sweatt v. Painter* 339 U.S. 629 (1950), 634-635.

[49] "Alabama Effectively Bars Negro Lawyers," *Chicago Defender* 9 Aug. 1947, p.3.

[50] Ibid.

[51] Ibid.

extended beyond those of the bar associations, as in the case of John Marshall Law School in Atlanta, which after opening its doors to a few African American students in 1950, barred them from its library nonetheless.[52]

It is important to place Jim Crow racial segregation within the southern progressive movement because doing so emphasizes the agency of southern governments in creating an inequitable society. Progressives were generally those who witnessed a rapidly changing society in the decades from Reconstruction through the end of the First World War and deigned to create order amongst what they perceived as chaos by installing people like them as the professionals, administrators, community organizers, etc., who would lead the masses.[53] In the South, Progressives justified Jim Crow legislation as a rational means of preventing the race riots and racial animosity that had plagued the region since the Civil War had ended.[54]

Viewed in the light of southern progressivism, Howard Law School is an example of the strain placed on African American resources by Jim Crow. Though the underlying legal theory of segregation proclaimed the justness of the practice only when the state provided African Americans and whites with equal access to resources, in reality the

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[52] Martin Lehfeldt, "Black Lawyers in Georgia," p. 7, unpublished document in possession of author.

[53] On the Progressive era in general see Richard Hofstadter *The Age of Reform: From Bryan to F.D.R* (New York: Alfred Knopf, 1963); and Robert Wiebe *The Search for Order, 1877-1920* (New York: Hill and Wang, 1967.

[54] George Fredrickson *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817-1914* (Hanover, NH: Wesleyan University Press, 1971), 256-319; Joel Williamson *The Crucible of Race: Black-White Relations in the American South Since Emancipation* (New York: Oxford University Press, 1984), 253; Dewey W. Grantham *Southern Progressivism: The Reconciliation of Progress and Tradition* (Knoxville, TN: University of Tennessee Press, 1983).

allocation was usually not equal.[55] In general, African American law school candidates had to attend Howard, rather than a public institution in their home state because statutory legislation and public policy deemed it so. The laws varied state-by-state; yet, the result was generally the total exclusion of African Americans from mainstream public law schools in the South.

African Americans who survived the rigors of law school still faced difficulties passing southern bar examinations. Given the secretive nature of bar exam proceedings it is not possible to prove charges of malfeasance, but in the 1930s the African American press raised concerns about the seeming inability of African Americans to pass the Georgia bar exam. Even African Americans who attended elite mainstream law schools failed the bar exam. Finally, in the 1940s, African American leaders began to openly question the integrity of Georgia bar examiners after all four African Americans who took the exam in 1941 failed. Most prominent were the repeated failures of George Elmer Ross, a graduate of the prestigious University of Chicago Law School. Ross took and failed the Georgia exam six times after having passed the reportedly more difficult Illinois bar exam.[56] The African American press reported suspicions that "prejudice has a way of circumventing the law."[57] Applicants to southern bars often had to secure recommendations of practicing attorneys, who were usually white southerners. White

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[55] Ronald Bayor has written a book describing how progressives in Atlanta were more concerned with preventing white mob violence than with "improving the environment of black neighborhoods." See Ronald Bayor *Race and the Shaping of Twentieth-Century Atlanta* (Chapel Hill: University of North Carolina Press, 1996), 129-196.

[56] "Test Georgia Bar on Lawyer in High Court," *Chicago Defender*, June 12, 1943, p.10.

[57] "6 Take Georgia Bar Exams and All 6 Flunk," *Atlanta Daily World*, 12 October 1940, p.5.

lawyers often would not recommend African Americans, of course. If the applicant could find African American recommenders then their names on a letter would then inform the bar examiners of the applicant's race; the assumption being few southern whites would ask an African American attorney to support their application.[58] "Moreover, when the [applicant] calls to pay his $15 fee, it would be a simple matter to put a black mark beside his name."[59]

Ross took the bar exam in December 1936, December 1940, June 1941, December 1941, May 1942, and December 1942. Each time, he received notification that he had not earned the seventy-percentile score required to pass. During the December 1942 exam, Ross claimed that he witnessed "irregularities" at the test site. Frustrated by his repeated failures, he filed a petition with the Fulton County, Georgia, Superior Court requesting they enjoin the bar examiners from destroying the exams before he could verify the accuracy of the reported scores. In the proceedings, Katherine S. Wright, a white legal secretary of fifteen years, testified that she took and passed the exam at the same site as Ross and noticed irregularities, too. Wright said she saw white applicants using law books and obtaining improper aid from monitors on difficult questions throughout the test day. Other whites continued taking the exam after the three hour time limit had expired, she added.[60] Unfortunately for Ross, and historians, the bar examiners reportedly destroyed, as was the common practice, all copies of the exams prior to releasing the list of successful exam takers. The court ruled it could do nothing for Ross.

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[58] Ibid.

[59] Ibid.

[60] *Ex Parte Ross*, 196 GA 499, 26 SE 2d 880 (1943), 501.

Ross then appealed this outcome before the Georgia Supreme Court, requesting a writ of mandamus to force the bar examiners to prove why he should not be admitted to the legal profession.[61] The Georgia Supreme Court also denied Ross's claim because there was no law in Georgia requiring an appeal of the grading conducted by the examiners. Under state law, the examiners must certify any applicant who scored a seventy percentile or higher, but it was totally within the examiners discretion to decide what constituted a passing score.[62] The Reverend A.R. Cooper of Augusta wrote a letter to Governor Ellis Arnall protesting what he thought was a conspiracy against African American applicants.[63] All of this negative publicity may have persuaded state officials to be more vigilant in proctoring and grading because in 1943, Rachel Pruden passed the bar exam. Pruden was the first African American to pass the exam since Benjamin Davis, Jr., of Atlanta in 1932. Pruden was also the first African American woman to practice law in the state. She was joined at the bar by Professor Charles Morgan Clayton, a principal of an Atlanta high school who took the December 13, 1944, exam and reported no irregularities.[64]

In the opening decades of the twentieth century American society experienced fissures that encouraged people to search for order. One way this was accomplished was through calls for the increase in educational levels. Those with particular occupational

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[61] "Georgia High Court Upholds Ban on Negro Lawyers," *Chicago Defender*, Feb.19, 1944, p.4.

[62] Ibid.

[63] "Prospective Negro Lawyers in Georgia Declared Victims of Bar Examiners," *Pittsburgh Courier*, Jan. 15, 1944, p.2.

[64] *Atlanta Daily World*, December 29, 1944, p. 1.

skills began promoting themselves as "experts" and contrasted their level of knowledge with those they in turn considered dilettantes. In some cases state governments devised licensing requirements to regulate who could legally practice in certain fields. But regardless of the catalyst for change it is clear that early 20th century Americans witnessed an increase in professionalization. Medicine, education, and the law were three of the most prominent fields attracting the attention of professional boosters. In many cases boosters claimed that by heightening standards within professions the larger society would be better served because only the best and the brightest would be able to achieve these standards, thus ensuring that services would be of a desired quality.

But as states sought to professionalize their bars, it was the men who had shaped the bar earlier and who personified the profession, who wrote the modern canons dictating how one could become a lawyer. The elite lawyers explicitly and implicitly sought to maintain the bar as it had developed prior to the 20th century when their leadership went largely unquestioned. Thus, even when promoting change leading lawyers harkened back to an earlier age.[65] African American men and women had to challenge racial and gender obstacles militating against their desire to practice law. For example, Louis L. Redding, a graduate of Brown University in 1923 and Harvard law in 1928, still had to obtain the recommendation of a practicing attorney within his home state of Delaware before being admitted to the bar. Redding was the first African American lawyer in Delaware and thus had to find a white lawyer willing to be party to

[65] Jerold Auerbach makes this point of elite lawyers attempting to impose changes in the profession while simultaneously making illusions to the positive demographics of the bar in prior eras. See Jerold S. Auerbach *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976), 14-39.

this historic occasion. As reported in the *Baltimore Afro-American*, "This law, it is said, has prevented any colored lawyers, heretofore, from qualifying in Delaware, which has 140,000 white and 80,000 colored inhabitants but not a single colored lawyer."[66]

Professional camaraderie was an intangible factor that served as a source of difference between southern African American lawyers and those of other races. By nature, the legal profession has had a fraternal atmosphere that the social customs of the South exacerbated. During the antebellum era, lawyers were popular amongst southerners because they rode on horseback from town-to-town "the circuit."[67] Various towns held sessions on assigned days, with people coming from many surrounding areas to have their day in court. The circuit was the domain of white men who rode hard, worked hard, and drank hard. In the early twentieth century the bar retained this fraternal atmosphere through local and statewide bar associations controlled by legal elites. With few friends, African American lawyers had little protection. A.P. Tureaud, a Creole lawyer from New Orleans, returned to his hometown after graduating from Howard Law School in 1925. Knowing that he did not "have anyone [he] could turn who was an authority," Tureaud avoided taking any cases that involved crimes prosecuting police

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[66] "Delaware City to Get First Race Lawyer," *Baltimore Afro-American*, 23 March 1929, p. 1.

[67] On circuit riding and the antebellum courthouse see, Orville Vernon Burton *In My Father's House Are Many Mansions: Family and Community in Edgefield, South Carolina* (Chapel Hill: University of North Carolina Press, 1985), 21, 28-29; Ariela Gross, *Double Character: Slavery and Mastery in the Courtroom* (Princeton: Princeton University Press, 2000), 21-30. On the masculine nature of the antebellum bar see Michael Grossberg, "Institutionalizing Masculinity: The Law as a Masculine Profession," in *Meanings For Manhood: Constructions of Masculinity in Victorian American* (Chicago: The University of Chicago Press, 1990), 133-151.

officers. Doing so could have led the New Orleans police to target him for abuse they would not dare commit against a white officer of the court.[68]

Relegation to the margins of the profession proved pernicious to African American lawyers' attempts to garner clients. In a field where the stakes are always seemingly high, clients tend to desire those with proven expertise. The inability of African American lawyers to gain this experience served to their detriment. Marvin S. Arrington, a 1967 graduate of Emory Law School who later served as a Superior Court Judge in Fulton County, Georgia, recalled: "Minority law firms have not had substantial exposure to the sophisticated and unique types of legal issues and transactions that occur in the corporate and governmental environments."[69] African American lawyers' careers suffered further, he added, because "often, prospective clients believed that this 'lack of exposure' automatically translated into a 'lack of ability'. Thus, prospective clients were reluctant to utilize minority legal talent because this talent had no demonstrated 'track record'."[70] Exclusion thus worked to create the rationale for further exclusion, according to Arrington.

National organizations also demonstrated resistance to full inclusion of African Americans in the profession. The American Bar Association (ABA) formed in 1878 at

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[68] Arnold R. Hirsch interview of A. P. Tureaud, Tape 7, found in "Simply a Matter of Black and White: The Transformation of Race and Politics in Twentieth-Century New Orleans," *Creole New Orleans: Race and Americanization* (Baton Rouge: Louisiana State University Press, 1992), 265.

[69] Marvin S. Arrington, "Speech to American Corporate Counsel Association Regarding the State Bar of Georgia Establishing a Minority Counsel Program," 11 June 1992, Marvin S. Arrington Papers, Robert W. Woodruff Library Special Collections, Emory University, MSS 714, Box 1, Folder 16, p. 3.

[70] Ibid.

Saratoga, New York, as a preserve for the White Anglo Saxon Protestant elite of the bar.[71] There were no provisions, originally, to thwart African Americans from participation in the ABA, because racial, ethnic, and gender minorities seemingly were of little concern to these elite men of the bar. In 1912, some southern members reported that the organization had unwittingly admitted two African Americans. William Henry Lewis, Butler Roland Wilson, and William Morris, all residents of Northern states, had joined the ABA without notice.[72] That year at the annual convention the ABA passed a resolution to exclude African Americans from its ranks.

Over the years various white and African American attorneys agitated for the repeal of the ABA color ban. Yet, this explicit racial discrimination continued into the 1940s. During the Second World War, forces aligned against the ABA. The NAACP and progressive members of the ABA used the war effort to change ABA policy. Most prominently, "Judge Jonah J. Goldstein and Mr. Arthur Garfield Hays [resigned] from the American Bar Association because Frank E. Rivers is said to have been refused membership in the American Bar Association because he is a negro."[73] The NAACP publicly praised the actions of Goldstein and Hays placing the ABA on the defensive.[74]

Other forces entered the fray soon thereafter. The National Lawyers Guild (NLG), a left-leaning, interracial organization founded in 1937, took the opportunity to

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[71] Robert Stevens *Law School: Legal Education in America from the 1850s to the 1890s* (Chapel Hill: University of North Carolina Press, 19993), 99-101; J. Clay Smith *Emancipation*, 541-543.

[72] J. Clay Smith *Emancipation*, 541-42.

[73] Bernard G. Waring to the ACLU, 26 April 1943, Manuscript Division, Library of Congress.

[74] Walter White to Arthur Garfield Hays, 20 April 1943, Manuscript Division, Library of Congress.

criticize the ABA. The NLG alluded quite often to the inappropriate persistence of racism in a nation rhetorically promoting its battle against fascism abroad. For example, the NLG noted the omission of African Americans from the militaries Judge Advocate Generals Corp (JAG):

> There are more than 500,000 Negro soldiers and sailors in our armed forces who are subject to military law. Despite this fact, and despite the availability of qualified Negro lawyers who are ready to offer their services, the Army and Navy are guilty of a policy of discrimination in their unwillingness to grant commissions in the Judge Advocate General's office on an equal basis to Negro attorneys…Granting of commissions to Negro attorneys in the Judge Advocate General's office would do much to enhance the morale of our armed forces and would bring about fuller and more direct participation in the war effort by a distinguished group of American citizens.[75]

Faced with this sort of direct pressure during the Second World War, the ABA rescinded its whites-only policy at the August 1943 meeting; however, there was still recalcitrance, especially in the South. In Dallas, Texas, W.M. Holland proposed a motion to continue denying African Americans membership in the ABA and its regional affiliated branches.[76] According to an article sent to Walter White, head of the NAACP, "Holland said the action of the American Bar Association was a slap in the face of all Southern members."[77] Undaunted by criticism from other members, Holland, a former judge, noted the hypocrisy of legal professionals who wanted to allow African Americans into the ABA but not other areas where people of their status congregated, making

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[75] "National Lawyers Guild Statement on Discrimination Against Negro Attorneys," p.1, copy sent to Thurgood Marshall of the NAACP from Bernard G. Waring, 3 May 1943, Manuscript Division, Library of Congress.

[76] "Bar Tables Issue of Negro Membership," p.1, newspaper clipping sent by Mr. Charles Brackins of Dallas, Texas, to Walter White of the NAACP, 6 October 1943.

[77] Ibid.

special reference to the then racially segregated Methodist and Presbyterian Churches.[78] The resolution failed in a thirty-three to thirty-one vote, nevertheless. The minor margin of difference in the two factions in Dallas signified the continued perception of some lawyers that African Americans should remain pariahs at the bar.

In response to exclusion from the ABA, African Americans joined the National Bar Association (NBA). The NBA was a national organization, formed in Des Moines, Iowa, in 1926 by George Woodson, S.J. Brown, and Charles P. Howard. The NBA aligned with the NAACP to fight for African American rights under the law. Charles Houston spoke on the dual roles of the NBA at the 1932 Annual Conference of the NAACP. He called for increased action amongst lawyers on the national level. "Perhaps of all the professional men in the Negro race the lawyers are the least organized. The local bar associations form the nucleus of the membership and it has been exceedingly hard to interest lawyers in the local associations to say nothing of the national."[79] To those lawyers who had taken the step of joining the NBA, Houston informed them that, "the primary purpose of the NBA is improvement of the legal profession. The social purpose of the NBA is merely improvement of conditions for the Negro."[80]

To achieve improved conditions under the law for African Americans required specific action by the NBA, Houston believed. He asked the NBA to focus on improving the status of African American lawyers at the bar. To achieve this end, NBA members

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[78] Ibid.

[79] Charles Hamilton Houston, "Cooperation Between the NBA and the NAACP," Papers of the NAACP, Annual Conferences, Group I, Series B, Box 8, Reel 0117.

[80] Ibid., Reel 0118.

should attempt to secure placement on the grievance committees of their local bar associations to provide a diverse perspective for lawyers accused of wrongdoing.[81] Houston also opined that NBA members should lobby for the appointment of African American judges.

> "One of the greatest offices in the American system of government, if not the greatest office with the highest arbitrary powers, is the office of judge, and in so far as Negro lawyers achieve professional standing; because the bench is the goal of all lawyers; and in so far as Negro lawyers achieve the bench, so far can the Negro population be assured that in that court will be impartial justice."[82]

As Charles Hamilton Houston mentioned in his speech, lawyers often set up local organizations to promote professional agendas. On January 28, 1947, ten lawyers met in Atlanta, Georgia, "for the purpose of organizing the Negro lawyers of Atlanta."[83] Those in attendance included: Mrs. Rachel Pruden Herndon, the first African American female lawyer in Georgia; A.T. Walden; Edward S. D'Antignac; and S.S. Robinson. D'Antignac, who shared a Butler Street office with Pruden Herndon and A.T. Walden proposed the name "Gate City Bar Association" and Robinson seconded the motion. The name linked the group to Atlanta's long held reputation of being the "Gate City of the South," a moniker earned for its location and its importance as a transportation hub.

At its second meeting on March 10, 1948, the Gate City Bar Association (GCBA) addressed the recent NBA decision to hold its annual meeting in Atlanta with the GCBA as host. Preparing for the NBA visit was a major undertaking, so the group declared that

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[81] Ibid., Reel 0118-0119.

[82] Ibid., Reel 0120.

[83] Gate City Bar Association minutes, 28 Jan. 1948. Folder 6, Box1, A.T. Walden Papers, Atlanta History Center.

"all members constituted a ways and means committee to plan for the NBA which meets in Atlanta in September."[84] The group then set out to define its purposes by drafting a constitution. Article I stated that the GCBA should "encourage the observance of the laws of the land and uphold the ethics, dignity, and prestige of the legal profession and encourage scholarship."[85] This first article spoke to the situation in Atlanta in which many officials were not upholding the law. The GCBA would be a "civil rights" group dedicated to protecting the rule of law; the GCBA would fight for rights guaranteed by law.

Article I also mentioned "upholding the ethics, dignity, and prestige of the legal profession." This line seemed to declare that the GCBA would not disrespect the established legal hierarchy but would remain true to the ideals professed in the lawyer's creed. The final section of Article I addressed legal scholarship. African Americans had found it difficult to obtain legal education. Moreover, they also experienced difficulties staying abreast of doctrinal changes. The GCBA accepted the responsibility of promoting continued education through legal scholarship.[86]

Article II stated that the GCBA would "encourage a spirit of mutual helpfulness among the members of this association, including helpful criticism of professional conduct."[87] African American lawyers often found themselves scrutinized in southern

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[84] Gate City Bar Association minutes, 10 Mar. 1948. Folder 6, Box 1, A.T. Walden Papers, Atlanta History Center.

[85] Gate City Bar Association Constitution, Article I, A.T. Walden Papers, Atlanta History Center.

[86] The NBA placed a similar resolution in its bylaws in 1925; J Clay Smith, "The Black Bar Association and Civil Rights," *Creighton Law Review*, 15:3 (1981-1982), p. 671.

[87] Gate City Bar Association Constitution, Article II, A.T. Walden Papers, Atlanta History Center.

courtrooms more so than white counterparts. Any breach of professional decorum would be a reason to disparage all African American lawyers. To improve this situation, the GCBA became its own watchdog; they would inspect and critique each other so that outsiders would have little to reason to complain about the conduct of its members. The GCBA had originally worded the article to read, "To encourage wholesome criticism of the scholastic and professional conduct of the members of the organization."[88] The emphasis in the original resolution was upon criticism; meanwhile, the amended version emphasized the mutual benefit such criticism would bring. The GCBA lawyers were determined to appear as consummate professionals.

African American lawyers also formed social relationships with other professionals. Not fully accepted in the white world, but unwilling, or unable, in most cases, to participate in activities with the African American masses, African American professionals entered a closed network of like-minded African Americans. Within these groups, lawyers, doctors, teachers, and others with similar educational backgrounds inculcated themselves from others—African American and white. In many cases, the behavior of these "bourgeois Negroes," was self-destructive. J.L. Chesnut, Jr., of Selma, Alabama, remembers returning home from law school in the North, and finding that he was "not part of the white world. But I hadn't anticipated I wouldn't be quite part of the African American world either."[89] To escape mentally, Chesnut worked only enough to

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[88] Gate City Bar Association Rosters, Articles. Folder 7, Box 1, A.T. Walden Papers, Atlanta History Center.

[89] J.L. Chestnut, Jr. and Julia Cass *Black in Selma: The Uncommon Life of J.L. Chestnut, Jr.* (New York: Farrar, Straus and Giroux, 1990), 131.

earn money to provide for his family, which amounted to three days a week, and spent the remaining four days in a drunken stupor.[90] In his autobiography, Chestnut recollected that it was the sum of isolation and racism in the pre-Civil Rights Movement years that led African American professionals to sink to this level of depravity.[91] His partner in the Alabama Black Belt legal circuit, Orzell Billingsley, spent many a night in the company of female schoolteachers who found these two renegade African American lawyers riding into town in a big Lincoln quite an event.[92]

The exclusion of African American lawyers often took a symbolic form. In Atlanta, A.T. Walden, a graduate of the University of Michigan Law School, was supposed to be treated as an equal with white attorneys in the city, but in reality bench and bar at times found his presence troubling. Instead of referring to Walden as "Mister" as was common in the 1920s, court officials called him "colonel." Prior to the 1920s, stated Judge P. Tuttle, a liberal Republican on the Federal Circuit Court, Georgians called all lawyers "colonel," because attorneys had often led militia units during the antebellum and Civil War periods. With their intricate knowledge of the state gained through the antebellum practice of circuit riding, lawyers were a perfect choice to lead troops.

Judge Tuttle emphatically denied that people called Walden "colonel". Instead, Tuttle recalled that Walden received only the courtesy title "captain," based on his rank

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[90] Ibid.,139.

[91] Ibid., 141.

[92] Ibid., 119-120.

during the First World War.[93] Nevertheless, some probably did so to avoid having to call Walden "Mister," the courtesy title usually extended to lawyers in Georgia after the 1920s. Tuttle's statement suggests white lawyers and judges did not address Walden in the same manner as they did white lawyers.

Some Atlantans have admitted that white lawyers found themselves in a quandary over how to address the African American attorney. The *Atlanta Constitution* published an editorial conceding that many whites could not countenance referring to Walden as "sir," or "mister," as they did white lawyers in this period. These whites, instead, called Walden "colonel," to avoid the dreaded step of having to place an African American man on equal footing with whites.[94] These Atlantans marginalized Walden by using an archaic Civil War courtesy title to address a twentieth century attorney.

Not all lawyers reported experiencing racial bias at the bar. Robert McCants Andrews, a 1918 graduate of Howard Law School, began practice in Durham, North Carolina, in 1921. Andrews claimed North Carolina possessed the "finest set of judges in the South and its Supreme Court decisions have long been recognized with great respect all over the country."[95] As for the lower courts, Andrews believed that they were the, "main protectors of the oppressed. They have punished mob members severely, charged grand juries to investigate peonage and crop-cheating and have protected and defended

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[93] Tuttle interview transcript, Georgia Government Documentation Project (GGDP), Georgia State University Special Collections, p.8.

[94] *Atlanta Journal*, July 5, 1965, 22.

[95] Floyd J. Calvin, "R. McCants Andrews Observes the Courts, Juries, Police Circles, Public Sentiment and Newspapers in 'Old North State'," *Pittsburgh Courier*, 1 Sep. 1928, p. 3.

the rights of the poor and lowly."[96] Juries in North Carolina were also fairer in North Carolina, according to Andrews. "It can be said with candor and pride that North Carolina juries are fairer and more intelligent than juries I have read about in other parts of the country."[97]

Overall, it nevertheless appears that African American lawyers, as was the case of the community in general, suffered egregious injustices during Jim Crow. Faced with these difficulties, African American lawyers often chose to use their intelligence in areas outside the profession. The most successful lawyers turned professional contacts into business opportunities. Quite often, lawyers became involved in the potentially lucrative African American insurance industry.[98] Samuel Decatur (S.D.) McGill of Jacksonville, Florida, graduated in 1908 from Boston University School of Law. McGill handled some high-profile death penalty cases, but he is also known for his business acumen. In 1931, McGill was President of the Citizens Industrial Insurance Company, an African American initiative, which merged with Afro-American Insurance Company, the preeminent African American-owned insurance business in Florida.[99] Insurance companies became rooted in the African American community following the Civil War

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[96] Ibid.

[97] Ibid.

[98] On the African American insurance field, see, Alexa Benson Henderson *Atlanta Life Insurance Company: Guardian of Black Economic Dignity* (Tuscaloosa: University of Alabama Press, 1990); Walter B. Weare *Black Business in the New South: A Social History of the North Carolina Mutual Life Insurance Company* (Durham: Duke University Press, 1993); Jesse Gloster *North Carolina Mutual Life Insurance Company, Its Historical Development and Current Operations* (New York: Arno Press, 1976).

[99] "Two Insurance Companies Merge in Jacksonville," *Chicago Defender*, Nov. 28, 1931, p. 4.

when the freed slaves set up benevolent societies to fund burial expenses of the dead. Eventually, these enterprises expanded, largely because mainstream insurers either refused to service African Americans or treated African American clients harshly.[100] Conrad Odell Pearson, who in 1935 began practicing law in Durham, North Carolina, recalled about white insurance agents' treatment of African American families, "That's the reason why the North Carolina Mutual made its growth for us, that the insurance man come to your house and keep his hat on in your house, and they capitalized on it."[101] Pearson made reference here to the breech of southern decorum by white insurance agents who would disrespectfully wear their hats while in African American homes.

McGill was not the only lawyer to work in the insurance industry. Austin Thomas Walden, of Atlanta, was a director of the Great Southern Fire Insurance Company in the 1920s.[102] A.P. Tureaud of New Orleans served as a director of the Pyramid Life and Accident Insurance Company. In 1954, Great Southern had sold a total of 600 shares of its stock, with Tureaud owning around three percent of the company.[103] Tureaud is an interesting case because he also applied for and received a commission to

[100] This was the still the era of travelling insurance agents who would visit the homes of clients to sell and update policies. White agents were infamous for disrespecting African Americans inside their own homes.

[101] Conrad Odell Pearson to Gilbert Weare, Interview H-0218, Southern Oral History Program Collection, UNC Chapel, April 18, 1979, transcript p. 19.

[102] "Georgian Starts Fire Insurance Company" *Chicago Defender*, Sept. 18, 1920, p.1.

[103] Pyramid Life and Accident Insurance Company Board of Directors minutes from April 2, 1954, A.P. Tureaud Papers, Amistad Research Center, New Orleans, LA, Roll 6, Series II, frame 0418.

serve as a notary public.[104] It is not clear what effect this proclivity for involvement in outside affairs had upon the public's impression of African American lawyers, but there is little doubt this tendency would have enervated the lawyers' focus on the law.

The African American insurance industry actually had its origins in the fraternal and benevolent societies formed during Reconstruction to provide financial security for the formerly enslaved. Lawyers often served as leaders not only within insurance companies but also fraternal organizations. Scipio Africanus Jones, of Arkansas, became head of the Mosaic Templars of America in December 1929.[105] Jones had been a member of the Masonic group for years, making many legal and business contacts. In 1925, four years before he became head of the entire order, Jones had initiated a drive by the Mosaic Templars to operate African American industrial enterprises in Little Rock, Arkansas.[106] Jones sent out a letter to the members delineating plans to form, "a great industrial enterprise to be financed, owned and managed by the people of our group, to engage in the manufacture of a widely used article."[107] According to the *Chicago Defender*, the belief was that the Templars would operate a cotton mill.

Politics was another outside arena some lawyers chose to enter during Jim Crow. From the records it appears that Mississippi provides the most conspicuous case of

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[104] A.P. Tureaud letter to Governor Earl K. Long requesting commission upon death of previous notary Rene Metoyer, August 24, 1939, A.P. Tureaud Papers, Series 6, roll 19, frame 0394.

[105] "Scipio Jones Installed as Head of the Mosaics," *Chicago Defender* 28 Dec. 1929, p. 11, col. 3.

[106] "Co-Operative Industry for Little Rock: Millions to be Used in Enterprise," *Chicago Defender* 3 Jan. 1925, p. 13, col. 5.

[107] Ibid.

African American lawyers involved in politics. Given the Redemption of the South by white Democrats in the late 1870s, the Republican Party in most states remained the only true political party open to African Americans in the region. Perry Howard graduated from the Illinois College of Law, later De Paul University, in 1904 and began practicing in Mississippi the following year. Howard used his law degree to enter Republican politics, becoming the national committeeman for the state and special assistant to the United States Attorney General under President Warren G. Harding. Eventually, this acclaim brought Howard into difficulties with white Republicans garnering him two federal indictments for selling political offices. In 1928, Attorney General William D. Mitchell indicted Howard for "conspiracy to violate the law against the purchase and sale of federal offices."[108]

Charged along with Howard was Sidney Dillon Redmond, a former physician turned lawyer from Hinds County, Mississippi. Redmond gained a fair amount of wealth from the law and other endeavors, including perhaps the selling of patronage positions within the Republican Party. Redmond's success incensed Ku Klux Klansmen in Jackson, Mississippi, who sent him a threatening letter in 1925. The Ku Klux Klan ordered Redmond to depart the city, declaring, "This is to warn you that unless you and a few other niggers leave town at once you are going to be tarred and feathered…this is a fair warning and you had better take heed and leave."[109] Redmond had amassed enough wealth to operate a store in a central business area of Jackson. "You have entirely too

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[108] *Chicago Defender* 26 October 1929, p. 2. col. 6.

[109] "S.D. Redmond Target of Ku Klux Klan Threat," *Chicago Defender* 12 Nov. 1921, p. 1. Col. 6.

many niggers hanging around your store and they are a regular nuisance. You are too near Capitol street [sic] for your own good."[110]

All of these problems the average African American experienced trying to practice law effected the number who entered the profession during Jim Crow. Census reports provide evidence about numerical changes in African American participation in the legal profession over time. The number of African American lawyers practicing in the South generally declined during Jim Crow. In the twenty-year period from 1910 to 1930, only the states of Arkansas, Maryland, Missouri, North Carolina, Virginia, and the District of Columbia, witnessed a growth in African American lawyers. The degree of growth was not large as Arkansas went from one to sixteen, Maryland from 21 to 33, Missouri from 26 to 55, North Carolina from 19 to 27, Virginia from 37 to 57, and the District of Columbia from 59 to 94. The remainder of the South and all the states in the Deep South saw African American participation in the law decrease in the same time frame. The five remaining states with the largest number of lawyers in 1910 experienced the following trends: Tennessee went from 43 in 1910 to 26 (a 60 percent decrease) by 1930, Texas from 33 to 20 (60 percent), Mississippi from 21 to 6 (29 percent), Kentucky from 27 to 25, and Georgia from 18 to 14.

Ironically, the number of lawyers had been relatively high as the nation underwent Reconstruction following the War Between the States. But as southern progressives came to power and implemented their discriminatory racial system, African American lawyers became increasingly scarce. Mississippi, for example, had 6 African American lawyers according to the 1930 census. However, in 1900, Mississippi had 24

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[110] Ibid.

African American lawyers, many of whom worked in the black belt area known later for its severe racial oppression.[111] Many of these attorneys got their start in the post-Civil years when paternalistic white elites used their resources and influence to aid favorite African Americans, a sentiment that preceded the Jim Crow ethos of racial separation; others benefited from the relatively liberal political environment during Reconstruction. Josiah Settle, of Jacksonville, Mississippi, graduated from Howard Law Department in 1872 and enjoyed a career serving in various prominent positions in the District of Columbia, including: clerk of the Board of Public Works, accountant in the Board of Audit, Trustee of the District schools, and Chairman of the Republican Congressional Executive Committee.[112] During Jim Crow, African American lawyers would witness their opportunities for professional advancement through such public service seriously curtailed.

African American legal aspirants faced increased obstacles to entering the profession in the twentieth century for two reasons: the southern Jim Crow system and the professionalization efforts of the ABA and AALS. This denial of equal access to the bar harmed African American communities in many ways. Foremost, since most African Americans still lived in the South that the number of African American lawyers in the region declined in the early twentieth century was cause for concern. African American people increasingly found it difficult to locate someone to represent their interest in an adversarial legal system.

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[111] On the declining number of black lawyers see Charles Hamilton Houston, "The Need for Negro Lawyers," *The Journal of Negro Education*, vol. 4. no. 1 (Jan. 1935) 49-52; and Paul Finkelman, "Not Only the Judges Robes Were Black: African American Lawyers as Social Engineers," 47 *Stanford Law Review* 161, p. 182-183.

[112] "Hon. J. T. Settle: An Eminent Colored Barrister," *Indianapolis Freeman*, 2 Feb. 1889, p. 1.

But such protection of rights and property was not the norm for southern African Americans during Jim Crow. In general, limited access to legal counsel precluded success in southern courts. Even when African Americans enjoyed adequate representation they would find in the words of Wilford H. Smith, an 1883 graduate of Boston University School of Law and lawyer for African American leaders Marcus Garvey and Booker T. Washington, that "the South can set at naught all the safeguards which the Constitution of the United States meant to throw around us as citizens…with the permission…of the Supreme Court of the United States."[113] African American lawyers would have to define civil rights broadly to defend the property and lives of the community.

[113] Wilford H. Smith, "The Supreme Court of the United States and the Alabama Suffrage Case in Equity," *The Colored American Magazine* vol. 7, no 9, Sept. 1904, p. 582. Smith represented Washington after the race leader received a beating from a New York police in 1911; see, "B.T. Washington Beaten on New York Streets Like Dog," *Chicago Defender* 25 March 1911, p. 1,col. 2.

## Chapter 3 Before "Civil Rights" Was in Vogue

African American lawyers posed a significant problem for southern whites during the Jim Crow years. Racial segregation rested on the fundamental premise of African-American inferiority. The presence of African Americans who could meet the arduous requirements necessary to enter the bar challenged that assumption. There had always been some prestige surrounding professional occupations, but certain events would increase the status of the professions even more in the post-Civil War era. As the nation entered the twentieth century, a period of rapid industrialization led to technological advances and urbanization that transformed society. The rural Jeffersonian democracy no longer existed. One way people dealt with this changing world was to latch upon the idea of the United States as a meritocracy where people of talent would rise to the top. As part of this ideal, those who could attain professional status, preferably through formal education, represented the infallibility of this system that rewarded people who excelled in rational, scientific, and objective thought.[1] Within the incipient scientific racism (and sexism) of this period it was expected that white men would be the ones to rise to the top of the professional hierarchy. However, there were always African Americans who somehow attained the skills to enter almost every profession. They daily served as examples of the fallacy of African American inferiority, especially in the South.

[1] Burton J. Bledstein *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (New York: Norton Books, 1976).

This chapter explores some of the myriad ways African American lawyers challenged white supremacy in the Jim Crow South. Since the Supreme Court decision in *Brown*, scholars have tended to perceive of racial integration in a universal way; they portray integration with white America as the central objective of African American people. However, African American people had other goals, apart from integration, that confronted the institutions of white supremacy. Lawyers provide a window into the multiple options available to African American people because of the nature of the profession. Successful lawyers win cases for their clients. To do so they must predict what the courts and juries will do. As legal realist Karl Llewellyn writes on the law, "What these officials do about disputes is, to my mind, the law itself."[2] This prescient knowledge is the essence of professionalism; this is how lawyers earn their keep. African American layers knew the society they lived in and used approaches set in this context to achieve results. Similar to the trickster of slave tales who usually outsmarted his adversaries, African American lawyers subtly challenged white supremacy in the Jim Crow South in ways that have eluded some scholars.

African American lawyers had no choice but to work within the mainstream legal system, given the absence of separate courts for African Americans. This fact also created a dilemma for segregationist politicians. The separate but equal legal doctrine required that there be the semblance of distinct racialized communities. Segregation therefore required African American professionals who could provide services inside the

[2] Karl Llewellyn *The Bramble Bush: On Law and Its Study* (New York: Oceana Publications, 1951), 2-5.

separate African American world. African American professionals, in this instance, demanded that the colorline be enforced.[3] Once segregationist accepted the necessity of an African American professional class, the difficulty remained how to include these African Americans in the profession.

All attorneys, white and African American, remained theoretically brothers at the bar. In a region where social status depended greatly upon occupation, that African Americans could enter a gentlemanly profession led to inevitable conflicts. For example, in 1958 when J.L. Chestnut, Jr., began his legal career in Selma, Alabama, the probate judge summoned him to the office. Without provocation, ten white secretaries, whom Chestnut had yet to meet, filed complaints when they learned he was African American.[4] The official complaint said Chestnut had been "sassy."[5] In some instances, spectators physically struck African American attorneys inside the courtroom as happened to Arthur Shores in Birmingham, Alabama, when a spectator struck hit him for no apparent reason during the 1940s.[6] Samuel Beadle learned when he attempted to try a case in Greenwood, Mississippi, that judges there only allowed, "Negroes inside the bar, or

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[3] On African American teachers demanding the right to teach African American children in Jim Crow schools see, Howard N. Rabinowitz," Half a Loaf: The Shift From White to African American Teachers in the Negro Schools of the Urban South, 1865-1890," *The Journal of Southern History*, 40 (Nov.1971), 565-594; Adam Fairclough *A Class of Their Own: African American Teachers in the Segregated South* (Cambridge, MA: The Belknap Press of Harvard University Press, 2007), 61-95.

[4] J.L. Chestnut, Jr., and Julia Cass *African American in Selma: The Uncommon Life of J.L. Chestnut, Jr.* (New York: Farrar, Straus and Giroux, 1990), 88-89.

[5] Ibid.

[6] Arthur Shores, "The Negro at the Bar: The South," *National Bar Journal*, 1944, p. 270. An African American man struck Shores after a case. Later, Shores found out that local whites had paid the man to do so in order to demonstrate that average African Americans did not appreciate African American lawyers.

railing, as defendants."[7] Clearly, some white southerners had serious problems accepting the presence of an African American attorney.

In general, African American attorneys received generally badly press during the period following Reconstruction through the 1930s. This negative perception of the ability of African American attorneys can be attributed to a number of factors. African American clients believed, properly in some cases, that African American attorneys would not be well received by judges and juries responsible for their fate. Instead of hiring within the race these people would usually employ a white member of the bar with some degree of standing in the community. American justice, these African American clients knew, was not colorblind.

This pariah status was not permanent, however; eventually, African American lawyers gained some degree of respect from the African American masses. This change came along with the organized civil rights movement and the participation of African American lawyers in these affairs. Led by the National Association for the Advancement of Colored People (NAACP), which had promulgated a gradualist legal approach for decades, civil rights became a cause associated intimately with African American lawyers. Thus African American lawyers went from legal pariahs to legal saviors within the African American community. However, assuming the role of civil rights lawyer was not all positive. As African American lawyers became associated primarily with the fight against racial segregation and discrimination, popular and scholarly perceptions of them narrowed.

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[7] Irvin C. Mollison,"Negro Lawyers in Mississippi," *Journal of Negro History*, vol. 15, no.1 (Jan. 1930), 53.

Today, the liberal, racial integrationist framework that dominates most scholarship concerning race relations portrays African American lawyers only as dedicated to the fight against segregation. But African American lawyers fought and won legal battles without attacking segregation in many cases. These lawyers made conscious choices to work within the social system of the South not because defeating segregation was impossible but because they did not see the world in the post-*Brown* frame of mind. Since *Brown,* society has come to perceive of civil rights as issues arising only out of the Fourteenth Amendment's equal protection clause. In *Brown*, Chief Justice Warren's opinion defined equal protection for African Americans to mean they had the right to be integrated into white institutions. In the decades before *Brown,* integrating into the white world was not the primary goal of African American lawyers, or their clients. African Americans in the Jim Crow era realized their battle was against white supremacy, not necessarily racial segregation. By focusing on integration we tend to confuse the ends (challenging white supremacy) with a means (racial integration).[8] Racial integration was just one of many means to achieve the dismantling of white supremacy.

This emphasis on racial segregation by historians has not been all positive. Despite being successful in terms of helping to eradicate and vilify white supremacy in the form of segregation, the liberal integration school has prevented a more nuanced critique of the Jim Crow era. Racial segregation and Jim Crow practices in general were aimed at maintaining white supremacy over African Americans, thus they took on various forms depending on the situation. Jim Crow came in various forms depending

[8] Lani Guinier, "From Racial Liberalism to Racial Literacy: *Brown v. Board of Education* and the Interest-Divergence Dilemma," *The Journal of American History*, vol. 91, no. 1 (June 2004), 95.

often on the geographical location.[9] We need to reconsider the nature of Jim Crow segregation and how people responded to this social system. Jim Crow was not a monolithic system best eradicated by Supreme Court decrees.[10] The United States Supreme Court does not operate in a vacuum. The efforts of people across the South for decades prior to *Brown v. Board of Education of Topeka* (1954) created the environment precipitating this decision usually given credit for pronouncing the end of legalized racial segregation in the South. African American lawyers in particular provide a window into

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[9] In *Deep Souths: Delta, Piedmont, and Sea Island Society in the Age of Segregation* (Baltimore: Johns Hopkins University Press, 2001) J. William Harris explores the varying forms of white supremacy that arose depending on geographical location; See Mark Schultz *Rural Face of White Supremacy: Beyond Jim Crow* (Urbana, IL: University of Illinois Press, 2005) for a study of a rural county in Georgia where race relations were more fluid than scholars have noted. In rural areas, white planter elites had to use persuasion rather than force to keep African American and white laborers on the farm. Also, in rural areas, particularly in the piedmont regions, there was less formal segregation. However, it most be noted, that both Harris and Schultz thought this piedmont paternalism was itself a method of preserving white supremacy. Likewise, I argue here that Jim Crow laws in urban areas had the same purpose. For a comprehensive study of the politics of southern states, see V.O. Key *Southern Politics in State and Nation* (New York: Vintage Books), 15-276; Dewey Grantham *The Democratic South* (Athens, GA: University of Georgia Press, 1963); and Numan V. Bartley *The Rise of Massive Resistance: Race and Politics in the South During the 1950s* (Baton Rouge: Louisiana State University Press, 1969), 3-27.

[10] Gerald Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); Michael Klarman, "How *Brown* Changed Race Relations: The Backlash Thesis," *The Journal of American History*, vol. 81, no. 1, (June 1994), 81-118; and Michael Klarman *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), both argue that *Brown v. Board of Education* and subsequent federal court decisions demanding forced desegregation of schools and other areas of life provoked white southerners to unite against African American social progress in the form of massive resistance. In effect, Klarman argues that the federal courts slowed down, and perhaps ultimately halted, the progress in race relations that had been occurring in the South in the 1940s before Brown. But, Derrick Bell *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (New York: Oxford University Press, 2004), proposes the courts should have been more honest by acknowledging that *Brown* upheld white supremacy in some respects by focusing more on the "separate" side of the "separate but equal doctrine," allowing *de facto* racial segregation to remain in existence. Consequently, those African Americans not able to enter the mainstream received the blame for their failure to take advantage of *Brown*.

the nature of Jim Crow and the means African Americans employed to survive and alter the system.

African American lawyers worked within a particular context. Jim Crow created an environment circumscribing some of the possibilities for African American lawyers. Social, political, and geographical issues influenced the way African American lawyers operated within the profession. From the 1890s to the 1930s, the South became more urban as people left rural areas seeking employment in the industrial plants and retail establishments funded largely by northern capitalists. The New South boosters convinced their northern patrons that racial segregation would help reduce friction between African Americans and whites of the working class. The relative peace that would ensue from segregation, they said, would make the New South a positive environment in which to conduct business. The South would be separate, but equal, and the New South merchant class, along with planters in rural areas, would maintain control of the workforce. In the New South there was an acceptance that slavery had been wrong, that Reconstruction had been a failure largely because of African American involvement in politics, and that elite white men now had to correct the failures of the past. It is within this environment that African American lawyers had to conduct their work during the early 20$^{th}$ century.

During the Jim Crow era, southern African American lawyers received a negative reputation as a result of the issues that brought about racial segregation. The participation of African American lawyers in politics during Reconstruction became a symbol of the threat the freed slaves presented to white manhood. In turn, African American lawyers had to defeat not just segregation but the white supremacy that lied at

the root of Jim Crow. African American lawyers felt a "twoness" about themselves; not in the Duboisian sense, in which one is both a Negro and an American, but in the sense that African American lawyers had to fight Jim Crow by winning the respect of the African American community that Jim Crow helped produce. The liberal racial integrationist school has not generated scholarship that can address, as well as end, the harmful forms of racial separation in which African American lawyers operated in their daily struggle against white supremacy. Instead, segregation appears as a monolith in liberal works. This thinking may result from a need in the civil rights era to legitimate federal intervention in areas where overt white supremacists used violence against African American demonstrators.[11]

There were real options other than integration available to African American lawyers who confronted Jim Crow. This chapter explores the period before African American lawyers became associated primarily with civil rights work to demonstrate these alternatives to integration. Another associated goal is to demonstrate the difficulty African American lawyers had countering racial segregation. As African American professionals they were members of the segregated African American community. Denouncing segregation in favor of racial integration entailed, to some degree, arguing that the separate African American world remained inferior to the mainstream white world. Yet, as leading members of the African American community, African American professionals would then denigrate their own capabilities?[12]

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[11] Schultz *Rural Face*, 9-11.

[12] Kenneth W. Mack, "Rethinking Civil Rights Lawyering and Politics in the Era Before *Brown*," *Yale Law Journal*, vol. 115, no . 256 (2005), 280-299; Adam Fairclough *A Class of Their Own:*

This chapter will focus explicitly on four African American lawyers in New South communities. A.T. Walden (Atlanta), Benjamin Davis, Jr. (Atlanta), A.P. Tureaud (New Orleans), and Charles Hamilton Houston (Washington, D.C.) serve as examples of African American lawyers who challenged white supremacy before the organized civil rights movement began. In many instances, as with A.P. Tureaud in New Orleans, they were at odds with the direction the civil rights movement was taking with respect to southern race relations. When these men challenged white supremacy there was often little support from sources outside the community. They had to find ways to subvert the racial order without causing a white backlash against them and the entire African American community. Moreover, the lawyers had to challenge questions about their competence as lawyers that had roots in racialized slavery and Reconstruction.

Other African American lawyers of the period will receive consideration too, but Walden, Davis, Tureaud, and Houston, practiced in cities that offer a cross-section of the urban South. Atlanta was the "city too busy to hate," where white boosters proclaimed an exceptionally egalitarian racial order kept peace between African Americans and whites. Walden would skillfully use this fact to his advantage; meanwhile, Davis exemplifies the overtly political African American lawyer that southern whites wanted to believe they had dispensed of after the collapse Reconstruction in 1877. Unlike Atlanta, New Orleans had been a cosmopolitan city during the Old South and had slowly adopted New South racial segregation. Tureaud, a Creole African American, represents the unification of the African American community in its fight against Jim Crow. Creoles

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*African American Teachers in the Segregated South* (Cambridge, MA: Belknap Press of Harvard University Press, 2007), 8-12.

did not always identify as African Americans, but Jim Crow laws mandated that all African Americans be relegated to the same position in the social order. Despite being raised in an environment where Creoles did not generally associate with other "African Americans," Tureaud became a civil rights leader before the movement. Finally, Houston lived in the nation's capital, a border region between the Deep South and the North, and he served as Dean of Howard Law School, the preeminent law school for African Americans. Under Houston, Howard Law would become a crucial site for the training of African American legal aspirants.

The negative image of African American lawyers was somewhat universal in the period before the civil rights movement. Not only did the masses perceive of African American lawyers as problematic, but so did scholars and African American community leaders. One of the earliest scholars to research the African American professional class was historian Carter G. Woodson, the father of Negro History, who, in 1934, published *The Negro Professional Man*, in which he disparaged African American attorneys. Woodson began work on this sociological study of African American professional men around 1928 with the aid of Lorenzo Greene. The two men scoured the nation, interviewing African American professionals. Some of the most influential members of the African American community provided assistance to insure Woodson and Greene acquired access to the information they needed. These men included: Charles Hamilton Houston, a professor at Howard Law School; Charles C. Spaulding, founder of North

Carolina Mutual Life Insurance Company; and Robert Moton, head of the National Negro Business League.[13]

Woodson did not paint a positive portrait of the African American lawyer. Those working in the Deep South cities of Norfolk, Durham, Atlanta, and New Orleans, he found, were relegated to handling civil matters that would not require their presence in the court room.[14] These matters included: real estate, insurance, loans, and property transfers.[15] Woodson believed that because of the restrictions African American lawyers faced in their case work and their desire to avoid unpleasant courtroom experiences, this "tended to make him a nonentity in the community."[16] Even state officials knew little of the work conducted by these lawyers, including the Attorney General of Kentucky, who in 1932 reported the state had two African American lawyers, when Woodson found the number to be closer to thirty and the 1930 census listed twenty-five.[17]

According to Woodson's research, the relationship between African American lawyers and the legal community varied. Despite the racial problems African American lawyers would obviously endure in the South, it is here, especially in urban areas, that he would find work. In Baltimore, Woodson received information that white lawyers had no

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[13] Jacqueline Goggin *Carter G. Woodson: A Life in African American History* (Baton Rouge, LA: Louisiana State University Press, 1993), 75. See in general, Lorenzo Greene *Selling African American History for Carter G. Woodson: A Diary, 1930-1933* (Columbia, MO: University of Missouri Press, 1996).

[14] Carter G. Woodson *The Negro Professional Man and the Community* (New York: Negro Universities Press, 1934), 193.

[15] Ibid.

[16] Ibid.

[17] Ibid., 194.

issue with African American lawyers utilizing public law libraries or trying cases in court.[18] Similar treatment was found in Washington, DC, too. In the Deep South, where there were higher percentages of African American residents, the findings were less clear. For the most part, African American lawyers found work in urban areas. Woodson found Atlanta, New Orleans, and Jacksonville to be places where African American attorneys had stable professional lives. Though African Americans could practice in New Orleans, the remainder of Louisiana was apparently not open to them.[19] Likewise, Texas, an overwhelmingly rural state, had few African American lawyers.[20]

The Woodson study provides valuable information on the African American professional class in the early twentieth century. The book is best used, however, as an example of the perception of African American lawyers amongst people in the 1930s. There are some indications that the book accepts prevailing notions about African American lawyers as fact. For example, when Woodson notes that African American lawyers in the Deep South found work only in the cities, he relies on the generalization that prejudice against African Americans was higher in rural than in urban areas. But, in Mississippi, usually considered a hostile environment for African Americans, there is evidence that Woodson's findings may be incorrect. Rather than coastal areas, such as Biloxi or the state capital of Jackson, African American lawyers practiced primarily in the rural African American belt Delta region.[21]

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[18] Ibid., 212.

[19] Ibid., 219.

[20] Ibid., 220.

[21] Mollison, "Negro Lawyers in Mississippi," 42-43 and 57-58.

Jim Crow segregation, in its legal form, flourished most prominently in southern urban areas.[22] In the rural South, white planters continued to maintain a horizontal social structure with them at the top and all others, white and African American, in a position of subservience. This paternalistic system allowed African Americans to negotiate with their betters to attain things they needed. Planters acquiesced to some African American demands, and would protect "their" African Americans from others, whites and African American, in return for loyalty. Accepting the real, personal attachments of the paternalist system has not been a focus of the racial integrationist camp. In contrast, it seems paternalism and African American agency, a central focus of historiography since the African American power era, are mutually exclusive. But, in reality, the negotiation aspect of the system speaks to the agency of those at the "bottom." Rural African Americans living in the age of segregation understood their world and sought ways to forge a life worth living within that world.

Likewise, urban African Americans, living in a legally codified environment, found ways to circumvent Jim Crow. Similar to the trickster of the slave tales who always outsmarted his adversaries, African American attorneys used wit in legal battles.[23] A.T. Walden, an African American attorney who began a practice in Atlanta in 1918 was known for taking advantage of the city's desire to portray an image of racial

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[22] Howard N. Rabinowitz *Race Relations in the Urban South, 1865-1890* (Athens, GA: University of Georgia Press, 1978); John W. Cell *The Highest Stage of White Supremacy: The Origins of Segregation in South Africa and the American South* (Cambridge: Cambridge University Press, 1982), 131-135.

[23] Lawrence Levine *African American Culture and Consciousness: Afro-American Folk Thought From Slavery to Freedom* (New York: Oxford University Press, 1977), 121-133, provides a good discussion of slave folk tales.

egalitarianism.[24] In Atlanta there was a long tradition of middle-class African Americans and white elites uniting to solve problems in the African American community. This "biracial coalition" controlled Atlanta politics in the Jim Crow era, providing African Americans, who were otherwise disfranchised in Georgia, a voice in municipal politics.[25]

Using his knowledge of Atlanta's New South politics, Walden won the first case against the Atlanta police in an incident involving African American passengers on the segregated city streetcars. The episode began the evening of October 4, 1926, when Dr. C.A. Spence, a dentist and graduate of Howard University, and his wife found themselves ordered off the streetcar they had paid to ride. Afterwards, an African American passenger got into an argument with the conductor over a transfer, and in retaliation, the driver used the altercation as a reason to eject all African American passengers. Later, witnesses reported that other conductors were onboard at the time and there had been talk of their having a "liquor drinking party" after all the African Americans were off the

[24] David Kenneth Pye, "Complex Relations: An African American Lawyer Navigates Jim Crow Atlanta," *Georgia Historical Quarterly* (Winter 2007); Maurice Daniels *Horace T. Ward: Desegregation of the University of Georgia, Civil Rights Advocacy, and Jurisprudence* (Atlanta: Clark Atlanta University Press, 2001), 25; Robert A. Pratt *We Shall Not Be Moved: The Desegregation of the University of Georgia* (Athens, GA: University of Georgia Press, 2002), 10.

[25] The classic studies of the Atlanta biracial coalition are Floyd Hunter *Community Power Structure: A Study of Decision Makers* (Chapel Hill: University of North Carolina Press, 1953); Floyd Hunter *Community Power Succession: Atlanta's Policy-Makers Revisited* (Chapel Hill: University of North Carolina Press, 1980); and, Clarence Stone *Regime Politics: Governing Atlanta, 1946-1988* (Lawrence, KS: University of Kansas Press, 1989); See also, Karen Ferguson *African American Politics in New Deal Atlanta* (Chapel Hill: University of North Carolina Press, 2002); and for s study of the formation of the African American community in Atlanta, see, Allison Dorsey *To Build Our Lives Together: Community Formation in African American Atlanta* (Athens, GA: University of Georgia Press, 2004).

streetcar.[26] Having already partaken of some alcohol, the conductors slapped around a few slow-moving African American passengers.[27]

The African American passengers who obeyed the drivers' orders still found themselves under attack by whites who gathered at the scene. Perhaps fearing the spectators, Dr. Spence and his wife refused to leave the coach and subsequently received a brutal beating by the conductors and various members of the assembled white citizenry. After being subdued by the attackers and dragged from the coach, Dr. Spence was arrested by Atlanta police officers. When Mrs. Spence tried to interject and explain the situation, the police arrested her, too. The municipal court dropped the disorderly conduct charge in Mrs. Spence's case, but the court bound Dr. Spence over for trial.[28]

After the grand jury sent the case up to the Fulton County Superior Court, Dr. Spence wisely requested the legal counsel of the city's premier African American lawyer, A.T. Walden. Walden, who had begun his career as a criminal defense lawyer before winning some respect from the white bar and judiciary,[29] became perhaps the only African American man in 1927 who could stand in a Georgia courtroom and advance an argument for an African American citizen against the police force. As W.W. Law, a leader of the Savannah, Georgia NAACP remembered, Walden during this period, "Was

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[26] *The Chicago Defender*, May 21, 1927, part 1, p 2.

[27] *The Crisis: A Record of the Darker Races*, January, 1930, 16.

[28] *The Chicago Defender*, May 21, 1927, part 1, p 2.

[29] Osgood Williams, interview, May 12, 1988, GGDP.

just out there at a time when a lawyer who could take the pleadings of an African American who had been wronged was just something none of us could imagine."[30]

In court for Dr. Spence, Walden acted shrewdly, but cautiously, by requesting that all plaintiffs' witnesses, except the one presently testifying, be removed from the courtroom. With this tactic, he hoped to secure more accurate testimony from the witnesses and to substantiate those who were less than truthful.[31] Additionally, Walden called for a stenographer to maintain a record of the testimony given by all witnesses.[32] Again, Walden sought to document what the white witnesses offered as evidence against his client to prevent any irregularities by the court. On April 22, 1927, faced with a written transcript of the proceedings, a white judge and white jury acquitted Dr. Spence of disorderly conduct.

Walden also handled the case in a manner that not only won a verdict for his client but also gained the respect of many white Atlantans.[33] Rather than highlight the racial aspects of the incident, Walden, ever cognizant of the volatile nature of race relations in the South brought to light the use of alcohol by the white conductors.[34] Thus, the white jury sided with the African American who had obviously suffered from an attack by a drunken group of conductors. If Walden had attempted to challenge the city's

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[30] W.W. Law, interview with Clifford Kuhn and Timothy Crimmins, November 15 and 16, 1990, GGDP, Series E, Box 2, 168.

[31] See Gunnar Myrdal *An American Dilemma: the Negro Problem and Modern Democracy* (New York: Harper and Row, 1962), 547-557, for a discussion of racism within southern legal systems.

[32] *The Crisis*, August, 1927, volume 34, n.6, 214.

[33] *The Chicago Defender*, May 21, 1927, part 1, p 2.

[34] Ibid.

segregation ordinances or the right of the white conductor to eject African American passengers, then the jury may have been less willing to sympathize with the abused African American man. This result vindicated Dr. Spence's decision to retain an African American lawyer, despite protestations of many well-meaning friends.[35]

Though he fought tenaciously for African American rights, Walden never openly challenged white southerners' superior social position. Walden generally worked within the limits placed by whites. At the same time, throughout the early part of his career, the majority of African American Atlantans did hold Walden in high esteem--many because he was an African American man who dared argue against whites in court. Walden's, success in the African American world was due partly to his legal training. Furthermore, he believed that he, as an African American lawyer, had a duty to assume a leadership role in African American Atlanta. Walden summed up the responsibility he thought African American lawyers owed their community years later in a speech to the National Bar Association:

> Because of his special training in the law and in the science of government, whether he so elects or not, he must be the author, the architect, and fabricator of the frame of reference in which and by which his fellows must march forward to the realization of the ultimate goal of first class citizenship in the lifetime of the present generation.[36]

Despite presenting the African American lawyer as a social engineer, Walden never advanced racial integration as a central objective of his civil rights advocacy. Nor did he employ strategies likely to enflamed racial passions in the Jim Crow South.

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[35] *The Crisis*, January 30, 1930, 17.

[36] A.T. Walden, National Bar Week Address, May 20, 1959, A.T. Walden Papers, Series 6, folder 4, 5.

If Walden provides an example of an Atlanta African American lawyer earning respect by working within the prevalent order to subvert it, Benjamin Davis, Jr., is an example of one directly challenging white supremacy in the urban South. Walden employed facially race neutral strategies that resonated well with Atlanta's New South politics. In the Angelo Herndon case, Davis explicitly challenged the myth of the New South as a site of racial harmony. Davis' tactics become important because they are examples of an American lawyer exposing the hidden power between white supremacy; Davis tried to expose the southern judicial system as racially-biased and the trial of Angelo Herndon as a farce.[37]

Davis, who practiced in Atlanta from 1931 to 1964, argued the insurrection case of Communist Party organizer Angelo Herndon in the 1930s.[38] This case is instructive on a number of levels. The Davis clan was part of the African American elite of Atlanta that arose in the first two decades of the twentieth century.[39] Davis was not a member of

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[37] Charles Martin wrote the seminal text on the Herndon trial, *The Angelo Herndon Case and Southern Justice* (Baton Rouge: Louisiana State University Press, 1976), but he was not privy to more recent scholarship proving the widespread appeal of Communism to working class African Americans in the South. I look at the Herndon case through from this new perspective. Davis made race an issue while the legal system tried to relegate race to subtext. The whites made no explicit mention of race, all the while demonstrating in action their belief in white supremacy. Davis and Herndon, in turn, chose to speak to the white working class, asking them to empathize with Herndon instead of the racists handling the trial.

[38] *State v. Angelo Herndon* (1933) Superior Court of Fulton County, Georgia.

[39] During slavery and Reconstruction, the African American elite consisted primarily of light complexioned mulattoes who had attained social status based on their relative freedom. In the early 20th century, with the rise of the African American professional class, the elite consisted of the former as well as those who acquired status through education and business acumen. August Meier and David L. Lewis, "History of the Negro Upper Class in Atlanta, 1890-1958," *Journal of Negro Education* vol. 28, no. 2 (Spring 1959), p. 128-139. For a study of the African American elite throughout the nation see Willard Gatewood *Aristocrats of Color: The African American Elite, 1880-1920* (Fayetteville, AK: The University of Arkansas Press, 2000).

the African American working class masses who toiled in domestic service positions for white Atlantans, but grew up in a household that afforded him resources unavailable to most southerners—African American or white. Davis received a first-rate education at Morehouse College, Amherst College, and, finally, Harvard Law School.

Since Davis theoretically possessed all the prerequisites, excepting pigmentation, needed to attain full acceptance as a gentleman in the Georgia bar, we should analyze his treatment in Georgia to ascertain what role race played in this matter. Davis passed the Georgia Bar exam in January 1932, after receiving his law degree from Harvard three years earlier. Using familial contacts, his first job following Harvard was for a white publishing house that printed national advertisements for *The Atlanta Independent*, the paper his father published.[40] After becoming disillusioned with the printing industry in 1932, Davis quit his job and opened a law practice in Atlanta. Upon meeting John Greer, who hailed from a working class background, and realizing there was another young African American lawyer in the city, Davis offered him a partnership. Though Greer had some courtroom experience, most of it resulting from personal scrapes with the law, Davis was a novice. For example, during his first trial, Davis audaciously lit a cigar in the courtroom receiving a verbal lashing and fine by an incredulous judge. When he announced he could not pay the five-dollar fine immediately, the judge ordered him to join the shabby line of African Americans headed to the local stockade.[41] A.T. Walden, the senior African American attorney in the state, witnessed the event and graciously offered to pay the fine. Six months later, after handling very few cases in a city hard

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[40] Benjamin Davis *Communist Councilman From Harlem; Autobiographical Notes From a Federal Penitentiary* (New York: 1969), 43.

[41] Ibid., 49-50.

hit by the Depression, Davis read about the arrest of Angelo Herndon, an African American communist, and became intrigued. He wondered if it was true that the state would arrest a man for violating an insurrection law passed during Reconstruction that was actually just a revision of an old slave code! Therefore, only six months after passing the Georgia bar exam, Davis went to the Fulton County Jail towers, known locally as the "Tombs," to hear Herndon's story. Little did he suspect that he would soon introduce "the African American lawyer" to the average white Georgian who had no idea there was any such creature amongst them.

Herndon, a slim, light-complexioned, bespectacled African American man, joined the Communist Party because it appeared to be the only group attempting to organize the masses against capitalist exploitation. In 1932, the nation was in the midst of the Great Depression and Atlantans, like all southerners, were having a very tough time making ends meet. In many cases, the city's poor complained about the lack of relief aid from the government. The Party sent Herndon to Atlanta from Alabama where he worked as an organizer for ten dollars a week. The Communist Party, despite the challenges presented by southern political conservatism, saw the South as fertile ground for revolution.[42] In Atlanta, Herndon's responsibilities included holding protest rallies at government buildings. The picketers, comprised of Communists and unemployed white and African American workers, demanded some sort of relief from the state. After an interracial rally at the Fulton County Courthouse in which one thousand people protested the county's decision to discontinue its "charity" for the poor, Atlanta police began following Herndon for suspected affiliation with Communists. On July 11, 1932, detectives

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[42] Hosea Hudson *African American Worker in the Deep South: A Personal Record* (New York: International Publishers, 1972); Nate Shaw *All God's Dangers: The Life of Nate Shaw* (New York: Knopf, 1974); Robin D.G. Kelley *Hammer and Hoe: Alabama Communists During the Great Depression* (Chapel Hill, NC: University of North Carolina Press, 1990).

John Carter and Frank Watson grabbed Herndon after he open his private post office box in the Fulton County Post Office. They placed Herndon under arrest and delivered him to police headquarters.

Though the initial charge is unclear, the police ledger book had the word "communist" inscribed above Herndon's name.[43] The prisoner remained in police custody for eleven days before the state informed him of the charges. Finally on July 22, 1932, after Fulton County Judge Virlyn Moore ordered the county prosecutor to charge Herndon or to set him free, Herndon received an indictment for "inciting an insurrection." The maximum penalty for violating this anarcho-syndicalist law was death by electrocution. Apparently, Georgia felt Herndon was a serious threat.

It is not clear why Davis accepted to defend Herndon, but it also certain that an older established African American attorney would not have done so. Here is an example of Jim Crow segregation laws working to create unity that otherwise might not have existed. Davis's elite social background did not portend that he would become the lawyer for a southern African American Communist. But the racial angle, made apparent by the state charging Herndon under a slave law, probably created more interest in Davis than normally would be expected of an elite professional; Davis, unlike whites who graduated from Harvard, had almost no opportunity for a legal career at an established law firm. That he chose to handle the defense free of charge also indicates a degree of empathy for Herndon beyond that of the normal attorney-client relationship.

Young and inexperienced in criminal litigation, Davis worked hard in preparing his case. After receiving the evidence and concluding that Herndon had never attempted to incite a riot,

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[43] Ibid., 21; *Atlanta Daily World* July 12, 1932, p.1.

Davis decided to attack the Jim Crow order that had placed his client in jail. When the trial began at 9:30 a.m. on Monday, January 16, 1933, the first motion by the defense was to quash the indictment based on the unconstitutionality of the Fulton County grand jury's composition. Georgia, Davis proclaimed, had systematically kept African Americans off Fulton County juries since the late 1800s, thus the indictment against Herndon should be overturned. To buttress his argument, Davis placed David T. Howard, a prominent African American mortician, on the witness stand to prove that there were qualified African Americans in Atlanta who had never served as jurors. After hearing Howard's testimony, Davis called an African American college graduate, R.L. Craddock, to the stand and questioned him on his background. Again, despite impeccable credentials, Craddock also stated that he had never been part of a jury pool.

Jim Crow segregation was seldom a set of formal laws marginalizing African Americans. There was both formal and informal means of preventing African Americans from challenging white supremacy. In the Georgia court system the state government can choose which judge handles a case. In special circumstances, as in the *Herndon* trial, a judge outside the normal circuit may preside. Lee Wyatt came up from La Grange, Georgia, a small town near the Alabama border, specifically to handle this trial. Many presume that Wyatt was the state's choice because of his much-deserved reputation for being hard on African Americans and his unsophisticated nature would conflict with that of the "spoiled" Atlanta African Americans.[44] Wyatt lived up to this advanced billing displaying little respect for the two African American attorneys Davis and Greer, or their African American client.

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[44] Benjamin Davis 62-63.

Georgia also racialized the trial in jury selection. Davis proved, without doubt, that the jury selection process had been tainted. He first did so by placing well-qualified African Americans who had never served as jurors on the stand. Next, the defense showed how jury selectors were aware of the racial composition of the jury pool because Fulton County used different colored paper for white and African American perspective jurors. At one point during this phase, Judge Wyatt turned his back on Davis and read a newspaper while the African American lawyer argued against the jury selection procedure.[45]

Davis also questioned eleven white court officials who all gave inconclusive evidence concerning the selection of jurors. Although no African Americans had ever served as jurors during any of their careers, the workers emphatically denied the intention of excluding African Americans as jurors. Jury Commissioners Oscar Palmour and Steve Nance both stated that their belief was that African Americans were not selected for jury pools because the commissioners did not personally know them rather than because of racist proclivities. Furthermore, any African Americans that the commissioners knew, the court officials argued, were government employees, thus exempt from jury duty. After hearing this testimony, Judge Wyatt dismissed the defense's claim to quash the indictment and the trial continued. For the time being, Georgia's jury selection process would remain unchanged.

Davis became the first African American lawyer to question the jury selection process in Georgia. In fact, the rumor that he would broach this issue during Herndon's trial had actually led to the selection of two African Americans for a jury pool shortly before the trial began. The state, in a blatant attempt to render Davis's racism claim moot, placed John Moated, a firefighter,

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[45] Benjamin Davis, 67.

and Alex Carter, a small business owner, on the Fulton County jury panel for a case involving a white executive accused of swindling an African American woman.[46] However, as one might expect, the defense struck both African American men from the final jury. Still, the state had made it abundantly obvious that African Americans could possibly serve as jurors. Apparently, it was merely a coincidence that no African Americans had sat on Georgia juries since Reconstruction.

Their motion denied, Davis, Greer, and Herndon left the courtroom to spend the remainder of the day preparing for the trial. As they emerged from the room a group of angry whites taunted them and threatened to harm Davis if he did not "leave the Klan out of this." One man pulled a knife and it seemed as if the Klan would lynch the African Americans, for somehow, despite official policy to the contrary, all courthouse deputies had left the room before the spectators. Fortuitously, for Davis, the Reverend J. A. Martin, a huge, muscular man, witnessed the ensuing lynch mob and came to help the African Americans. Martin, who later told Davis that he had barely survived a number of lynchings, and two of his parishioners, walked the defense team past the whites and down the street to Davis's office.[47]

The next morning, Davis's day began inauspiciously when he awoke to find a white cross in his front yard with a warning note from the Ku Klux Klan stating, "The Klan Rides Again. Get Out of the Herndon Case."[48] Undaunted, he placed the cross in his kitchen as a souvenir. Back at the courthouse, with the jury selection issue settled, Davis continued his one-man assault on the inequities of the Georgia legal system. As the trial proceeded, police detective Watson, one of the

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[46] *Pittsburgh Courier*, January 14, 1933, p.1.

[47] Benjamin Davis, 68-69.

[48] Ibid, 71.

arresting officers, and Solicitor General E.A. Stephens took the stand. Throughout their testimony each made gestures toward the defendant while calling him "that nigger there."[49] In 1930s Georgia, it was common for judges, lawyers, witnesses, and jurors to refer to African Americans as "niggers" in the courtroom. Even in the Upper South state of North Carolina, according to African American attorney R. McCants Andrews, court officials called African American defendants and African American lawyers “darkey” and “nigger” to “convey a debased opinion of the [African American] litigant or defendant whom they opposed.[50] The term “nigger,” according to most southern whites at the time, was synonymous with African American. Whenever one of the prosecution's witnesses used the term, however, Davis refused to honor this Georgia custom, by objecting. To Davis, so labeling a man on trial for his life prejudiced the jury against him. Judge Wyatt repeatedly overruled Davis's objections and finally, only after relentless complaining about the use of the offensive term in open court, Wyatt informed the witnesses to refer to African Americans as "darkeys," which he claimed was a term of endearment. Finding no humor in the Judge's actions, Davis continued his objections to the use of racist terminology until Judge Wyatt assented and instructed all witnesses to refer to Herndon as "the defendant."

Davis's final challenge to the southern way of life occurred when he attempted to argue that communism was no real threat, and thus, Herndon's possession of communist literature was not an incitement to insurrection. To do so Davis placed two Emory University economics professors on the witness stand as experts on communism. The first, Dr. Mercer G. Evans, had conducted tests among his students and concluded that the majority, when unaware of the source of

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[49] Benjamin Davis, 73.

[50] Floyd J. Calvin, “North Carolina Has Finest Set of Judges,” *Pittsburgh Courier* September 1, 1928, p. 3.

material presented to them, found the literature of the American Revolution much more inflammatory than the propaganda found in Herndon's box.[51] Judge Wyatt, displaying his well-known intransigent racism, denied that neither Emory professor was an expert on communism.[52] Communism, the Judge erroneously averred, was not an economic system as defense counsel asserted, so the economics professors' testimonies were superfluous.[53] On cross-examination, prosecutor John H. Hudson grilled the Emory professors on the Russian Revolution, but only embarrassed himself, and the judge, because neither knew the difference between the Secretary of the Communist Party and the President of the Union of Soviet Socialist Republics. Nevertheless, Wyatt felt he was competent to decide whether the two professors were experts![54] After becoming aware of the professors' roles in the trial, some white Atlantans took exception to the presence of what they interpreted as communist sympathizers at Emory and began a campaign calling for the dismissal of all known "reds."[55]

Weary from his battle, Davis concluded the defense's case by calling Angelo Herndon to testify. According to Georgia law at the time, a defendant could address the court even if not sworn-in without facing questions from either prosecution or defense.[56] Herndon used this opportunity to spend twenty minutes fulminating against the State of Georgia and the capitalist

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[51] Benjamin Davis, 73.

[52] *Atlanta Constitution*, January 18, 1933, p.4; James H. Street *Look Away! A Dixie Notebook* (Westport, CT: Greenwood Press, 1936), 148.

[53] "Trial of Angelo Herndon is Nearing," *Atlanta Constitution* January 18, 1933, p.4.

[54] Street, 148.

[55] Ibid.

[56] Benjamin Davis, 75.

economic system for using racial prejudice as a means of exploiting African American and white workers.[57] Herndon insisted that his arrest was an attempt to prevent the uniting of African American and white workers because, "the capitalist class teaches race hatred to Negro and white workers and keep it going all the time, tit for tat…and the capitalist becomes the exploiter and the robber of them both."[58]

Davis, who had joined the Communist Party the previous night out of disillusionment with Georgia's legal system, allowed Herndon to speak his mind. Perhaps Davis realized that given the manner in which the judge conducted the trial, Herndon's chances of an acquittal were slim anyway. Thus, any inflammatory remarks the defendant made were not likely to affect the decision. Herndon's speech condemned racial prejudice as a blinder that kept people from perceiving the inequities the capitalist class heaped upon the workers of both races.[59] Standing before the jury that possessed the authority to take his life, Herndon steadfastly refused to apologize for his communist convictions.

After hearing closing arguments from the prosecution and the defense, Judge Wyatt gave the jury its instructions for deciding the fate of young Angelo Herndon. By now, many of the jurors were openly hostile towards Davis and Herndon. In fact, as Davis paced in front of the jury box during his closing statement, three jurors turned their backs in blatant contempt for the African American attorney.[60] This contempt is telling because Davis' closing arguments were an

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[57] *Atlanta Constitution* January 18, 1933, p.1.

[58] "Angelo Herndon's Speech to the Jury," Angelo Herndon *Let Me Live* (Ann Arbor: University of Michigan Press, 2007), 346-347.

[59] Ibid.

[60] Charles Martin, 59.

attempt to portray Herndon as an African American with whom the jurors could identify. First, Davis presented Herndon as a "man," who "in the words of a man and not those of a cringing coward that he would never give up his principle of fighting for the workers and Negroes."[61] Davis hoped the juror would understand that Herndon's harsh speech had been that of person willing to stand behind his convictions. Davis continued by pronouncing that "what happens to Herndon today…is going to determine what is going to happen to you when the sharp pains of hunger tug at the helpless emaciated forms of your loved ones tomorrow.[62] Again he hoped the jurors would see beyond race and perceive of the class conflict between the interracial working class and the elite, white capitalists. The jury had an opportunity to decide whether to join with the Georgia power structure or with Herndon, their class equal. A guilty verdict, "[would] be catering to the basest passion of race prejudice which the [prosecutor] has sought to conjure up in you all."[63]

The racially-charged atmosphere in the courtroom, the defendant's dogged advocating of communism, and Davis's refusal to submit to southern courtroom decorum proved too much for the twelve white men to bear. Although Herndon never even had the opportunity to distribute the literature confiscated in the post office, the jury found him guilty as charged. The sentence rendered was eighteen to twenty years on the infamous Georgia chain gang.[64] Though

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[61] "Summary for Angelo Herndon, Defendant, Before Fulton County Petit Jury by Benjamin Davis, Jr., Chief Defense Trial Attorney," *Let Me Live*, 352.

[62] Ibid., 353.

[63] Ibid.

[64] For description of the brutal nature of the Georgia chain gang, see John Louis Spivak *Georgia Nigger* (Montclair, NJ: Patterson Smith, 1932). The chain gang is often considered the last remaining form of involuntary servitude, excluding contemporary sexual slavery of women, in the United States, see William Cohen, "Negro Involuntary Servitude in the South, 1865-1940: A

the jury could have given Herndon a death sentence, the average life span on the brutal chain gangs was only around ten years. In effect the jury had decided Angelo Herndon was to die a slow, painful death for his crimes against southern society.[65]

*The Atlanta Constitution* called the Herndon trial one of the most significant in Georgia history.[66] To many observers, Benjamin Davis made the trial so memorable. As Clarence Bacote, who was then a history professor at Atlanta University, remembered, "Well, of course, the case was stacked against Herndon from the beginning, but I'll always admire the way Ben Davis, Jr., handled the case."[67] The Communist Party affiliation also increased emotions concerning this case as it had previously in Alabama's infamous Scottsboro trial.[68] In *An American Dilemma: The Negro Problem and Modern Democracy,* sociologist Gunnar Myrdal notes that in the 1930s most southern African American lawyers avoided the courtroom.[69] Instead, they settled matters outside the courts, engaged in real estate and insurance, or offered legal advice.[70]

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Preliminary Analysis," *Journal of Southern History* 1976, vol. 42, no.1, p. 31-60; Walter Wilson *Forced Labor in the United States* (New York: International Publishers, 1933); and Alex Lichtenstein, Good Roads and Chain Gangs in the Progressive South: The Negro Convict is a Slave," *Journal of Southern History*, vol. LIX, no.1, Feb 1993, p. 85-110.

[65] Five years later the U.S. Supreme Court overturned the conviction.

[66] *Atlanta Constitution*, January 19, 1933, p.1.

[67] Clifford Kuhn, Harlon E. Joye, and E. Bernard West *Living Atlanta: An Oral History of the City, 1914-1948* (Athens, GA: University of Georgia Press, 1990), 207.

[68] See Dan T. Carter *Scottsboro: A Tragedy of the American South* (Baton Rouge: Louisiana State University Press, 1969). For a more recent consideration of the case, see James Goodman *Stories of Scottsboro* (New York: Pantheon Books, 1994).

[69] Gunnar Myrdal *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper and Row, 1944), 550.

[70] Ibid.

Davis' insistence on not having the terms "nigger" and "darkey" used in the courtroom infuriated Judge Wyatt, whom the state chose to preside over the trial because he embodied the South's patriarchal ideals. Furthermore, Davis's contention that Herndon had only requested aid for unemployed African American and white workers seemed a call for racial unity, an act white supremacists could not accept during the Jim Crow era.[71] These bold pronouncements clearly infuriated the judge and jury who resented the open challenge to the Jim Crow system. Their only recourse to the articulate African American attorney's demeanor was to turn in their chairs and pretend he did not exist.

On its face, the trial of Angelo Herndon was fair. He received adequate legal representation, trail before a jury of his peers, and objective jury instructions. Davis' legal strategy presents us with another perspective of the southern legal system during Jim Crow. Despite the obvert appearance of objectivity, white supremacy was a factor in the case. Davis demonstrated that neutral legal principles do not always provide true equality but instead often merely obfuscate societal inequalities.

Many African Americans found it necessary to leave the South temporarily in times of economic difficulties or increased racial animosities. By leaving the South, African American lawyers fled Jim Crow. In returning to the South, they challenged Jim Crow directly. During slavery the status of African Americans was made somewhat permanent by their immobility. Though restricting African American mobility ensured a tractable labor source, the slaveholding class also needed African American slaves to perceive of their enslavement as natural. One way of achieving this result was by

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[71] *Atlanta Constitution*, January 19, 1933, p.1.

maintaining the appearance that all African Americans were slaves. Many southern states enacted laws requiring African Americans manumitted by owners who otherwise won their freedom had to leave the state within a certain period or revert to slave status. Meanwhile, roving slave patrols kept slaves in their place on plantations.[72] The presumption then was that any African American in the area was a slave who must at the request of any white produce evidence of why he or she was roaming about without white supervision. In the slave South, being African American became synonymous with slave status. Only in New Orleans and Charleston, and a few other port cities, did one witness free African Americans on a regular basis.

After emancipation, African Americans could move and did. They left rural southern areas for southern cities or for other regions of the country.[73] Even those African Americans unable or unwilling to leave the rural South had a marked propensity for moving from one plantation to the next each year usually in search of a better employment contract with the white planter. The African American professional class

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[72] On slave patrols see Sally E. Hadden *Slave Patrols: Law and Violence in Virginia and the Carolinas* (Cambridge, MA: Harvard University Press, 2001), especially pages 71-136. These patrols were comprised of men from various levels of society who served for a specific term in a specific locale, or "beat." Patrols had the authority to stop and question any African Americans they encountered; See Philip J. Schwarz *Slave Laws in Virginia* (Athens, GA: University of Georgia Press, 1996), 142, on the 1841 Virginia law prohibiting free African Americans from entering the state, except as hired hands on oceangoing vessels; In *Roll Jordan Roll: The World the Slaves Made* (New York: Pantheon Books, 1974), 399, Eugene Genovese states, "Between 1830 and 1860 one state after another closed off manumission altogether or insisted on the removal of freedman from the state [except Missouri]."

[73] William Cohen *At Freedom's Edge: African American Mobility and the Southern White Quest for Racial Control* (Baton Rouge: Louisiana State University Press, 1991); Nell Painter *Exodusters: African American Migration to Kansas After Reconstruction* (New York: Knopf, 1977); James Grossman *Land of Hope: Chicago, African American Southerners, and the Great Migration* (Chicago: University of Chicago Press, 1989); Paul Edwards *The Southern Negro as Consumer* (New York: Prentice-Hall, 1932), 1-12.

was on the move as well. By the 1920s a class of African American professionals and merchants with formal educations had moved in and supplanted the old mulatoo elite in New South cities.[74] The increased urbanization of African Americans created a viable market to sustain a professional class.[75]

Jim Crow laws, though part of the New South program, which was not directly descended from the Old South of slavery, did attempt to replicate slavery in some forms. For example, one characteristic of enslaved African Americans was that they had little formal education hindering their knowledge of the outside world beyond their workplace. There were variations because those enslaved in cities would have more opportunities to come in contact with outside sources of information. Under Jim Crow, southern states refused to fund African American schools at any adequate level, the rationale being African Americans only needed educating to an elementary school level. In many areas, there were not even high schools for African Americans to attend.[76] The city of Atlanta, for example, despite its large African American population, did not have a high school for African Americans until 1921, and then only after the municipal government attached the high school provision to a bond issue in which the mayor needed African American votes. For African Americans in rural areas the situation was much worse.

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[74] William B. Gatewood *Aristocrats of Color: The African American Elite, 1880-1920* (Bloomington, IN: Indiana University Press, 1990), 333-34.

[75] August Meier, "Negro Class Structure and Ideology in the Age of Booker T. Washington," *Phylon* vol. 23, no.3 (1962), 259-260; August Meier and David Levering Lewis, "History of the Negro Upper Class in Atlanta, Georgia, 1890-1958," *The Journal of Negro Education* vol. 28, no. 2 (Spring, 1959); 128-139.

[76] Thomas O'Brien, "The Dog That Didn't Bark: *Aaron v. Cook* and the NAACP Strategy in Georgia Before *Brown*," *Journal of Negro History* vol. 84, no. 1, Winter 1999, p. 86.

Southern state governments created an uneducated populace that would exude the level of ignorance of the outside world needed to exploit their labor. To escape this environment, African American professional class aspirants had to leave their homes to get resources rendered unattainable in the South. In this way, African American professionals who migrated out of the South displayed similarities to runaway slaves of the Old South who left their slaveowners and then acquired additional skills to attack the system.[77]

A.P. Tureaud of New Orleans, Louisiana, exemplified the African American lawyer leaving his state to garner resources to battle white supremacy and then returning home. Tureaud, an African American French Creole born in 1899, grew up in the Creole enclave of New Orleans located south of Canal Street, which physically separated them from "American" African Americans. French Creoles occupied a spot in the racial order between whites and African Americans for much of Louisiana history.[78] Jim Crow represented a departure from this tradition as segregation laws dictated that anyone with a noticeable trace of African American blood was deemed of the Negro race. Despite their amalgamation into the African American race through legislation, Creoles still maintained a social separateness from the rest of the African American community well into the early 20th century.

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[77] A good example of the runaway returning to wreak havoc on the South would be Harriet Tubman, who made numerous trips into the region to rescue African Americans held in bondage. Another example is Frederick Douglass, who did not return to the South physically, but did so metaphorically through his slave narrative and support of the anti-slavery Republican Party.

[78] William Gatewood *Aristocrats of Color: The African American Elite, 1880-1920* (Bloomington, IN: Indiana University Press, 1990), 82-85.

Creoles also differed from other African Americans in terms of their "radical protest tradition" with roots in the French Revolution.[79] It was Creoles who provided needed leadership in the African American community during Reconstruction, and it was they who led the legal attack on racial segregation in Louisiana streetcars in 1896's *Plessy v. Ferguson*.[80] Another feature of the radical protest tradition is the belief in race as a social construct. To Creoles, French heritage was more significant in their self-identification than was their racial designation, which in Jim Crow Louisiana was "Negro." Concomitant with abhorrence for racial segregation was the Creole desire to transcend the African American/white dichotomy of race relations in the South.

New Orleans politics differed from those in Atlanta in that there was no real coalition between whites and African Americans. Instead, New Orleans clung to the old paternal system that was partly a vestige of the Old South. Historian Arnold Hirsch notes that under Jim Crow African Americans were powerless in New Orleans. By this he meant African Americans could not directly use the political system to affect change. What they did do, says Hirsch, was employ powerful whites to achieve their objectives. In return, African Americans would then support these same whites whenever needed.[81]

Tureaud sought to transcend the African American/white dichotomy and subvert the white supremacy implicit in the paternal system. To him the basis of recognition

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[79] Arnold R. Hirsch, "Race and Politics in Modern New Orleans: The Mayoralty of Dutch Morial," *Amerikastudien* vol. 35, no. 4 (1990), 463.

[80] 163 U.S. 537 (1896).

[81] Arnold R. Hirsch, "Simply a Matter of African American and White: The Transformation of Race and Politics in Twentieth-Century New Orleans," in *Creole New Orleans: Race and Americanization* (Baton Rouge: Louisiana State University Press, 1992), 263-270.

should be on individual achievement rather than social ties. He did not challenge white supremacy through integration, per se, however. Tureaud commenced his struggle by allying with African American "Americans," and acknowledging his membership in that segregated community, rather than emphasizing integration with whites. This strategy conflicts with the prevalent portrayal under the liberal integrationist framework of a monolithic African American community that had as its ultimate goal integration with white Americans. The African American community in New Orleans was not socially unified nor was racial integration its primary goal. Tureaud, remaining true to his French radical heritage, challenged white supremacy as an African American southerner; his tactics, as were those of Walden in Atlanta, were always designed with reconciliation of the South in mind. In the latter phases of the civil rights movement, militant African Americans would label his seemingly more gradual approach to race relations, "Uncle Tomism," after the fictional slave character that was overly obsequious around whites.[82]

In New Orleans, Tureaud spent his early years living as many Creole did, in a world of racial unawareness. Unlike their "American" African American counterparts, Creoles for a time attended schools and churches with whites. At the age of seven, Tureaud entered the Bayou Road School located near his Creole home. Bayou Road at the time had a faculty and administration consisting solely of whites. He remembered fondly those times when a white teacher would hold his hand and walk with him to

[82] Harriet Beecher Stowe *Uncle Tom's Cabin: Or, Negro Life in the Slave States of America* (London: T. Bosworth, 1852).

school.[83] The close proximity of the Creole community with those of whites aided in this integration process with the white world.

As Clyde Robertson notes, there is an irony of the year spent at Bayou Road School. Though Tureaud expressed contentment with the racially integrated situation at the school, which was a microcosm of the larger situation of the geographical area in and around the Creole enclave, unlike in the "American" African American community, racial pride was a corollary of white supremacy.[84] Creoles were acceptable in mainstream society to a greater extent than African Americans because so doing supported the racial hierarchy. The New Orleans Creoles living in the enclave usually possessed what African American Americans considered "light skin complexion" and facial features more similar to whites than Negroes. The Creoles, denied equality with whites, refused to socialize with the African Americans and considered them inferiors.[85] This distinction between African Americans and Creoles had roots in slavery when the majority of the free African Americans in New Orleans had been mulatoos.[86] Only in1920 did the United States Census stop recording separate mulatoo and Negro categories.[87] So the distinguishing of light and dark complexioned African Americans

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[83] A.P. Tureaud Papers, Amistad Research Center, Tulane University, Box 76, File 27.

[84] Clyde C. Robertson, "Unsung Hero: The Afrocentric Location of Alexander Pierre Tureaud," unpublished dissertation, Temple University (1998), 83.

[85] Ibid., 81; Joseph Logsdon, taped interview of A.P. Tureaud, Archives, University of New Orleans.

[86] John W. Blassingame *African American New Orleans, 1860-1880* (Chicago: University of Chicago Press, 1973), 21-22.

[87] Joel Williamson *New People: Miscegenation and Mulattoes in the Unites States* (New York" Free Press, 1980), 114.

was not just an informal reality but legally noted by the federal government well into the 20th century.

Life for Creoles was never certain, however, because white supremacy proscribed their lives, too. In 1896, the United States Supreme Court decided in *Plessy v. Ferguson* that states could pass legislation ordering the physical separation of the races. After spending a year enjoying the serenity of the integrated school, Tureaud got transferred to the all-African American elementary school located south of downtown. The city, in compliance with orders from the state, decided to place all "African Americans" in segregated schools. Bayou Road replaced the white faculty and principal with African American ones altering Tureaud's view of the world. It was the first time that he had to interact with African Americans, especially those in a position of superiority.

The tougher racial stance in New Orleans following *Plessy* began to affect the lives of the Creoles who for generations had been aloof from the mainstream African American community. Despite being a light-complexioned Creole, Tureaud found it difficult to secure decent work in New Orleans as a teenager. For younger Creoles, such as Tureaud, having attended an African American school probably made the change less daunting. Yet, Tureaud still did not perceive of himself as African American; there were still Creoles and "American" African Americans. But upon leaving New Orleans with his brother for Chicago to find work, Tureaud began a transformation. From the railroad boxcar transporting them to the North, he witnessed African Americans begging for the train to stop and take them to the perceived promised-land of equal opportunity. The lack of opportunity he had known in New Orleans became insignificant in comparison to the deprivation the unskilled African American masses along the rail route displayed. Being

younger and socially advantaged than the masses, Tureaud was acutely aware that African Americans were suffering disproportionately from something. Yet, his Creole background prevented an immediate complete comprehension of the causes of the situation.

African American political participation in Chicago would further increase Tureaud's deeper understanding of the African American experience in Jim Crow America. In New Orleans, African Americans faced disenfranchment by poll taxes, literary tests, exclusive Party primaries, and violent pogroms. Chicago African Americans, though suffering from *de facto* segregation, still had the franchise. The power of the northern African American vote is best captured by historians who focus on the effect the increasing numbers of African Americans moving north had upon national elections. It was this effect that would aid the mainstream civil rights movement win many of its concrete goals in the 1950s and 1960s. Richard Wright, the African American novelist, would make a similar journey north from Mississippi. In *Black Boy*, Wright provides a comparison of the racial politics of North and South. Despite Wright's known disillusionment with many facets of Northern live, he still made it clear that he enjoyed a greater degree of political engagement than in the South.[88]

Harlem during the 1920s was the epicenter of African American cultural expression. There was at the time a concerted effort by racial progressives to deemphasize biological conceptions of race for a more cultural-based notion.[89] Much of

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[88] Richard Wright *Black Boy: A Record of Childhood and Youth* (New York: Harper, 1945).

[89] Nathan I. Huggins *Harlem Renaissance* (New York: Oxford University Press, 1971), 13-51.

this effort coalesced in the New Negro Movement, a program aimed at producing African American artists capable of proving the intellectual capacity of the race in the face of scientific racism.[90] Though many of the white patrons had paternalistic motives and African American leaders often acknowledged African American pathology in their attempt to eradicate it, African American political awareness arose out of this movement. Tureaud moved to Harlem and there he met with NAACP members for the first time. After being away from the New Orleans enclave that had sheltered him from his African Americanness, Tureaud was now connecting with his racial identity.

Tureaud returned to his hometown after graduating from Howard Law School in 1925. No longer adhering to Creole exclusivity, which provided tacit support of white supremacy by placing an emphasis upon light skin complexion, Tureaud began an active racially progressive career. He had joined the NAACP while at Howard and continued his involvement in New Orleans.

Back in New Orleans, Tureaud viewed the African American social clubs that stratified the community in a different light. Though he headed the Autocrat Club in the 1930s, which remained a primarily Creole bastion, Tureaud believed the social clubs could be a "vehicle for getting people concerned and interested."[91] When the people did get concerned and interested they did so behind a cause such as schools or municipal facilities that affected all African Americans. As head of the Autocrat Club, Tureaud demonstrated his approach to agitation. Instead of denouncing in total Creole identity in

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[90] Ibid., 52-83.

[91] Joseph Logsdon, taped interview of A.P. Tureaud, Archives, University of New Orleans, Tape 9; Arnold R. Hirsch, "Simply a Matter of African American and White: The Transformation of Race and Politics in Twentieth-Century New Orleans," 266.

favor of a more universal African American identity, he became a leader of a Creole establishment and used this position to forward a pro-African American agenda.

In his dealing with the New Orleans power structure, Tureaud also displayed a degree of tact. Rather than overt challenges Jim Crow segregation, he suggested that the African American community, "was not looking for anything that much."[92] The goal was to achieve the best facilities for the community within the existing social structure. As he remembers, "We were asking for separate schools or enough of them to house the children."[93] Clearly, neither racial integration nor rights discourse was primary in the minds of Tureaud in New Orleans. Comprehending the situation in the Jim Crow South, he claims that, "whatever benefits we got, we got…by supplication rather than by demanding."[94] This "supplication," as Tureaud characterizes it, can be seen, in this post-African American Power era, as ineffectual Uncle Tomism. But there were multiple ways to achieve goals and Tureaud employed what he saw as the optimal choice in the present situation.

Tureaud challenged white supremacy, not necessarily racial segregation. First and foremost Tureaud was a southerner who desired the reconciliation of the community. He also understood that aggravating white authorities would not benefit his cause. Knowing that he did not "have anyone [he] could turn who was an authority," Tureaud

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[92] Arnold R. Hirsch interview of A. P. Tureaud, tape 10; "Simply a Matter of African American and White: The Transformation of Race and Politics in Twentieth-Century New Orleans," *Creole New Orleans: Race and Americanization* (Baton Rouge: Louisiana State University Press, 1992), 268.

[93] Ibid.

[94] Ibid.

avoided taking any cases that involved crimes prosecuting police officers. Doing so would lead the New Orleans police to target him for abuse they would not dare commit against a white officer of the court.[95] It would be disingenuous, nevertheless, to portray Tureaud as a reluctant militant when he was at the forefront of the movement to merge "African American" Americans and African American Creoles into a force to challenge white supremacy in New Orleans.

In the liberal integrationist paradigm, teacher equalization lawsuits that exemplified local strategy before the *Brown* litigation become ineffectual attempts by African American lawyers to forge piecemeal attacks on Jim Crow. The "gradualist" legal approach becomes conflated with acquiescence rather than militancy. A. P. Tureuad led one of the earliest teacher equalization suits in the early 1940s against the unequal pay afforded African American teachers in Louisiana public schools. Instead of acquiescence, Tureaud's actions indicate a calculated attack against white supremacy grounded in the local community. Unlike the national NAACP, which in *Brown*, to some extent, forwarded an argument acknowledging myths of African American "pathology," Tureaud and local African Americans in New Orleans sought to gain what would sustain them in their everyday lives (equal compensation) and acknowledge the value of African American schools.[96] In this respect, Tureaud and the African American teachers of New

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[95] Arnold R. Hirsch interview of A. P. Tureaud, Tape 7, found in "Simply a Matter of African American and White: The Transformation of Race and Politics in Twentieth-Century New Orleans," *Creole New Orleans: Race and Americanization* (Baton Rouge: Louisiana State University Press, 1992), 265.

[96] On African American pathology and how *Brown* litigation presented African American children as physiological damaged see Daryl Scott *Contempt and Pity: Social Policy and the Image of the Damaged African American Psyche, 1880-1996* (Chapel Hill: University of North Carolina Press, 1997), 119-136.

Orleans reaffirmed their humanity through their strategy, while, unfortunately, the national NAACP began taking a strategic course that culminated in the victory in *Brown* validating white supremacist myths of damaged African American souls.

Tureuad initiated action against the Orleans Parish school system when it became apparent officials would not pay African American teachers salaries commensurate with that paid white teachers of equal rank. The petition he drafted argued that using race as a basis of compensation was unconstitutional and thus African American teachers either would receive a raise or the case would go to court.[97] Upon receiving no response from authorities, Tureuad filed an action against the Orleans Parish School Board in the name of Joseph P. Mckelpin, an African American teacher affected by the salary disparity.[98] The school board filed numerous motions to dismiss, which delayed the case. With the state legislature as an ally, Orleans Parish surmised that given enough time the state would pass a law nullifying any decision the federal court might make in favor of the African American teachers.[99]

If Tureaud was interested primarily in not upsetting state officials then he would presumably accept the delaying tactic as part of the legal process. However, African American lawyers in the Jim Crow era, despite their predilection for working within the system, were first and foremost advocates of their clients' interests. Facing continued delays by the school board, Tureaud filed his own motion to have the trial advanced,

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[97] Petition to Orleans Parish School Board, A. P. Tureaud Papers, box 49, *Joseph P. Mckelpin v. Orleans Parish School Board*.

[98] *New Orleans Sentinel*, June 14, 1941.

[99] A. P. Tureaud to Thurgood Marshall, February 25, 1942, A.P. Tureaud Papers, box 49.

which the court granted.[100] Obviously, Tureaud did not fear the white power structure. Instead, he was willing to force the state into court displaying his earnest pursuit of what he thought best for his clients.

What local people desired is an important aspect of the school pay equalization suits. In New Orleans, the African American teachers had, for years prior to the *McKelpin* case, worked with labor unions to force Orleans Parish to pay them adequately. There were two principle organizations that represented the group interests of African American teachers. The first, the Louisiana Colored Teachers Association (LCTA), founded in 1901, was a rather conservative organization led often by entrenched African American school principals. In 1938 George S. Longe, a New Orleans school principal, took over the reins and began echoing the rising sentiment amongst teachers in the city for equalization of pay.[101] Doing so was difficult because the statewide group had some "four of five out-of-town school principals who are 'in good' with the school board bigwigs," stated one participant in the struggle.[102] It should be noted that the tension within the LCTA was between local teachers who supported agitation versus "outsiders" with other conceptions of what was best for New Orleans African American teachers.

The second teacher's organization was the African American affiliate of the American Federation of Teachers (AFT), Local 527. African American teachers formed this union a year after witnessing the white branch, Local 353, win a suit for a restoration

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[100] Ibid.; A.P. Tureaud to Thurgood Marshall, April 10, 1942, Tureaud Papers, box 49.

[101] Adam Fairclough *Race and Democracy: The Civil Rights Struggle in Louisiana, 1915-1972* (Athens, GA: University of Georgia Press, 1995), 62-63.

[102] Adam Fairclough interview of John Rousseau, March 16, 1992, cited in *Race and Democracy*, 63.

of their previous salaries that the Orleans School Board had cut during the Depression years.[103] The African American local petitioned the school board to equalize pay in February 1938, almost two years before Tureaud filed the suit in federal District court. The local people demonstrated what they wanted, which was adequate compensation for their labor. In *Mckelpin*, Tureaud fought for what the people desired. The traditional civil rights narrative ignores these stories that do not delineate a progression toward racial integration.

Another means open to subordinate people is their "voice," often expressed in politics. For a few decades following the Civil War, African American men did find the voice option available to them. During Congressional Reconstruction African American lawyers were prevalent in southern and national politics. In the period from Reconstruction to the 1890s African American lawyers exercised their "voice" in the political arena. During Reconstruction South Carolina, African American lawyers held faculty positions at the University of South Carolina and on the South Carolina Supreme Court.[104] Mississippi African American lawyers established a presence to rival that set in

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[103] Barbara Ann Worthy *The Travail and Triumph of a Southern African American Civil Rights Lawyer: The Legal Career of Alexander Pierre Tureaud, 1899-1972*, Ph.D. dissertation, (1984) Tulane University, 39.

[104] Richard T. Greener was a professor at the racially integrated University of South Carolina from November 1873 to 1877. On Greener see, Michael Robert Mounter, "Richard Theodore Greener and the African American Individual in a African American and White World," in *At Freedom's Door: African American Founding Fathers and Lawyers in Reconstruction South Carolina* (Columbia, SC: University of South Carolina Press, 2000), 134-138. Justice Jasper Wright served on the South Carolina Supreme Court from 1870 to 1877. On Wright see, R.H. Moody, "Jonathan Jasper Wright, Associate Justice of the South Carolina Supreme Court, 1870-1877," *Journal of Negro History*, vol. 18, no. 2 (Apr. 1993), 114-131; and Richard Gerbel and Belinda Gerbel, " To Vindicate the Cause of the Downtrodden: Associate Justice Jonathan Jasper Wright and Reconstruction on South Carolina," in *At Freedom's Door: African American*

South Carolina. Perry Howard and S.D. Redmond were Republican political operatives in the early 20th century. Howard served as state committeeman for a number of years despite opposition from the Republican lily-white faction.[105] Using political contacts Redmond became a capitalist worth $50,000.[106] In the 1930s Benjamin Davis, Jr., expressed his discontent with southern racism politically, too, by joining the Communist Party in the wake of the *Herndon* case.

Politics was not something African American lawyers could enter easily after the 1900s in most areas of the South. A prominent feature of white supremacy was the concern with African American male sexuality. Each race-gender group was to inhabit a domain of its own within limits prescribed by the dominant white male group. Since colonial times, politics was the exclusive preserve of white men. For example, women could not vote in until the passing of the 19th Amendment in 1920. One legal rationale for the exclusion of women at the polls was the doctrine of coverture, which implied that a married woman was legally covered by her husband. When the white man voted he did so apparently as the sole representative of his household. He effectively spoke for the entire family. As slaves, African Americans were quasi-members of the white family that owned them. African American males did not need to vote, the theory suggests because they had their interests covered by the family patriarch. Society thus attempted to emasculate African American males by rendering them on a social plane at a level

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*Founding Fathers and Lawyers in Reconstruction South Carolina* (Columbia, SC: University of South Carolina Press, 2000), 36-89.

[105] *Chicago Defender*, Feb. 9, 1924, p. 2, col. 3.

[106] *Chicago Defender*, March 28, 1914, p. 4, col.5. $50,000 in 1914 was worth $1 million in 2006.

similar to women and children. Emancipation and Reconstruction seriously challenged this world and required the birth of overtly racist actions to relegate African American males back to their previous condition of political silence.

A continuation of this racist violence was the implicit violence of Jim Crow that sought to deny African American males the manhood accessible to, and expected of, all white men. We must think of violence and not just the kind that occurs physically, but that type of force used to prevent certain events, possibilities, thoughts, etc., from coming to fruition. Physical violence does just this sort of thing by causing the physical injury to another that we commonly associate with true "violence." But, by limiting the definition of manhood to white males only, Jim Crow society attempted to forcefully prevent African American males from imagining other possibilities—especially African American males as the social equal of white males. Those African American men who did enter politics faced enormous challenges to their reputations. The image of the corrupt African American politician still lingered from Reconstruction in southern mythology. Both Perry Howard and S.D. Redmond suffered investigations on corruption charges. The federal government claimed there was evidence that the two sold patronage positions in Mississippi. Eventually both were acquitted of any wrongdoing and Redmond became even more successful as a lawyer, saving one man from the gallows only five minutes before the scheduled hanging.[107]

[107] On acquittal of the two lawyers see, *Chicago Defender*, Dec. 22, 1928, p. 1. col. 1; and *Chicago Defender* Oct 26, 1929, p. 2, col. 6; For an example of Redmond's post-acquittal career, see *Chicago Defender*, Jan. 16, 1932, p. 13, col. 1.

The legal profession was another site dominated by white men. By nature, the legal profession has had a fraternal atmosphere that the social customs of the South exacerbated. During the antebellum era, lawyers were popular amongst southerners because they rode on horseback from town-to-town "the circuit."[108] Various towns held sessions on assigned days, with people coming from many surrounding areas to have their day in court. The circuit was the domain of white men who rode hard, worked hard, and drank hard. African American lawyers found it difficult to join this close knit legal fraternity. Even in the early twentieth century, lawyers "rode" the circuit, driving between courthouses to handle cases. An African American attorney accepted by one community was not always assured of acceptance in another.

African American lawyers who did enter politics challenged both white supremacy and Jim Crow explicitly. Similar to Benjamin Davis, whose actions led to Georgia convicting his client with the death penalty, politically active lawyers may not have best served their clients' immediate interests. Furthermore, those heavily involved in southern politics were subjected to political witch hunts as was the case with Redmond and Perry in Mississippi. Prior to the civil rights movement, direct assaults upon white supremacy were not seemingly viable options for African American lawyers. Instead, those who challenged white supremacy more stealthily were more successful. Subterfuge

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[108] On circuit riding and the antebellum courthouse see, Orville Vernon Burton *In My Father's House Are Many Mansions: Family and Community in Edgefield, South Carolina* (Chapel Hill: University of North Carolina Press, 1985), 21, 28-29; Ariela Gross, *Double Character: Slavery and Mastery in the Courtroom* (Princeton: Princeton University Press, 2000), 21-30. On the masculine nature of the antebellum bar see Michael Grossberg, "Institutionalizing Masculinity: The Law as a Masculine Profession," in *Meanings For Manhood: Constructions of Masculinity in Victorian American* (Chicago: The University of Chicago Press, 1990), 133-151.

was more successful than radical politics and African American lawyers were capable of using it.

In Jim Crow southern states, African American people had difficulty locating adequate legal representation. This problem of inadequate counsel prevented the African American community from realizing its full potential. The law has served the purpose in America of facilitating growth and progress. With few lawyers to represent their interest in a competitive society, African American people suffered neglect in many areas of their lives. Lawyers were able to use their skills to protect these interests and did so employing strategies that can expand our conception of approaches to civil rights.

During the early twentieth century there were a disproportionate number of African Americans convicted of capital offenses. Such high rates of incarceration strip resources from the community especially considering there is a gender and age imbalance, with young African American men overwhelmingly representative of the prison population. During the Jim Crow period, African American lawyers faced very high odds in their efforts to secure reduced sentences in cases where African American defendants were almost sure to receive the death penalty at the hands of southern justice.

African American lawyers saved many men and women from execution. Though the disposition of these trials was usually still in the favor of the state, the reduced sentence provided the possibility of a later commutation by the governor.[109] In Florida, S.D. McGill prevented the state from executing Abe Washington in 1926. Four years

[109] On black convicts having sentences commuted for various reasons despite convictions on rape charges involving white women see Lisa Dorr *White Women, Rape, and the Power of Race in Virginia, 1900-1960* (Chapel Hill: University of North Carolina Press, 2004), 169-204.

earlier, Washington had attended a party in a Jacksonville dancehall where he got into an altercation with his girlfriend. Under the influence of alcohol, Washington killed the woman by cutting her throat. A local jury found Washington guilty of murder and sentenced him to death by execution. At the time, Florida law specified execution by hanging, and the jury ordered that the state carry out its duty in such fashion. However, two days prior to the scheduled execution, the Florida legislature amended the capital punishment statute to the effect that, "capital punishment should be by electrocution only."[110]

McGill, representing Washington before the Circuit Court of Duval County, Florida, argued that Washington could no longer be executed in Florida since the state had outlawed the prescribed method of execution to which he had been sentenced. To save his client, McGill, whom the court had chosen to represent Washington, called upon the court to use its *coram norbis* powers to enjoin the state from executing Washington.[111] The writ of *coram norbis* allows the court to alleviate the burdens imposed by judges and juries when there is a legal inconsistency that may render imposition of the original penalty unjust. *Black's Law Dictionary* defines *coram norbis* as, "a writ of error directed to a court of review of its own judgement and predicated on alleged errors of fact."[112] *Coram norbis* is literally "before us" in Latin, a reference to the use of this writ in the Anglo legal tradition before the King's Bench, a court of equity.

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[110] "Change in State Law May Save Condemned Man's Life in Florida Hanging Case," *Chicago Defender* 6 Feb. 1926, p.1.

[111] "Writ Saves Man From Death: Clever Work By Attorney Stuns State," *Chicago Defender* 13 Feb. 1926, p. 1.

[112] *Black's Law Dictionary* (St. Paul, MN: West, 2009), 388.

The Circuit Court agreed with McGill and stayed the execution.[113] That McGill would employ a legal argument historically linked to the courts of equity is informative. In Anglo legal history, courts of equity addressed wrongs that could not be handled within the normal common law. The underlying theory of equity courts is that people should be able to plead their cause in equity when the correct, or just, course of the law would render obvious unfairness.

So ingenious was his legal strategy that McGill won acclaim amongst the Florida Bar. In February of 1926, Walter G. Walker, a "prominent white lawyer of Daytona Beach, Fla., walked into the offices of Attorney S.D. McGill of this city [Jacksonville] and there sought advice on how his client might escape death."[114] Walker represented Charles Brown, a white man convicted of murdering a chauffeur in 1923. McGill drafted the petition for Walker to present to the court to stay the execution. The petition was the same used in the Washington case because Brown had been convicted and sentenced to death prior to the imposition of the electric chair as the sole means of execution in Florida. Again, the court agreed with S.D. McGill's legal theory that condemned persons cannot be executed if the means of execution imposed is under later rendered invalid by positive (written) law. So successful was McGill in these two cases that the Florida

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[113] "Legal Tangling Sets Courts to Puzzling: Abe Washington Case Stirs Florida," *Chicago Defender* 19 June 1926, p. 8.

[114] "Helps White Lawyer Save Client's Life: S.D. M'Gill Assists Florida Barrister," *Chicago Defender* 19 Feb. 1927, p. 1.

legislature sought to forbid the further use of the writ of *coram norbis* by amending state law.[115]

To save lives, lawyers also employed broad interpretations of the Thirteenth Amendment, which made slavery unconstitutional. In 1919, twelve African American men in Arkansas faced murder charges in the death of Clinton Lee, a white man. Lee had been a member of a posse of white men who embarked on the Arkansas Delta region to reinforce their authority over African American sharecroppers demonstrating growing political awareness.[116] The accused were arrested and placed in the Phillips County Jail in Helene, Arkansas, where they allegedly faced threats of torture and whipping if they failed to confess to the crime.[117] As was often the case, the local press inflamed the situation with stories that all but ensured potential white jurors would have formed a conclusion prior to the trial.[118] In fact, only United States Army troops prevented a mob of whites from lynching the defendants. In the initial trial, the men received death sentences imposed by the all-white local jury.[119]

Handling a significant part of the appeal of the convictions was Scipio Africanus Jones, an African American lawyer from Little Rock, Arkansas, who practiced for over

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[115] "Lawyer's Writ Makes State Alter Its Law: Florida is to Abolish Coram Nobis Writ," *Chicago Defender* 9 April 1927, p.2.

[116] Scipio A. Jones, "The Arkansas Peons: A Brief Prepared by Scipio Jones Reviewing the Case for Presentation to the Supreme Court of the United States," *The Crisis* vol. 23, no. 2, Dec. 1921, p. 73.

[117] Ibid.

[118] Ibid., 74.

[119] Arthur I. Waskow *From Race Riot to Sit-In, 1919 to the 1960s: A Study in the Connections Between Conflict and Violence* (Glouster, MA: Peter Smith, 1966), 139; Tom Dillard, "Scipio A. Jones," *Arkansas Historical Quarterly* vol. 31, Autumn 1973, no. 3, p. 207.

fifty years.[120] Jones had attempted to attend law school at the University of Arkansas Law Department in 1887 but was denied admission because of his race. Enduring the fate of most African American legal aspirants at the time, Jones compensated by studying law under the tutelage of some willing white lawyers of the Little Rock bar, including U.S. District Court Judge Henry C. Caldwell.[121] In 1889, the Circuit Court of Pulaski, County, Arkansas, which includes Little Rock, admitted Jones to the bar. Eventually, Jones would be admitted to practice before both the Arkansas State Supreme Court and the United States Supreme Court, making him a valuable resource for African American litigants in the Delta.

To counter the atmosphere that seemingly ensured the imposition of the death penalty for the African American sharecroppers accused of the murder, Scipio Jones, formed his defense around the theme of class struggle. Understanding that the racial issue in the South was often employed as means of obfuscating real class and social inequalities between elite whites and the masses (African American and white), Jones decided to emphasize the class dynamic when appearing before the United States Supreme Court to contest the convictions. Although the Supreme Court would later find race to be a suspect class requiring greater scrutiny in legal issues, at the time to focus on

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[120] Moorefield Storey, a prominent Jewish lawyer and NAACP leader, presented the oral arguments based on Jones's briefs. It was typical for the NAACP to use white attorneys prior to the 1930s because it was though few black lawyers, or whites for the matter, at the time had the standing within the profession to argue before the Supreme Court in high profile cases.

[121] Judith Kilpatrick, "(Extra) Ordinary Men: African-American Lawyers and Civil Rights in Arkansas Before 1950," 53 *Arkansas Law Review* 299, p. 354.

race would probably not have helped the convicted men.[122] The trial was unfair, argued Jones, because of the presence of an unruly mob dedicated to preventing sharecroppers from exercising their basic constitutional rights.[123]

In his brief, Jones acknowledged the racial dynamic of the Delta, in which African Americans comprised the majority of the workers, stating that the African American sharecroppers faced legal and extralegal oppression because they had, "organized societies with the view of uniting their financial resources in the moral and legal measures to overcome the same [oppressive and ruinous economic effects of the system]."[124] Jones made a point that disappears from civil rights cases after *Brown*; he clearly links the racial oppression of African Americans in the Arkansas Delta with their financial and material condition.

The racial aspect was part of a larger socio-political system designed to extrapolate resources, such as labor, from those less powerful. Jones understood this situation well. He had been raised in the Delta and had attempted to attend the state supported law school only to be rebuffed because of his race. Poor, African American sharecroppers, according to this scheme by powerful interests in Arkansas, had to settle instead for inadequate legal counsel often appointed by the state, as was the case at the first trial of the Philips County men.[125]

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[122] *United States v. Carolene Products Co.* 304 U.S. 144 (1938), footnote four provided the bases for judicial close scrutiny of cases possessing a racial dynamic.

[123] Scipio A. Jones, "The Arkansas Peons," 75.

[124] Ibid., 74.

[125] Ibid., 75.

Jones clearly indicts the peonage system, portraying it as virtual slavery. His clients were embroiled in a system, "calculated to deprive and does deprive the Negro tenants of all their interest in the crops produced by them."[126] By preventing southern states from denying poor African American defendants adequate defenses, lawyers such as Scipio Jones prevented an injustice that was heaped upon other injustices endemic to the Jim Crow social order. These injustices were the badges of slavery that the Congress attempted to alleviate by passing the Thirteenth Amendment forbidding slavery and involuntary servitude. By conflating his racial discrimination claims with the material inequality of African American life in the Arkansas Delta, Jones presented a more comprehensive definition of civil rights than society would later understand when our focus shifted to Fourteenth Amendment equal protection arguments (primarily via racial integration) following *Brown*.

Cornelius J. Jones, who joined the Mississippi bar around 1883, most likely through the patronage of an elite white man, also interpreted the Thirteenth Amendment broadly in a suit to win federal reparations for African Americans. Jones, then residing in Memphis, Tennessee, often referred to as the capital of the Delta, represented the National Ex-Slave Mutual, Relief, Bounty, and Pension Association. This group sought to provide monetary aid for destitute ex-slaves and lobby Congress for a federal reparations bill. The first objective was in keeping with the actions of African Americans in the post-Reconstruction era when they formed numerous associations to ensure families received aid in times of need. The reparations suit was an attempt to change the relationship of African Americans and the federal government that had since the early

[126] Ibid., 47.

years of Emancipation generally refused to compensate the ex-slaves for centuries of enforced labor. Jones, comprehending that there was intense abhorrence amongst white Americans toward the "old ex-slave movement, which has attracted congressional attention so often," tried to distance his clients from prior claims. "The old ex-slave movement [aimed] for the pensioning of all persons who were dominated by the system of slavery in this country."[127] In contrast, Jones filed a lawsuit in Federal District Court (District of Columbia) in July 1915 for a specific amount of money owed to former slaves who had worked to produce the cotton known to be stored in particular government warehouses during the Civil War. The federal government had taxed cotton produced in the South by these now elderly former slaves. This money had been held in trust for technical reasons since that time, and Jones demanded that the money, seventy million dollars, be allocated to the slaves and their direct descendants.

Jones's arguments for "reparations" were in ways an early example of critical race reasoning as he attempted to persuade the government to reconsider the traditional victim-perpetrator paradigm that requires the harm and the claim for damages to be contemporary. Speaking in Baltimore, Maryland, in 1915, Jones opined on why the claim for reparations was reasonable. First, Jones explicitly mentioned that his was a "suit in a court of Equity."[128] The reference to equity is again important because in our Anglo-American legal tradition equity claims are unique in that they allow judges to use broad discretion in deciding the case; the normal customs of adherence to precedence and

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[127] Cornelius J. Jones, "America Must Redeem Her National Pledge of Sacred Honor—Called to the Bar of Her Own Courts For An Accounting," *Washington Bee*, 23 Oct. 1915, p. 2.

[128] Ibid., p.1.

formal doctrines are temporarily suspended in equity claims. To him, the ability to conceive of new definitions was possible because, "the circumstances under which our national life was created serves as a lesson which exemplifies the truth that in America there is no condition, however complex, that there is not a way to the house of justice."[129]

Those opposed to recompense for enforced labor often argued that Jones should address his case in a court of claims, rather than a higher court of law. To this suggestion, Jones proffered that the court of claims, "a special court provided by Congress which has jurisdiction only of such matters as Congress gives it…and then only when the government is a party," was not the correct place for these plaintiffs.[130] Since the government had no right to the taxes earned from the work of the slaves, then the ex-slaves who performed the labor had no reason to sue the government, he reasoned. He brought the case in federal district court because:

> "the claims of these plaintiffs have to be asserted in a court with broad and inherent jurisdiction and power; one capable of extending its strong arm to the limit of its specific and inherent prerogatives for the true corrections of the wrongs complained of."[131]

Next, Jones tackled the argument that has long lingered over the reparations debate: that claims for reparations have not been timely and the victims of American enslavement are deceased or otherwise unable to receive their day in court. "We are mindful of the technical argument that the statute of limitation should operate against our

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[129] Ibid., 2.

[130] Ibid.

[131] Ibid., 2.

claim, and to accommodate such views, we are pleased to state just what out claim is."[132] Justice had been delayed because the original litigants, enslaved African Americans, had, at the time of injury, no standing before the courts; slaves could not file suits against their masters. The time in which the victims should have filed a claim against the perpetrators was, "at a time and under circumstances over which these claimants had no legal status, and when they were [legally] helpless to object or protest against removal of the cotton."[133]

Jones's suit demonstrated an attempt to exact legal redress for persons who under traditional legal doctrine had no claim. The enslavement of African Americans was a unique situation that placed them outside the bounds of standard legal precedents. But that the enslaved were legally powerless to bring claims against their masters should not preclude them from doing so when they later garnered the resources to file such claims, suggested Jones.

The arguments failed to persuade the courts to release the funds to the former slaves, most of whom were destitute. For Cornelius Jones, the case ended on a tragic note, as well. The federal government initiated an investigation of Jones's legal practice resulting in an indictment for mail fraud. As historian Mary Frances Berry notes, "Using the mails to carry out a scheme, by making promises the postmaster considered impossible to perform…constituted using the mails to defraud."[134] In a somewhat circular argument, the federal government indicted Jones for using the mails to elicit

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[132] Ibid., 1.

[133] Ibid., 1-2.

[134] Marry Frances Berry *My Face Is Black Is True: Callie House and the Struggle for Ex-Slave Reparations* (New York: Alfred A. Knopf, 2005), 182.

donations for the reparations struggle because his actions were fraudulent since he should have realized the federal government would never allow the ex-slaves to win the case. Jones did escape conviction, but Callie House, a poor seamstress in Memphis who became the leader of the reparations struggle was sent to federal prison. Mary Frances Berry concludes that it was Jones's status as a male lawyer that saved him from a similar fate, illuminating the privilege African American professional men enjoyed relative to many African American women.[135]

Other lawyers forwarded arguments that counter later conceptions of "blackness." Arthur Shores, a graduate of a correspondence course in the law during the mid 1930s in Alabama, handled a case against the Alabama Public Service Commission (APSC), seeking to have the commission revise its Jim Crow laws. The APSC had one particularly odious law that, "compelled that Negroes traveling in open sections of Pullman cars be curtained off from others."[136] In 1946, Shores filed a suit contending the APSC law violated Section 2 of the Interstate Commerce Act, which defined discrimination partly as any act by a passenger carrier that is not of the same quality as that provided for another paying the same fare. Shores argued that by cordoning off African Americans in the open dining car, with curtains, and by reserving certain seats for African American passengers, rail carriers in Alabama discriminated against whites. The law, Shores reasoned, prevented whites from occupying spaces set aside for African

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[135] Ibid., 186.

[136] "Some of Jim Crow Sting Taken From Ala. Rail Law," *Chicago Defender* 2 Feb. 1946, p. 5, col. 6.

American use only.[137] In response, the APSC amended the law to strike out the provision requiring African Americans dine behind a veil. Shores' argument is one rarely employed in the years since *Brown* in which racial integration implicitly has become conceived as minorities moving into white spaces. But in 1946, Shores emphasized the effect of segregation upon whites rather than African Americans forcing the APSC to revise its ordinance.

Historically, the failure to provide African Americans with legal representation is significant because of the loss of wealth associated with this injustice. That African Americans could not utilize the law to protect their property interests in life, liberty, and due process, aided in generations of impoverishment. As stated by the NLG, "Such a denial of equal opportunity effectively prevents the Negro in the pursuit of their efforts to obtain full citizenship status by depriving them of legal representation of their own choice as well as the expert advice and leadership of members of their own race."[138] African American communities were often destroyed during racial disturbances. Though violence against African Americans by whites was once believed by many to result from the commission of crimes or broach of racial etiquette by a troubled African American person, Ida B. Wells of Memphis demonstrated that instead it was the African American middle class that faced the brunt of white violence.[139] Thus, racial violence was often an attempt to prevent the accumulation of wealth by African Americans. Outnumbered and

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[137] Ibid.

[138] "National Lawyers Guild Statement on Discrimination Against Negro Attorneys," p. 2, copy sent to Thurgood Marshall of the NAACP from Bernard G. Waring, 3 May 1943, Manuscript Division, Library of Congress.

[139] Ida B. Wells, "On Lynchings: Southern Horrors," (New York: Arno Press, 1969), reprint of the 1892 report.

outgunned by white supremacists in the South, some African American communities could turn to African American lawyers to protect their property rights.

In 1921, the solid middle-class African American community of Tulsa, Oklahoma, came under attack following newspaper reports of an alleged assault of a white female by an African American man. African American Tulsa was often referred to as "Black Wall Street," because there were so many successful professionals living in the area. Most African Americans prospered to some extent because Tulsa was an oil boomtown in the early decades of the twentieth century. Following the riot, city official passed an ordinance designed to prevent the rebuilding of this symbol of African American progress. The city chose to build a railroad terminal in the heart of the once African American community.

Buck Colbert Franklin, who began practicing law in Oklahoma after studying law via correspondence courses, filed a suit against the Mayor's office on the grounds that the city ordinance represented an unconstitutional taking of private property.[140] Franklin, the father of prominent African American historian John Hope Franklin, also argued successfully in *Lockhard v. City of Tulsa* (1921), that to allow this city ordinance would be to use the police powers of the state to "array citizens against one another."[141] Franklin's actions resulted in the striking down of the city ordinance and the saving of valuable African American property. Other African American communities in the South

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[140] Buck Colbert Franklin *My Life and an Era: The Autobiography of Buck Colbert Franklin* (Baton Rouge: Louisiana State University Press, 1997), 198.

[141] Ibid.

were not as fortunate to have African American attorneys able and willing to fight in court to preserve their wealth.

S.D. McGill, of Jacksonville, Florida, also protected African American property interests in land. In 1931, the Hollywood Land Company of Broward County attempted to, "foreclose a mortgage covering certain land in that county executed back in 1924 for $297, 225."[142] Many of those whose property would have been taken were African Americans represented by McGill. Under Florida law, the sheriff had to serve process upon each property owner whose land was facing foreclosure.[143] McGill, understanding the rules of procedure, requested a copy of the full foreclosure ruling for each of his clients. In response, attorneys for the land company replied that, "it would not be possible to provide copies of the bill containing 140 pages to 3,100 attorneys, who might be possibly employed in the case."[144] McGill continued the pressure making it impossible for the land company to take land from his clients without spending an exorbitant amount of fees serving process.

McGill also protected the interests of African American institutions in Florida. In December 1931, Edward Waters College, of Jacksonville, was enjoined from using funds by a court hearing a suit against the college in a separate matter. McGill was able to secure a lift of the injunction, allowing college administrators to collect their paychecks in time for Christmas.[145] The following year, McGill represented the Prince Hall

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[142] "Most Unusual Court Battle Arises in Florida," *Chicago Defender* 5 Sept. 1931, p. 2.

[143] Ibid.

[144] Ibid.

[145] "S.D. M'Gill Wins Victory for College," *Chicago Defender* 26 Dec. 1931, p. 1.

Masons, a prominent African American Masonic order, in the circuit court of Duval County. Both the City of Jacksonville and the State of Florida had levied taxes against land owned by the Prince Hall Masons, despite the group's exemption from taxes, because the Masons rented the land for profit.[146] In their defense, McGill demonstrated that the profits earned by the order were used to further benevolent objectives and that white Masonic orders rented their property and received the expected tax exemption.[147] His argument persuaded the court to relieve the Masons of the taxes that would have curtailed their profits.

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[146] "S.D. McGill Takes Masonic Case to Florida High Court," *Chicago Defender* 20 Feb. 1932, p.2.

[147] Ibid.

## Conclusions

African American lawyers began receiving negative press during Reconstruction. The white southern redeemers presented the participation of African American lawyers in southern politics as proof that he was not a serious advocate but an opportunist. "Negro Rule" in the South became synonymous with African American lawyers who were prominent in the ranks of the African American political class. When historians of the Dunning School, along with D.W. Griffith, excoriated Reconstruction as the nadir of white life in the South, African American lawyers' fate seemed sealed.

Segregation created the continued need for an African American community, but white supremacy led to the institution of racial segregation. It was this belief in the supremacy of the white race over the African American that manifested in the stereotypes of the Sambo slave and the African American beast rapist. African American men in the age of freedom apparently needed to remain inferior to whites otherwise they were liable to attack white women. African American lawyers, as officers of the court, were not fully restrained African Americans. Instead, these men demonstrated the possibilities open to other African Americans similar to that demonstrated by free African Americans during slavery. African American lawyers, then, had to be "vilified" as "bad" Negroes. The African American masses, in turn, learned that interacting with African American lawyers might have dire consequences that patronizing an African American grocer, African American banker, or African American doctor might not. Similarly, integrationist organizations, such as the NAACP, were also cautious about using African American lawyers who generally did not have the standing at the bar that some gentrified white lawyers maintained.

But white supremacy comes in various forms. Yes, there is the more common explicit type in the form of racial hatred. However, paternalism is another, less acknowledged, though perhaps more prevalent type. By ignoring certain forms of white supremacy in the Jim Crow era, liberals have not helped historians to critique fully the nature of racial segregation. In this respect they may be partners in a silent covenant to maintain white supremacy, perhaps not in its overt codified form, but present nonetheless.

To counter the negative perception of them within the public, African American lawyers utilized a variety of measures. Exploring the tactics they used to challenge white supremacy helps illuminate the nature of racial segregation in the Jim Crow South. In the end, however, African American lawyers "progressed" from being pariahs who seemingly had no standing at the bar and had to covertly attack white power, to being legal guardians of the African American civil rights tradition who would employ racial integration the primary objective. This latter fact presents a problem as we have come to ignore the longer civil rights tradition of various strategies.

## Chapter 4 We People Who Are Darker Than Blue: Class and Status in Black America

***WE PEOPLE WHO ARE DARKER THAN BLUE***
***THIS AIN'T NO TIME FOR SEGREGATING***
***I'M TALKING `BOUT BROWN AND YELLOW TOO***
***HIGH YELLOW GAL CAN'T YOU TELL***
***YOU'RE JUST THE SURFACE OF OUR DARK DEEP WELL***
***IF YOUR MIND COULD REALLY SEE***
***YOU'D KNOW YOUR COLOR SAME AS ME,***
***PARDON ME BROTHER AS YOU STAND IN YOUR GLORY***
***I KNOW YOU WON'T MIND IF I TELL THE WHOLE STORY.***
**Curtis Mayfield, singer**

Mainstream America takes little notice of class differentials in African American society. In fact, the idea of an African American elite that closely resembles the white elite, structurally and sometimes physically, is a difficult conception for some Americans.[1] Scholars possess more nuanced understandings of the African American community but there still exists a general emphasis on African American racial homogeneity. By concentrating on race relations between whites and African Americans, or the race relations model, scholars have obscured the complexity of intra-racial relations. This problem has roots in white supremacy, where racial segregationists rendered the entire African American race to a subordinate class. Or, as Dr. W.E.B. Du Bois once famously remarked, "The black man is a person who rides 'Jim Crow' in Georgia."[2]

To destroy this system partly required racial liberals to accent a universal African American experience. Jacquelyn Dowd Hall, on the contrary, has illustrated the need to

[1] I speak here of a social and political elite associated with familial background rather than a meritocratic elite entered through formal education or elective office, for example.

[2] W.E.B Du Bois *Dusk of Dawn: An Essay Toward an Autobiography of a Race Concept* (New York: Harcourt, Brace and Company, 1940), 153.

look at the civil rights movement as a long series of discrete movements rather than a singular movement, in which the South serves as the villain, obscuring the larger institutional investment in white supremacy throughout the nation.[3] The rise of the New Right, a coalition of corporate leaders, conservative intellectuals, neoconservatives, she says, forced the prevailing master narrative of the movement upon us to understate more radical elements of the civil rights era, such as communists and homosexuals.[4] This common story admits to America's racist past, especially the legal edifice of Jim Crow in the South, while claiming victory over racism in the present. Meanwhile, liberals, often reacting to this perceived co-opting of the movement by the right, continued stressing the master narrative, too, because it provided a palatable portrayal of white southerners as racists and African Americans as victims. In the end, the master narrative, despite much validity, prevents a critical exploration of race in America. The Jim Crow South, despite all of its repressive aspects, was not the only site of white supremacy in America. Nor was white supremacy within the South found only within the edifice of racial segregation. In rural regions, for example, white supremacy assumed the veil of paternalism.

Likewise, an emphasis on the varied experiences of southern African Americans depending on gender, skin tone, education, and profession would have diminished the strength of political liberals' contentions for dismantling Jim Crow. This portrayal of racism came to define African American life in the South but has proven problematic.

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[3] Jacquelyn Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the Past," *The Journal of American History*, vol. 1, no. 4 (March 2005), 1233-1263.

[4] Ibid., 1240-1241.

Universalizing the African American experience helped eradicate legalized segregation, but it also erroneously essentialized blackness as a monolithic experience.

In contrast to a unified conception of African American life, black people, for a number of reasons, experienced life in the Jim Crow South differently. First, Jim Crow appeared in various forms depending on geographical location and population demographics.[5] Within urban areas, where the New South creed was central to civic pride, there was space within the system for African Americans to negotiate with the white power structure. White elites sought to prevent African American protests that would highlight injustices. Rural areas provided a somewhat different situation. Mark Schultz has shown that African American tenant farmers in the Georgia Piedmont successfully took advantage of the competition between white planters desiring farmers to work their crops during the season. Despite attempts by planters to unite and set strict, general terms for African American farmers, African Americans left the plantation each year in search of another, "better" deal. In both the urban and rural South a less rigid form of Jim Crow life developed.

As a result of the nature of segregation in southern cities, African American society developed along class lines. Status seeking African Americans, often mulattoes and blacks free before the Civil War, sought to increase their advantages relative to the recently freed masses by emphasizing class distinctions. Various factors influenced the development of African American communities, often depending on the size of the

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[5] In *The Rural Face of White Supremacy*, Mark Schultz explores the paternalistic system in place in the Georgia Piedmont that contrasted sharply with the more overtly violent racial order of the Mississippi Delta and other Black belt regions; likewise, in *Deep Souths*, William Harris demonstrates how the southern racial order from the end of Reconstruction through 1940 was never clearly delineated, but always contested and varied depending on local situations.

African American population relative to whites, the number of free blacks living in the area prior to the Civil War, and size of the city before the War. But these factors were dependent themselves on the location of the city. In Atlanta, a small city before the War and decimated by federal troops in 1864-1865, freed slaves congregated in the city seeking safety in numbers. Located at the foot of the Appalachian Mountains, Atlanta was a transportation hub, rather than a plantation region. Few African Americans lived there as slaves or free persons during the antebellum period, which prevented the development of a strong free black community that could dominate African American social life after Emancipation.[6] Those who did attain some status in Atlanta faced competition from up-and-coming "bootstrappers," who often held little regard for the mulatto elite.

New Orleans provides a direct contrast to Atlanta. Here, arose the largest and perhaps only cosmopolitan city in the antebellum South. New Orleans possessed a large domestic slave force as well as the largest free black population in the region. Following freedom, mulattoes and Creoles physically and racially separated themselves from Americans. This stratification along the lines of skin complexion prevented the unification of African Americans in New Orleans well into the twentieth century.

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[6] On Atlanta as a New South rather than Old South city see Doyle, *New Men*, 144-48; On Atlanta as refuge site for recently freed blacks see, Tera Hunter *To'Joy My Freedom: Southern Black Women's Lives and Labors After the Civil War* (Cambridge, Mass.: Harvard University Press, 1997), 21-43. Alison Dorsey would somewhat disagree about the impact of the free black community because in *To Build Our Lives Together: Community Formation in Black Atlanta, 1875-1906* (Athens, GA: University of Georgia Press, 2004), she emphasizes the role of black elites, many of whom were free prior to the Civil War, in the development of black Atlanta. However, Dorsey does agree that these elite blacks depended more on status based on education, skin color, or religion, rather than any more quantifiable indicator of elite status, such as acquired wealth, that one finds in more established black communities.

African American professionals who desired to represent the interests of the African American community as a whole had to overcome these historic intra-racial cleavages.

In the old-South cities, such as New Orleans, Charleston, and Savannah, African American social status depended much more on relationships with white patrons than was the case in other areas. Ironically, these cities possessed a social system that outsiders, white and African American, could not penetrate; meanwhile, interaction between whites and African Americans with longstanding ties remained common. One witnessed fluidity in Old South cities that prevented African Americans from experiencing Jim Crow in the same manner as those in newer areas such as Atlanta.

The Mississippi Delta provides another contrast of African American life in the rural South. Virtually secluded in New South plantation country, Delta African Americans far outnumbered whites, but found that brutal repression prevented them from enjoying any sense of political democracy. In this environment African American leaders were closely aligned with white officials, who in turn were the selected representatives of the planter elite. Mississippi's race relations came closest to being a rigid caste system.[7] Midway between the fluidity of New Orleans and the rigidity of Mississippi, Selma, Alabama, was a mid-sized southern town with a moderate African American population. The African American community became stratified along class lines, but an older, traditional African American social-political elite found in larger or older southern cities did not exist.

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[7] Hortense Powdermaker *After Freedom: A Cultural Study in the Deep South* (New York: Viking Press, 1939).

Three areas: Atlanta, New Orleans, and Selma; will provide the main settings for this study of the African American class structure during Jim Crow. There has been previous work done on the African American elites.[8] What has not been done is a work that explains the role of African American professionals within the community. Usually, African American professionals appear as members of the African American elite. Though this may be true, it is not accurate to presume that acquiring professional credentials assured a person of full elite status. Indeed, it is more correct to portray professionals, including lawyers, as occupants of a middle ground between social elites and the African American masses.

This chapter enters the discussion of the under-class in American society that began in the late 1970s and has become the focus of scholarly debate since 1987 when sociologist William Julius Wilson published the influential book *The Truly Disadvantaged: The Inner City, the Under Class, and Public Policy* in which he put forth the claim that structural economic forces had caused the development of a large African American underclass mired in ghetto poverty.[9] Meanwhile, the African American middle class, including professionals, increasingly relocated out of these predominantly African American ghettos as the end of legal Jim Crow in the 1970s increased the ability of

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[8] E. Franklin Frazier *Black Bourgeoisie* (New York: Free Press, 1966); Willard Gatewood *Aristocrats of Color: The Black Elite, 1880-1920* (Bloomington, IN: University of Indiana Press, 1990); Evelyn Brooks Higganbotham *Righteous Discontent: The Women's Movement in the Black Baptist Church,1880-1920* (Cambridge, MA: Harvard University Press, 1993); Kevin Gaines *Uplifting the Race: Black Leadership, Politics, and Culture in the Twentieth Century* (Chapel Hill, NC: University of North Carolina Press, 1996); Lawrence Graham *Our Kind of People: Inside America's Black Upper* Class (New York: Harper Collins, 1999); Thomas Ward *Black Physicians in the Jim Crow South* (Fayetteville, AK: University of Arkansas Press, 2003).

[9] William Julius Wilson *The Truly Disadvantaged: The Inner City, the Under Class, and Public Policy* (Chicago: University of Chicago Press, 1987).

African Americans to live in wealthier areas. These dual influences, rather than racism, Wilson offered, decreased the chances that the African American underclass would find ways out of poverty while increasing the gulf between mainstream America and African American ghetto dwellers.

Wilson argued that racial integration produced a chasm that left many inner-city African Americans far outside the margins of American life. What Wilson's theory did not answer, however, is the role the African American middle class played within the segregated community of the Jim Crow era. One can surmise that middle class African Americans served as role models for their more impoverished brethren. Then, with racial integration and the flight of middle class African Americans to suburbs, the lack of these positive examples produced generations of African Americans unable to perceive of other life possibilities. But this hypothesis assumes that working class African Americans would value the lives of middle class African Americans more than their own, a fact difficult to prove. More likely, the movement of the professional class from the inner city produced a communication gap, in which the poor could not articulate their needs in a manner deigned legitimate by society. During the Jim Crow era the African American professional class, from their hybrid position between the mainstream and the African American community that spoke to both constituencies. We must, then, comprehend more fully the groups that comprised the African American community and how the ever present conflicts that illuminate the process of ongoing contestation over the common goal of eradicating racial discrimination.

This chapter addresses the intra-racial battles in southern urban areas, and attempts to fulfill some of the research agenda laid out by Kenneth W. Goings and

Raymond A. Mohl in a 1995 issue of the *Journal of Urban History*.[10] The authors lauded scholars of African American urban history for moving the field from its beginnings in which the focus primarily remained on external dynamics that created African American ghetto life, primarily in the North.[11] This shift began in the 1970s as historians, influenced by the black power movement of the late-1960s, began emphasizing the agency of their African American subjects. The 1995 special issue of the *Journal of Urban History* published a series of papers addressing the new African American urban history that capitalized on this new research agenda with articles on urban African American life in the South.[12]

Donald R. Matthews and James W. Protho studied African American political participation in the South in 1966.[13] Using statistical analysis, various factors present in cities affected the level of African American political activity. For example, a high percentage of African American professionals within the African American community

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[10] Kenneth W. Goings and Raymond A. Mohl, "Towards a New African American Urban History,", vol. 21, no. 3, (March 1995), 283-295.

[11] Ibid., 283-284l; Examples of these early works are, respectfully, Seth M. Scheiner *Negro Mecca: A History of the Negro in New York City, 1865-1920* (New York: New York University, Press, 1965); Gilbert Osofsky *Harlem: The Making of the Black Ghetto, Negro New York, 1890-1930* (New York: Harper and Row, 1966); Allan H. Spear *Black Chicago: The Making of a Negro Ghetto, 1890-1920* (Chicago: University of Chicago Press, 1967); Kenneth L. Kusmer *A Ghetto Takes Shape: Black Cleveland, 1870-1930* (Urbana, IL: University Of Illinois Press, 1976).

[12] On Richmond, Virginia see Elsa Barkley Brown and Gregg D. Kimball, "Mapping the Terrain of Black Richmond," *Journal of Urban History* 1995, vol. 21, 283-295; Earl Lewis wrote on historical memory and blacks in Norfolk, Virginia, in, "Connecting Memory, Self, and the Power of Place in African American Urban History," 347-371; while Kenneth Goings used the theoretical approaches of Robin D.G. Kelley and James Scott in, " 'Unhidden' Transcripts: Memphis and African American Agency, 1862-1920," 372-394; and Raymond A. Mohl wrote on Miami in, "Making the Second Ghetto in Metropolitan Miami, 1940-1960," 395-427.

[13] Donald R. Matthews and James W. Prothro *Negroes and the New Southern Politics* (New York: Harcourt, Brace, and World, 1966).

increased the likelihood of political participation. Unlike the working class masses, professional African Americans often had more economic stability that allowed them to question the status quo without detrimental retribution from authorities. Likewise, they argued that the numbers indicated that the larger the percentage of African Americans in a community compared to whites, the greater the resources whites would use to prevent African American activity in the political realm. In this situation, African American political activity was less likely. Though this reasoning may at first seem counterintuitive, the situation in the Mississippi, Alabama, and Georgia black belts supports the argument. Last, the authors portend that the lack of community-based organizations always served as a detriment to further political mobilization.

Though this chapter is not a study of African American politics, per se, we can consider any organizing along race lines as a form of identity politics. The factors that produced greater political activity in *Negroes and the New Southern Politics* also created the "imagined" African American community alluded to in the introduction.[14] These factors receive consideration here because they engendered a race consciousness among competing factions of "African Americans." These groups would perhaps not have united, or least not racially, without the presence of Jim Crow segregation. We see these factors most prominently in the Old-South cities where Creoles and mulattoes often separated themselves from other African Americans.

The African American elite is best defined as a group rising out of the free African Americans who were able to attain some degree of success, economically and

[14] Benedict Anderson *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991).

educationally, relative to the overwhelming majority of African Americans who remained slaves in the South prior to the Civil War. Free African Americans usually acquired this status based on some relationship with influential whites. Many were the mulatoo children of relationships between white men and African American women, usually slaves. Others gained freedom by purchasing it from slaveowners.[15] Finally, some free African Americans were descendants of free people of color who fled the Caribbean during the Haitian revolution. Free African Americans enjoyed the most independence in the old port cities that possessed cosmopolitan, Atlantic world flair.[16] Charleston, New Orleans, and Savannah had the largest concentrations of free blacks. It would be in these cities that the African American social elite would develop its unwritten rules to highlight differences between those who were to belong to their group and those outside the pale.

Following the Civil War and Emancipation, the mulatoo elite continued its relative advantage over the newly freed slaves. In fact, in many ways this elite had skills that not even the majority of southerners, white or African American, could claim. They often held skilled jobs during slavery and went on to hold potentially lucrative service positions after Emancipation and prior to the imposition of Jim Crow.[17] By the 1920s, however, as southern states codified racial segregation laws claiming to separate whites

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[15] Many southern states instituted laws requiring manumitted black slaves leave the state or be relegated back to slave status.

[16] A view of the cosmopolitan Atlantic World in which many of these creole blacks inhabited appears in Ira Berlin *Many Thousands Gone: The First two Centuries of Slavery in North America* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1998), 17-28.

[17] A good example of this rise from slavery to elite status within the black community based on a service learned as a slave is Alonzo Herndon, the founder of Atlanta Life Insurance Company. See, Alexa Henderson *Atlanta Life Insurance Company: Guardian of Black Economic Dignity* (Tuscaloosa, AL: University of Alabama Press, 1990).

from anyone with "discernible" African American ancestry, the mulatoo elite faced increased competition within the African American community from an emerging professional class.[18] Willard B. Gatewood notes that by the First World War the African American elite, itself, had undergone substantial changes.[19] The traditional elite, with their close ties to the white elite and hopes for eventual assimilation into mainstream America, realized by the end of the First World War that southern whites intended to keep the two races separate and unequal forever. Furthermore, with racial segregation firmly entrenched, the African American elite had lost its intimate relationship with the southern patriarchy. Though Gatewood is correct about the shifting of the power relationship among African Americans, it is not correct to portend that African American professionals replaced the African American social elite. Instead, the African American elite had persisted similar to the white aristocracy that has weathered generations of lost wealth and influence while remaining quietly intact, receiving popular notice only when one of their own enters the mainstream, usually through politics.[20]

Other scholars besides Gatewood have made similar misinterpretations of the African American elite. A classic example of this trend is Black Bourgeoisie, a pioneering work on the African American middle class, in which E. Franklin Frazier believed the African American middle class led lives of frustration because neither the

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[18] 1920 was the last year that the mulatoo category appeared in the US census reports. Joel Williamson *New People: Miscegenation and Mulattoes in the United States* (Baton Rouge: Louisiana State University Press, 1995), 114.

[19] Willard B. Gatewood, Jr., "Aristocrats of Color South and North: The Black Elite, 1880-1920," *Journal of Southern History*, vol. LIV, no. 1, Feb. (1988), 17.

[20] For example, both Franklin Roosevelt and Theodore Roosevelt hailed from socially elite families and became President of the United States.

African American world nor the white world would have them.[21] Frazier was overly harsh at times in his commentary, going as far as to label middle class African Americans as "delusion."[22]

Gunnar Myrdal produced the most informative research on the African American elite to date in *An American Dilemma*, his classic study of race in American society. Myrdal noted some of the characteristics that would accord an African American a degree of class respectability. African Americans tended to respect employment, especially in a public agency, such as the post office. Family background is central for entrée to the black elite. Because of the heritage of slavery and its deleterious effect on the African American family, the elite frowned upon any hint illegitimacy. Intimate relations between whites and African Americans would bring strict condemnation, for example. The elite believed in providing race leadership both on the national and local level, especially in the NAACP.[23] Based on Myrdal's conclusions, a lawyer, absent any of the other prerequisites, save education, would have been considered middle class; the African American elite being just as restrictive as that of whites. I will refer to this "elite" within this chapter as the African American "social-political elite" to differentiate between it and a meritocratic elite that would develop later in the post-civil rights era. It is this latter "elite", comprised of African Americans, many of whom have lived and been

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[21] E. Franklin Frazier *Black Bourgeoisie* (New York: The Free Press, 1957).

[22] Frazier, 229-231. Frazier seems to agree with Chestnut when he writes, "Excessive drinking and sex seem to provide a means for narcotizing the middle-class Negro against a frustrating existence."

[23] Gunnar Myrdal *An American Dilemma: The Negro Problem in Modern Democracy* (New York: Harper and Row, 1944), 702-703.

educated largely in mainstream (white dominated) society, that causes confusion for those unfamiliar with African American history or southern culture.

Because of this socio-political elite presence and influence on large race-organization, such as the NAACP, the internal battles in the NAACP offer a microcosm of the larger intra-racial conflict within the African American community. Furthermore, the NAACP was from its inception an interracial project, allowing for a study of the relationship between the African American community as a whole and its mainstream white liberal allies.[24]

In the end the liberal integration program won the day, becoming the dominant paradigm of the civil rights movement. But focusing on this paradigm ignores the various strategies available to African American people to challenge white supremacy. Moreover, the portrayal of the African American community as a monolith results from this approach as well. The African American professional class, then, becomes part of an elite stratum of the community in lockstep with the national NAACP agenda. This agenda has always been more integrationist than that proposed by local African Americans. In reality African American lawyers were not members of the African American elite. Elite status in the African American community since Emancipation did not depend upon white approval. Instead, African Americans conferred elite status based on traits endemic to their situation after slavery. In this respect African American

[24] There is some debate over whether the earliest white NAACP leaders should be called liberals. However, here this debate is not productive. Part of the argument in this dissertation is that white supremacy can undergird the political projects of both liberals and conservatives. Derrick Bell makes a similar argument against liberal white supremacy in Bell, "The Interest Convergence Dilemma."

lawyers, who gained their professional acceptance through mainstream licensing procedures could not use their occupation as entrée into the African American elite.

African American lawyers faced conflict with African American elites in various environments during Jim Crow that illuminated their somewhat tenuous position in the community and highlighted a more fractured African American community than presented in traditional liberal discourse. This chapter explores the relationship between African American lawyers and elites in various environments and suggests how the structure of communities determined the nature of their interactions. Lawyers usually functioned outside the ranks of the African American elite properly defined.

In New Orleans, A.P. Tureaud faced difficulties with the entrenched elites of the NAACP and the Creole community. This conflict arose out of Tureaud's role as lawyer, rather than his social status. Tureaud was a Creole and a member of the social elite, but when operating as a lawyer, he often faced conflict. Ultimately, he would form a separate faction of the NAACP and publish a local newspaper to accentuate his progressive racial agenda. A.P. Tureaud challenged the old guard in New Orleans that was set in its ways. Conservative African Americans and Creoles adhered to the prevailing color consciousness that prevented a united front for the racially oppressed.

Tureaud is an example of a lawyer who fought against a seemingly intransigent African American class structure. Creoles were at the time outside the African American community, both physically and mentally (to be Creole meant being outside the larger black racial group), but they possessed resources that American "blacks" needed to defeat Jim Crow. Tureaud embodied this unification of American blacks and Creoles.

Creoles in New Orleans had a tradition of radicalism stretching back to Revolutionary France.[25] Unlike most African Americans Creoles resisted Jim Crow in total. Racial segregation did not benefit Creoles. In the American black community there was an ever-present tension between the struggle against racialized segregation, epitomized by Jim Crow, and support for African American communal values, epitomized, ironically, by separate African American institutions.[26] This was especially the case amongst the rising bourgeois class of African Americans in the post-1920s era who often organized "buy black" campaigns to ensure black dollars remained in African American hands, or at least in the hands of the African American middle class.

Tureaud was a member of the Autocrat Club, an old-line elite organization specifically catering to those of Creole descent. The Autocrat, founded on September 14, 1914, arose in response to the common orders of police to African Americans to "keep moving," whenever African Americans gathered to socialize.[27] The expansion of the African American population in New Orleans following the Civil War increased the anxiety of the white political power structure to control African American bodies. Vagrancy remained a concern of white leaders, both Northern whites during Reconstruction and Southern redeemers after Reconstruction, who feared the threat of

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[25] Arnold R. Hirsch, "Race and Politics in Modern New Orleans: The Mayoralty of Dutch Morial," *Amerikastudien* vol. 35, no. 4 (1990), 463.

[26] Adam Fairclough makes this point clear in his works on black teachers; see *A Class of Their Own : Black Teachers in the Segregated South* (Cambridge, Mass: Belknap Press of Harvard University Press, 2007); and *Teaching Equality: Black Schools in the Age of Jim Crow* (Athens, GA: University of Georgia Press, 2001). Black teachers understood well that attacks on the quality of Jim Crow institutions, such as schools, implied the inferiority of those managing these institutions.

[27] A.P. Tureaud, "Editor Writes First Chapter of Club's History," *The Autocrat Voice*, vol.1, no. 1, June 1934, p.1, A.P. Tureaud Papers.

African Americans free from labor.[28] This tradition of rousting groups of African Americans not involved at the moment in some type of labor continued into the Jim Crow era. The Creole community adamantly opposed this sort of discrimination and opened social clubs as sites where they could gather without white interference.

The politics of the Autocrat Club, though opposed to racial segregation, could not unite the African American community. Creoles were unable to recognize that their racial worldview was not a realistic option for the majority of American blacks who had been racialized as the "other" in southern society. Unlike Creoles, who could claim some degree of white blood and thus question the validity of their status as "blacks," American blacks accepted, voluntarily or involuntarily, the role of complete non-white. The fiction of racial purity that southern white elites promulgated in the early twentieth century created a line of demarcation that delineated African Americans and whites as polar opposites. Creoles often experienced Jim Crow differently as exemplified by Tureaud's time spent in a segregated school with white teachers, something not possible in the "American" black section of New Orleans.

Tureaud challenged the exclusive nature of the Autocrat Club and changed the group into a wider civic organization with a leadership role in the entire African American community. He accomplished this task by first founding a newspaper to present a more radical, united front against racism in New Orleans. The local NAACP through the 1940s was led by members of the elite ranks of Creole New Orleans, along with some elite American blacks who refused to follow the dictates of the national office;

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[28] John Blassingame *Black New Orleans, 1860-1880* (Chicago: The University of Chicago Press, 1973), 50-52.

instead, the New Orleans NAACP was split along historic ethnic lines that prevented the members from uniting behind their common blackness. Though he was relatively young, Tureaud had gained enough stature in New Orleans to openly defy the old-Creole elite. And because his grandfather had served in the famous *Corps d'Afrique* during the Civil War, the Creole elites could not easily ignore him.

A united black front in New Orleans began to emerge prior to the 1940s. In 1931, for example, the NAACP filed suit, in *Trudeau v. Barnes*, against Louisiana voting laws that allowed registrars to subjectively challenge applicants' ability to comprehend sections of the state and federal law.[29] These challenges usually occurred when the applicant was black, it seemed. Two of the largest Creole social groups, the San Jacinto Club and the Autocrat Club, supported the suit with money and a plaintiff, respectively. The coming together of various Creole groups with the more American NACCP portended well for the unification of the black community in New Orleans, editorialized the *Louisiana Weekly*.[30] Though the federal court ruled against the African American plaintiffs, telling them they had to exhaust all state court appeals before seeking relief in the federal courts, the seeds of the future had been set.[31] As a member of both the Auto Crat and the NAACP, Tureaud understood the power inherent in a united African American community.

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[29] *Trudeau v. Barnes* 65 F. (2d) 563 (C.C.A. 5th 1933); Charles Staples Mangum *The Legal Status of the Negro* (Chapel Hill, NC: University of Chapel Hill Press, 1940), 396.

[30] *Louisiana Weekly*, March 7, 1970.

[31] Adam Fairclough *Race and Democracy: The Civil Rights Struggle in Louisiana* (Athens, GA: The University of Georgia Press, 1999), 104; Roger Klarman *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2006), 197.

It required more than understanding to get the African American community of New Orleans to forgo decades of divisiveness. The local NAACP was, at the time, led by George Labat, a San Jacinto Creole. Labat refused to hire an African American lawyer to handle the lawsuit displaying what Tureaud could only perceive as a passé elitist attitude that only whites were qualified to be professionals.[32] New Orleans had an established tradition of paternalism dating back to slavery in which powerful whites served as protectors of less powerful African Americans. This protection also provided African Americans some degree of standing within the African American community depending upon the social status of "their" white people.

Tureaud attacked the old paternalism that provided some African Americans with a status superior to others while relegating all African Americans to an inferior position. To provide a voice within the African American community for the unification of all African Americans Tureaud founded the *New Orleans Sentinel* in 1940. The newspaper did not last long, only surviving for around four years, but it exemplified Tureaud's insistence on changing the political discourse in black New Orleans.

Tureaud advanced his vision of a united African American community in the *McKelpin* case. Here, Tureaud unites not only African Americans in New Orleans, but also African Americans on a national level via his role in the NAACP. This case was the 1941 teacher salary equalization dispute Tureaud handled along with Thurgood Marshall of the national NAACP. Though histories of the civil rights movement once tended to focus on the national level, we have seen increasingly an emphasis on the important role of local African Americans. Unfortunately, this scholarship has not yet pervaded legal

[32] A.P. Tureaud letter to Walter White of the NAACP, October 2, 1931 in the Tureaud Papers.

history, where a top-down approach remains dominant. But local lawyers initiated many of the court cases and handled the day-to-day operations necessary for successful prosecution of claims. Most often these lawyers, such as Tureaud, were leaders of the local NAACP branch, who worked as middle-men between the objectives of the national NAACP and local forces, African American and white.

Though *McKelpin* was filed in the Federal District Court for New Orleans, local issues were critical to the case and Tureaud played an important role in the deliberations. First, we must be aware of the reasons why racial discrimination cases were handled on a national rather than local level. It is easy to assume that local whites would be so intransigent about race relations that African Americans availed themselves of the federal courts to get a fairer hearing. Oftentimes, this attempt at removal of state cases to the federal courts because of perceived prejudice did occur. The United States Congress had understood the need for such an avenue for African Americans when it initiated Removal Legislation during Reconstruction. For example, the 1871 Voting Rights Act allowed a person arguing that their constitutional right to vote had been abridged by a state could, if they did not believe the state court would offer a fair hearing, file a petition to remove the case to the federal courts. Given the superior standing of the federal courts on the issue of federal constitutional rights, the state court had to cease and desist from prosecuting the case.[33] But in salary equalization disputes, where African American plaintiffs wanted the state government to force local governments to live up to rather than overturn the

[33] William M. Wieck, "The Reconstruction of Federal Judicial Power," *The American Journal of Legal History* , vol. 13, no. 4 (Oct 1969), 336-342.

"separate but equal" doctrine, removal to the federal courts on the basis of perceived prejudice became a less than persuasive rationale.

Instead, the case began in federal court more plausibly because of two factors: 1.) the national NAACP wanted to fight racial segregation rather than win the honest enforcement of separate and equal facilities 2.) the Federal Rules of Civil Procedure had been revised in 1938 providing for systematic means of pleading cases in all states. But local counsel was still needed, as Tureaud demonstrates. In the 1930s the national NAACP began handling teacher salary equalization suits, protesting the higher salaries paid white teachers than their African American counterparts. Though there were victories in these battles, it became clear that teachers were only one segment of the African American population and that each school district in every southern state would require separate lawsuits. As a result, by the 1940s the national NAACP had shifted its objectives from the local level to defeating racial segregation in broader areas; the most promising being segregated graduate schools.

The United States Supreme Court had also re-written the Federal Rules of Civil Procedure, which allowed a more streamlined pleading process in the federal courts. Now, under the notice pleading procedure plaintiffs could file federal lawsuits as long as there was a constitutional issue in dispute. The courts would not dismiss the suit on technicalities as was common before 1938. Given that many federal judges in southern states were themselves racial segregationists, the new rules allowed African American plaintiffs increased objectivity in accessing the federal courts. Moreover, the rules made it possible that a successful argument in one jurisdiction would be valid in another, a promising prospect for a national civil rights organization that needed to fight Jim Crow

in various states. For these reasons the national NAACP probably chose the federal courts rather than the more arbitrary state courts in the 1940s.

Local counsel was necessary in these federal lawsuits because it was they who could smooth over difficulties and work out solutions between three adversaries: southern whites, southern African Americans, and national African Americans. In *McKelpin*, these factions were represented, respectfully, by the New Orleans Parish School Board, the African American teachers union, and Thurgood Marshall. Tureaud, the consummate professional had to be able to speak to all of these groups and mediate a solution.

The school board and the Louisiana Attorney General wanted to maintain racially segregated schools and avoid immediate increase of African American teachers' salaries. The Attorney General announced a plan to provide increased funding for separate and truly equal African American schools that would include some form of a pay increase for African American teachers.[34] He announced this plan at a dinner for white teachers. Apparently, the New Orleans streetcars had separate but fully equal facilities for African Americans and whites, so this arrangement was perceived as acceptable to locals. But once Tureaud filed the petition to equalize salaries, local city officials began stalling. Instead of granting the request or increasing funds for African American schools in general, the school board filed motions to delay the case.[35] The state also sought to have the federal district court dismiss the case on jurisdictional grounds, claiming that since all the parties were citizens of Louisiana then the suit should have been heard in a state

[34] A.P. Tureaud to Thurgood Marshall, June 2, 1941 (APT Papers).

[35] Howard Lenfant, Assistant City Attorney, to A.P. Tureaud, July 7, 1941 (APT Papers).

court.[36] This argument had little chance of succeeding since there was a constitutional basis to the suit and the strategy appeared to be only an attempt to delay the lawsuit.

These delay brought the conflicting visions of the African American teachers and the national NAACP to the forefront. Local African Americans had to live and work in the city after the suit had ended. These people knew that they might have to compromise on some issues. The national NAACP, for the most part, perceived of these lawsuits as part of the larger overall goal of eradicating racial segregation. These suits, to the NAACP, laid the legal framework for the *Brown* litigation. But as the case continued in the courts the local teachers began questioning the need to pay the salary of local counsel.

The school board, witnessing the increasing strife between the African Americans, began initiating settlement proposals with the teachers alone. Thurgood Marshall, who was usually traveling to various jurisdictions as lawyer for the NAACP, failed to stop this breach. In what appears to have been a secret proposal to end the case, the state approached African American teachers and principals to inquire as to whether they would be willing to accept a $12 per month pay increase (white teachers would get a $40 a month increase).[37] Two principals visited Tureaud soon thereafter and "confided…that they were interested in a settlement of the case."[38]

The New Orleans Citizens' Committee questioned the role Tureaud played in the negotiations. The Committee Chairman, Donald Jones, wrote to Thurgood Marshall

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[36] A.P. Tureaud to Thurgood Marshall, September 4, 1941 (APT Papers).

[37] A.P. Tureaud to Frank Reeves, NAACP Legal Research Assistant, December 14, 1941 (APT Papers).

[38] A.P. Tureaud to Thurgood Marshall, December 31, 1941 (APT Papers).

privately to inquire about how much remuneration Tureaud, the local attorney, should receive.[39] Marshall refused to encroach upon what he correctly understood to be a local matter. Tureaud requested a fee commensurate with that paid to counsel in similar cases, amounting to $3,500. In response Jones compared Tureaud's role in the case to a contractor who locates an expert to do the real work.

The members of the Citizens' Committee failed to understand that Tureaud kept the lawsuit moving forward. The Committee thought Tureaud should have been more partisan. However, as a trained professional, Tureaud probably saw his role as that of an officer of the court who seeks a long term victory for his client. In the Jim Crow South this type of victory required knowledge of the local social scene. For example, Tureaud secured hearing dates with a simple phone call to the city attorney because of his reputation within New Orleans legal circle.[40] The Committee did not comprehend the animosity created among local officials by the decision of the NAACP to file a federal lawsuit. In a private conversation with a local white lawyer, Tureaud learned that the state's lawyers believed the case should have been handled in the state courts because all parties were Louisianans. To the whites involved, Marshall became an outside agitator with whom they held nothing but an adversarial relationship. On the other hand, Tureaud was a respected and trusted member of the bar for whom these same whites were more willing to accord professional courtesies on which the outcome of trials often hinge.

Creoles in New Orleans, exemplified in the actions of Tureaud, aided in the successful prosecution of the civil rights movement by uniting their traditional Creole

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[39] Thurgood Marshall to Donald Jones, September 9, 1942 (APT Papers).

[40] A.P. Tureaud to Thurgood Marshall, September 13, 1942 (APT Papers).

radicalism with the desire for change amongst most American African Americans. Tureaud accepted that American blacks, unlike Creoles, saw change as the end with the defeat legalized racial segregation as a means to that end. He worked as a middleman between American blacks and Creoles in New Orleans to create a united African American community and change the discourse around blackness in the city. Then, Tureaud also worked to realize the common goals of local African Americans and the larger national African American movement represented by Thurgood Marshall of the NAACP Legal Defense Fund.

New Orleans presents a more complex portrayal of the African American community. In this Old South city intra-racial strife flourished between American blacks and French Creole blacks. Atlanta, the leading city of the New South, demonstrates a case of intra-racial divisions between members of the African American elite that arose in the aftermath of slavery and a new rising class of professionals African Americans in the early twentieth century.

Beholden to protect the legal interests of their clients, African American lawyers could not adopt an overtly integrationist stance. This fact would exacerbate the conflict between African American lawyers and the elite who usually supported the aims of the national NAACP. The years 1924 to 1936, when Walden headed the Atlanta branch of the NAACP, provide a prime example of both the personal problems Walden faced within African American civic groups and the complex issue of social relations amongst African Americans. Walter White, the National Secretary during these years, hailed from Atlanta, though he resided in New York. Solid members of the old African American aristocracy the Whites rose to influence during slavery when African Americans

possessing lighter complexioned skins often forged closer relations with whites. The federal government hired Walter White to study race relations and to aid in the implementation of integrationist strategies.

The Whites and other members of the old aristocracy enjoyed greater access to education and "culture", unlike those blacks laboring in the fields. White had such Caucasian features that most people, unless they knew him, considered him a white man. The NAACP often gathered evidence of southern lynchings by sending White into the South to attend these acts of terror and take notes and photographs.[41] Many of these "mulattos" became community leaders, by virtue of their advantageous position relative to other African Americans.[42] The Whites were no exceptions, for Walter White and his family steadfastly fought for white America to acknowledge the inherent humanity of African American people. Nevertheless, as within any social group, there was conflict between those who had previously enjoyed elite advantages and those seen as comprising the new elite. During this period, with increased access to education, a new set of professional African Americans emerged outside the old mulatto elite. These newcomers, such as A.T. Walden, challenged the old elite for social status within the African American community. This internal conflict underpinned the dissension Walden often faced in civic groups.

After ten years at the helm of the Atlanta NAACP, Walden began receiving open criticism from members of the Atlanta mulatto elite. It did not help that Walter White's

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[41] Walter White *A Man Called White*, 56-59.

[42] Willard B. Gatewood, Jr., "Aristocrats of Color South and North: The Black Elite, 1880-1920," *Journal of Southern History*, vol. LIV, no. 1, Feb. 1988, 5.

family still resided in Atlanta and could send letters critical of Walden under the auspices of friendly correspondence. Helen Martin, sister of Walter White, mentioned in a March 1934 letter to her brother, that "many people are disgusted with Walden as head and feel that he doesn't do anything with the branch here [so] they are unwilling to give [donations]."[43] Martin opened her letter with congratulations to White on his recent job promotion but spent the remainder of the letter railing against Walden. White's sister could not leave well enough alone, because the very next week she sent another letter with clippings of an *Atlanta Daily World* newspaper article detailing the need for new NAACP leadership. As Martin put it in the letter, "The complaints seem to be universal."[44]

The situation became worse for Walden the next week when Josephine Dibbles Murphy, head of the NAACP women's auxiliary, formed two years earlier partly in defiance of Walden, wrote to Walter White complaining that Walden had been disingenuous about his role in developing the well-known Atlanta Citizenship Schools. These schools, developed by the local NAACP in conjunction with the historically black Atlanta University Center schools, provided voter registration training and stressed the importance of doing so. Moreover, the establishment of these schools became the only tangible results accomplished by the NAACP under Walden.

By discrediting Walden's role in planning the schools, these elite women may have desired to prove his ultimate unworthiness as a leader, rendering him ineffectual in

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[43] Helen Martin to Walter White, March 19, 1934, Papers of the NAACP, Part 12, reel 10, files 417-419.

[44] Helen Martin to Walter White, March 26, 1934, Ibid., files 432-434.

the eyes of Walter White. Mrs. Murphy asserted to Walter White that Lugenia Burns Hope, the wife of longtime Morehouse College president John Hope, had actually originated the citizenship school concept and that Walden had done very little to accomplish its success.[45] Murphy, an Atlanta socialite with a close relationship with the White family, went so far as to suggest that Walter White replace Walden with Eugene Martin, the secretary of the African American-owned Atlanta Life Insurance Company.[46]

Apparently, Walden, still an outsider in these elite circles, remained unaware that those around him desired his dismissal, probably because most of the dissension occurred in private within the social elite. In the correspondence between White and Walden during this period, there was no mention of the dissension in the ranks. Instead, Walden continued to emphasize that he would pursue legal recourse for black Atlantans. This strategy, as historian Mary Gambrell Rolinson argues, compelled members to feel that Walden "did little outside his law office."[47] Eventually, the Women's Auxiliary openly refused to work with Walden and by 1936, Walter White and Roy Wilkins, the national executive secretary, had began maneuvering to replace Walden, a feat accomplished with some degree of tact by March of that year.[48] Walden, who still headed many other civic organizations, and received a position on the national NAACP board, seemed unperturbed by his loss of the directorship and began focusing more on regaining the franchise for African Americans. Given that Walden remained in the NACC, receiving a

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[45] Josephine Dibbles Murphy to Walter White, May 31, 1934, Ibid., Part 12, reel 10.

[46] Josephine Murphy to Walter White, July 30, 1934, Ibid.

[47] Mary Gambrell Rolinson, "Community and Leadership," 17.

[48] Eugene Martin to Walter White, March 11, 1936, Papers of the NAACP, Part 12; Roy Wilkins to Walter White, June 23, 1936, Ibid.

promotion at the national level, one can only surmise that local dissension amongst the cost him his job.

J.L. Chesnut, a lawyer in Selma, Alabama, talked quite a bit about the problems African American professionals faced. But he, too, failed to differentiate between these professionals and the social elite. In Selma, there probably was no real traditional social elite; just African American professionals who could not attain the level of respectability they thought they could. Selma was a mid-sized town in comparison with Atlanta and New Orleans. Unlike New Orleans there was no long history of diversity within the African American community. Selma also differed from Atlanta in that there was not a progressive New South agenda which allowed room for African Americans to negotiate within. Instead, Selma was somewhere in between the Old South paternalism of New Orleans and New South progressivism in terms of relations between whites and African Americans.

In this setting whites and African Americans remained relatively separate in social and political relationships. Even African American professionals found relatively few opportunities to interact with their white counterparts, something untrue in New Orleans and Atlanta. To combat this isolation, African American lawyers formed social relationships with other African American professionals. Not fully accepted in the white world, but unwilling, or unable, in most cases, to participate in activities with the African American masses, African American professionals entered a closed network of like-minded African Americans. Within these groups, lawyers, doctors, teachers, and others with similar educational backgrounds extricated themselves from others—African American and white.

In many cases, the behavior of these "bourgeois Negroes," was self-destructive. Chesnut remembers returning home from law school in the North, and finding that he was "not part of the white world. But I hadn't anticipated I wouldn't be quite part of the black world either."[49] To mentally escape, Chesnut worked only enough to earn money to provide for his family, which amounted to three days a week, and spent the remaining four days in a drunken stupor.[50] In his autobiography, Chestnut recollected that it was the sum of isolation and racism in the pre-Civil Rights Movement years that led African American professionals to sink to this level of depravity.[51] His partner in the Alabama Black Belt legal circuit was Orzell Billingsley who spent many a night in the company of female schoolteachers who apparently found these two renegade African American lawyers who rode into town in a big Lincoln quite an event.[52] This lifestyle of alcohol and women characterized the African American elite in Selma, according to Chesnut. In this respect he agrees with the now discredited interpretation of African American professionals offered by E. Franklin Frazier in the 1950s when he wrote, "Excessive drinking and sex seem to provide a means for narcotizing the middle-class Negro against a frustrating existence."[53]

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[49] J.L. Chestnut, Jr. and Julia Cass *Black in Selma: The Uncommon Life of J.L. Chestnut, Jr.* (New York: Farrar, Straus and Giroux, 1990), 131.

[50] Ibid.,139.

[51] Ibid., 141.

[52] Ibid., 119-120.

[53] E. Franklin Frazier *Black Bourgeoisie* (New York: The Free Press, 1957), 231; One of the earliest critics of Franklin's work was August Meier in, "Some Observations on the Negro Middle Class," *The Crisis* 64 (October 1957), 461-69.

Chesnut's portrait of the African American elite fails to comprehend that attaining professional credentials alone did not accord elite status. His definition of elite seems to conflate all African American professionals into the African American elite. Doing so, however, ignores the fact that African American professionals often attained their credentials through the white power structure rather than the African American community. Lawyers, in particular, presented this problem because they must practice in the mainstream legal system. In Selma, there appeared to be only two types of African Americans, the poor and the elite. However, using the more precise conception of elite offered in this research we realize that Chesnut did not perceive the reality that there was an African American professional class that might have existed along with a smaller African American elite class.

This chapter provides examples of a lawyer reacting to the particular social structure of a southern community. The characteristics of the community influenced how the lawyer developed his legal strategies. Yet, each example demonstrates that the African American community was stratified, not monolithic, even during Jim Crow segregation. In fact, legalized racial segregation in the American South provided the contact between otherwise competing factions necessary to foment intra-racial unity across class lines.

We must explore the cleavages within the African American community before what made it whole will become clear. In a colorblind, post-*Brown* society, "black unity" seems at times to be an oxymoron. Moreover, without Jim Crow segregation, the old liberal coalition cannot locate common ground to effectively challenge white supremacy. During Jim Crow, however, African Americans united to defeat the system and racial

liberals coalesced to aid in the struggle. Today, scholars and activists have ignored the intra-racial strife that African Americans overcame to the detriment of those committed to eradicating white supremacy in all its forms.

## Chapter 5 THINGS FELL APART: The NAACP, Intra-Racial Interest Convergence and *BROWN v. BOARD OF EDUCATION.*

Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the center cannot hold;
Mere anarchy is loosed upon the world.

William Butler Yeats, "The Second Coming"

This chapter builds upon the work of two legal scholars: Derrick Bell and Michael Klarman. In "*Brown v. Board of Education* and the Interest-Convergence Dilemma," Bell argued, in what proved to be the seminal essay of the Critical Race Theory Movement, that social gains for African Americans usually occur when their interests coincide momentarily with those of more powerful social interests.[1] Unfortunately, when the factors creating these favorable conditions shift, then African American interests become subordinate to those of their former allies.

Mary Dudziak has also utilized Bell's interest convergence theory in Cold War Civil Rights.[2] Dudziak argues persuasively that the success of the civil rights movement came partly because of the convergence of forces external to the African American community with southern African American challenges to Jim Crow. The federal government began during the Second World War to support liberal integrationist policies as official American policy. Both the need to distance the United States from Nazism and to counter Soviet Cold War propaganda that stressed Jim Crow to the nonwhite Third

[1] Derrick A. Bell, Jr., "Brown v. Board of Education and the Interest-Convergence Dilemma," 93 *Harvard Law Review,* v. 518 (1980).

[2] Mary Dudziak *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, NJ: Princeton University Press, 2000).

World, persuaded the federal government to alter its course.

*Cold War Civil Rights* demonstrates the civil rights movement had inextricable links to larger forces outside the African American community. Dudziak's study reminds historians to think about coalitions among various communities and how larger political issues affect insular minority populations. We have not yet employed interest convergence theory in studies of insular minority populations. The same types of factors we deem important in studying the coalition of large groups are most likely present within minority communities. Furthermore, it is necessary to first comprehend fully what enabled these minority communities to unite; a necessary precursor to the later coalition with national and international forces. Dudziak's work on the macro-level, illuminates the need for more micro-level histories.

In this chapter, I propose that in addition to convergence of external interests with those of the African American community, there was also a convergence of interests within the African American community that culminated in the successful prosecution of the *Brown* case. Scholarship of the civil rights movement has progressed from its formative years in which there was a distinct focus on major leaders, men, and formal organizations. Today, scholars have incorporated marginalized figures, women, and informal resistances to power, into the narrative of the movement. Legal historians have not ignored this shift in emphasis. Where once the Supreme Court decision in *Brown v. Board of Education of Topeka, Kansas* was sacrosanct, receiving criticism primarily from reactionaries, now respected scholars openly question the material benefits the decision

brought African Americans in the five decades following the opinion.[3] Most prominently, Michael Klarman has forced us to rethink our acceptance of popular assumptions of *Brown* as the catalyst for the civil rights movement.[4] According to Klarman's "backlash thesis," *Brown* had no direct positive effect though it did have a negative effect, in the form of a southern white backlash against racial progressivism. In the aftermath of the Second World War, there was room in southern state politics for racial moderates; but, after *Brown* southern state politics shifted decisively to the right, exemplified by the massive resistance programs that led to the closing of whole school systems to avoid racial integration.

Klarman questions the role *Brown* supposedly served as impetus for the African American struggle for equality in the late 1950s and 1960s. He notes a burgeoning movement amongst the African American population that would have occurred regardless of *Brown*. Here, Klarman raises a question that needs consideration. His backlash thesis fails to answer what force drove the movement if not *Brown*. Klarman arrives at his conclusion about the failure of *Brown* to energize the African American community partly because his thesis perceives of African Americans as an inherently united group.

The limitation of the backlash thesis is its emphasis on a monolithic African American community that possessed a singular mind. We need to consider more seriously the convergence of various interests within the African American community

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[3] *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954).

[4] Michael Klarman, "How Brown Changed Race Relations: The Backlash Thesis," *The Journal of American History* vol. 81, no. 1 (June 1994), 81-118; see also, Michael Klarman, "Brown, Racial Change and the Civil Rights Movement," 80 Virginia Law Review (1994), 7-150.

around *Brown* because this unity of purpose produced the victory both in *Brown* and ultimately in other areas of civil rights. Bell, Dudziak, and Klarman have provided the groundwork for study in this area. This chapter offers a new look at the National Association for the Advancement of Colored People (NAACP) two decades prior to their success in *Brown*. This period, witnessed a certain degree of disunity that had its roots in centuries of slavery and decades of racial uplift ideology advanced by the African American middle class as a way to advance model citizenship. But, the very act of acknowledging the perceived deficiencies of working class African Americans, explicitly placed African American professionals in an elevated position within the African American class hierarchy.[5]

Lawyers were uniquely qualified to lead the charge against racial segregation. The legal system, because of its grounding in supposedly neutral principles, provided these lawyers with a space to articulate the needs of African American citizens to the nation. African American lawyers could demystify for the masses the complex legal theories the courts had developed around race. The lawyers also occupied a social space between competing interests within black America. Given that mainstream society, rather than the African American community, granted their professional status, African American lawyers were not automatically members of the African American socio-political elite. Moreover, unlike other African American professionals, they did not work within an insular segregated environment. For example, no southern courts specifically functioned for African American legal professions. Eventually the NAACP would

[5] Kevin Gaines *Uplifting the Race: African American Leadership, Politics, and Culture in the Twentieth Century* (Chapel Hill: University of North Carolina Press, 1996).

increase the visibility of African American lawyers as it laid the legal groundwork for *Brown,* and eventually the lawyers would use their enigmatic position within African American society as a source of power.

In the 1930s, NAACP lawyers did not utilize their middle-ground status successfully. In his first case for the NAACP, Charles Hamilton Houston failed to provide a strong defense for his client, George Crawford, in a double murder trial. Houston, then dean of Howard Law School, did not believe he had to sacrifice the NAACP's larger objectives for an African American ex-con he suspected had committed the crimes. At one point, Houston harangued his client in a jail cell interview forcing Crawford to "admit" to taking a part in the homicides.

By the time of *Brown*, the NAACP, under Marshall was able to capitalize on the middle-ground status of African American lawyers. From his position within the middle ground of groups in the African American community, Marshall successfully prosecuted *Brown*. Unlike his predecessors, Marshall understood that he had to work with local African Americans to ensure victory. By analyzing his writings of the 1950s, we see that Marshall believed that he had to get local communities to support the efforts of the NAACP. Marshall knew that victory depended on success in the courtroom and on political maneuverings within southern localities where his clients lived.

When we focus too heavily on a monolithic African American community, we tend to ignore the various levels that comprise communities served by the legal system. Without the convergence of various interests within the African American community working together under the leadership of the NAACP, *Brown* would not have come before the court for consideration. Therefore, we need to begin to understand and

appreciate how it was that African Americans united before and during *Brown*.

The practical conservatism of local lawyers would come under considerable strain as the NAACP gained more influence on the national level in the 1930s and 1940s. Local African American lawyers, most of whom were members of their state and city NAACP branches, found the national organization, located in New York City, encroaching on their territory. The national organization, after acquiring funds from the Garland organization became the central civil rights group to most race liberals. Unfamiliar with the situation amongst workaday types in the South, northern and western whites, for example, looked upon the national NAACP to guide the masses. National NAACP conferences usually drew the crème de la crème of progressive and liberal America, as well as old-guard Republicans who continued to display an avid interest in the African American issue.

The NAACP began its wholesale campaign against segregation when the American Fund for Public Service, better known as the Garland Fund, provided a $100,000 donation to the group in 1932. These funds allowed the NAACP to initiate a comprehensive attack throughout the South. Following the stock market Crash in 1929, most of the Garland Fund's assets depreciated to such an extent that the money set aside for the NAACP was no longer available, but, nevertheless, the initial expectation of the influx of money from the Fund stimulated renewed vigor for a legal attack against southern racial discrimination.

Despite new funding to launch its campaign; the NAACP had to decide which legal strategies would be productive. Walter White, the head of the organization, hired Jewish lawyer Nathan Margold to write a report detailing the best plan of procedure.

Margold surveyed the situation of African Americans in America and found that most of the rights found within the Fourteenth Amendment had been rendered ineffectual via conservative rulings by the Supreme Court. Though this amendment to the Constitution facially provided African Americans born or naturalized as citizens the same rights as all other citizens, Margold believed that African Americans had, "gotten very little out of it in practical effect."[6] The Supreme Court had limited the amendment via the state action doctrine and by insisting that equality of rights did not include social equality. The state action doctrine stated that for there to be a finding of discrimination under the Fourteenth Amendment an agent of the state, for example a police officer on duty, had to perform the act. Under this legal theory, individual discrimination was not considered discrimination because the Fourteenth Amendment applied only to state governments. The right to equality as guaranteed by the Fourteenth Amendment was weakened in 1896 when the Court decided that African Americans and whites could be segregated because African Americans had no right to social equality with the superior white race.[7]

The problem of securing equality was exemplified for Margold by the NAACP's attempt to confront public school discrimination in the South. Up to the 1930s the group had taken cases as they came rather than devise a comprehensive legal strategy.[8] The Garland money provided an opportunity to be proactive in fighting discrimination. Margold remained concerned over the lack of vision among NAACP leaders. To prove

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[6] Nathan R. Margold, "A Program of Legal Defense for Negroes," Address Delivered Before the Twenty- Third Annual Conference of the NAACP (May 10, 1932), 2. Papers of the NAACP, part 1, Reel 9, frame 0107-0116.

[7] *Plessy v. Ferguson*, U.S. 357 (1896).

[8] Margold, 1.

the existence of state action, NAACP lawyers had to sue each state government for segregating public schools. But within each state, Margold found there were innumerable white hands that handled the money, signed the checks, and passed the legislation that amounted to discrimination against African Americans. Each of these people would have to be sued and found guilty to effect any change. Furthermore, these people, and others, would have to be sued each year because the rules and budgets changed on an annual basis. Even with new funding it was not feasible to file lawsuits in each state every year.[9]

Margold called for a new principle to fight racial discrimination in public schools. The goal was to get African American children admitted to white schools because only in doing so could equality be guaranteed. The old theory of an equal right to association between whites and African Americans, one of the arguments put forth in *Plessy*, had to be revised. Margold believed that instead the NAACP lawyers should argue that African American children had a right to attend white schools in their states because of the Fourteenth Amendment's guarantee of equal protection under the law.[10] In the South, states spent at least twice as much on white students as they did African American students. The worst southern state in this regard, South Carolina, spent ten times as much on white students relative to African American students.[11] The focus was no longer to be upon association with white people, but the inequality present and easily visible in the southern public school systems.

This new approach to school discrimination cases would be, in the end, a

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[9] Ibid, 3-4.

[10] Ibid., 4.

[11] Richard Kluger *Simple Justice: The History of Brown v. Board of Education and African American America's Struggle for Equality* (New York: Knopf, 1976), 132.

challenge to racial segregation without forcing the conservative Supreme Court to overturn *Plessy*. Since the precedent in *Plessy* established that states could segregate the races when the spaces provided remained equal, Margold wanted to argue that the equality side of the "separate but equal" doctrine had never been enforced. To enforce this doctrine immediately would require the states to build separate schools for African Americans parallel to those afforded whites, an expensive proposition even without a world-wide economic depression. In the interim, Margold planned to insist that African American southerners attend the white schools until equal schools for them opened. Doing so would further challenge the theory that African American and white students could not coexist in the same schools, thus militating against the need for the states to build the African American schools.

Margold also proposed comprehensive challenges to racial segregation in housing and in public accommodations. In both cases, he thought the NAACP needed a comprehensive plan of attack that would placate the conservative Supreme Court while rebutting southern progressives' contention that only separation of the races secured peace and order in the South.

Houston understood the value of the Margold Report, but he suggested changing the proposal slightly. To Houston, a better strategy would focus on one particular area of discrimination, secure victories there, and then attack Jim Crow itself as a principal. Furthermore, he believed the initial battles had to be fought in the upper-South where race relations had moderated. For Houston, the areas most vulnerable to legal challenges by African American plaintiffs, were graduate and professional school admissions. Since graduate schooling entailed more specialized training, it would be difficult, if not

impossible, for southern states to replicate all the programs offered whites. Moreover, the judges who would decide the cases had attended law school and would better understand the intangible benefits states denied African Americans by refusing to admit them to mainstream graduate programs.

In the end, this legal strategy would be vindicated by *Brown* in 1954. The national, legal arm of the NAACP, then led by Thurgood Marshall, managed to consolidate all the forces of the African American community with those of mainstream progressive America to persuade the Supreme Court to overturn the separate-but-equal doctrine. The success in 1954 has proven misleading to scholars who conclude the inevitability of the national organization to move into southern states and mobilize the masses of African Americans to fight segregation. Rather than adopting the needs of the people and communities they represented in the South, the NAACP got off to an inauspicious start.[12]

In the South the NAACP remained weak in many areas where violence prevented African Americans from any type of agitation. For African American lawyers in the NAACP, the fight against Jim Crow had two objectives: to end racial discrimination in the region and to prove the competence of the African American attorney. Both of these goals would be achieved eventually; however, at times, the desire to reach predetermined ends would prevent the NAACP from uniting factions within local African American communities and providing the best representation possible for their clients.

On the legal front, the NAACP began to assert its influence in southern locales

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[12] The Scottsboro case was another instance where the NAACP attempted to handle a case in the South receiving criticism from various quarters. See, Dan Carter *Scottsboro: A Tragedy of the American South* (Baton Rouge: Louisiana State University Press, 1969), 51-103.

beginning in 1933 when Houston entered the case of the *Commonwealth of Virginia v. George Crawford*, an ongoing dispute between Virginia, the state of Massachusetts, and an African American ex-convict. This case involved the 1932 murder of Agnes Ilsley, a white, fox hunting socialite, who resided in Loudon County, Virginia.[13] When the case came to the attention of NAACP leader Walter White, the organization had not fully recovered from its rough fight with the Communist Party in the Scottsboro trials. In Scottsboro, the Left had portrayed the NAACP as a group less than dedicated to the defeat American racism.[14]

White and the NAACP desired the chance to prove the viability of its legal program and the abilities of African American lawyers to lead the fight. These objectives were not, however, necessarily congruent with those the NAACP represented.[15] The communities in which individual African Americans lived possessed mores and customs that the national offices of the NAACP could not always comprehend.[16] Houston, born in Washington, D.C., and educated at Amherst and Harvard Law school, had spent little time living among the African American masses. Recently, he had just received unadulterated criticism for his role in transforming Howard Law School from a night school open to working class African Americans to a fulltime day school. In *Crawford*

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[13] Richard Kluger *Simple Justice*, 147.

[14] Dan T. Carter *Scottsboro.*

[15] August Meier and Elliot Rudwick, "Attorneys African American and White: A Case Study of Race Relations Within the NAACP," *The Journal of American History*, vol. 62, no. 4 (March 1976), 913-946.

[16] For a classic, definitive study of Southern race relations in a small town see, Hortense Powdermaker *After Freedom: A Cultural Study in the Deep South* (New York: Russell and Russell, 1939).

the divisions within African American America that the Left had exploited in Scottsboro continued to persist.

When it became involved in the Ilsley murder case, the NAACP did not know that George Crawford had previously served time in a Virginia prison. In 1925, Crawford, then in his late twenties, was living with his sister in Richmond, Virginia, when he was charged with receiving stolen goods.[17] The state imposed a fairly harsh penalty of nine years of confinement and hard labor on the infamous chain gang. In the fifth year of this sentence, Crawford went out of his way to save the prison warden from being stabbed by another inmate. For this act of courage the Governor commuted Crawford's sentence and in November of 1930 he was a free man.[18]

Upon his release, Crawford relocated to the small town of Middleburg, Virginia, in Loudon County, where the prison doctor, Dr. Holt, had established a practice. Dr. Holt lived in the chauffer's cottage on the estate of the prominent Ilsley family. Dr. Holt hired Crawford as a servant who performed odd jobs as needed. Crawford would work, at times, for the Ilsley family as well, making himself familiar with Agnes Ilsley, whom he would later be accused of murdering. Though most people thought of Crawford as a decent, African American man, he was the chief suspect in two thefts in his brief stay in Middleburg. In September of 1931, less than one year after his release from prison, Crawford left the South and moved to Boston, Massachusetts.

Crawford did not leave Virginia on good terms, an act that would come to haunt

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[17] Helen Boardman, "The South Goes Legal," *The Nation*, vol. 136, no. 3531, March 8, 1933, p. 258.

[18] Ibid, 259.

him later. To the whites, Crawford was a suspect in two thefts that had gone unsolved. To the African American community, Crawford was rascal. He earned this reputation by absconding to Boston with Bertie De Neal, the wife of another man from the African American community. Southern African American communities, as was southern society in general, tended to be socially conservative. Crawford had committed two unpardonable sins: causing southern whites to suspect his trustworthiness, and disrespecting the sacred vows between man and wife.

When the Ilsley estate was robbed on Christmas Eve of 1931 and then Agnes Ilsley killed two weeks later, apparently the authorities immediately suspected the handiwork of Crawford.[19] The sheriff deputized the town's white men who searched houses in the African American community for Crawford. Bertie De Neal, who had returned to her husband after spending less than a month in Boston, was arrested and jailed for months. It was only after Crawford was arrested for vagrancy in Boston in January of 1933 and later connected with the murder, that Virginia authorities stop this harassment of the African American community.

The NAACP entered the case when concerned people in Boston requested the organization's assistance to save Crawford. It seems the Crawford arrest in Boston and the subsequent extradition attempt by Virginia officials aroused Bostonians similarly to the way fugitive slave captures did to some in the 19th century. Walter White asked two local lawyers to handle the hearings in Massachusetts District Court to decide whether Crawford would be returned to Virginia against his wishes to stand trial for murder. The

[19] Ibid.

United States First Circuit Court of Appeals ruled that Crawford was the man in question and thus could be extradited to Virginia to stand trial, a decision that overturned the judgment of the Federal District Court that had denied Virginia's largely on the grounds that that state's white-only jury system would not provide Crawford a fair trial.[20] The United States Supreme Court refused to hear the case, so Crawford and the NAACP braced for a high profile murder trial in the South.[21] The trial ended in Crawford's conviction of murder and a sentence of life in prison.

There was a dispute over whether the NAACP scored a victory in *Crawford*. To Houston and White, *Crawford* was a victory because it provided the opportunity for African American lawyers to argue before a southern jury. A fair legal process was almost guaranteed because the state wanted to quiet the arguments over its jury selection procedures.[22] But procedural justice does not always guarantee real fairness. The debate spilled over onto the pages of *The Nation*. Helen Boardman, who had traveled from the North to Virginia to investigate the Crawford case for the NAACP, criticized Houston for failing to adequately represent the interest of George Crawford.[23]

According to Boardman, the NAACP falsely advertised it would prosecute the case in a manner that would call the exclusion of Negroes from Virginia juries into

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[20] *Chicago Defender*, "Virginia Gets Fugitive: Crawford to Face Trial for Slayings," Feb. 25, 1933, p. 4; Ibid., "Judge Frees George Crawford in Ilsley Murder; Hits South's Jury System," April 29, 1933, p. 1- 2.

[21] *Chicago Defender*, "High Court Orders Crawford Sent Back to Virginia: Big Mob Awaits his Arrival," Oct. 21, 1933, p. 1-2.

[22] Helen Boardman, "South Goes Legal," 259.

[23] Helen Boardman and Martha Gruening, "Is the N.A.A.C.P. Retreating?," *The Nation*, vol. 138, no. 3599, June 27, 1934, p. 730-32.

question. Boardman correctly asserted that the NAACP raised funds for the Crawford defense by claiming, "victory means, first, snatching an innocent man from the electric chair, and, second, that states must come into court with clean hands."[24] Though Boardman never provides evidence that the NAACP explicitly announced a desire to address the jury exclusion issue in the *Crawford* case, there is evidence of such an assertion. In November of 1933 the NAACP press service released a call for funds based on the need to pay the expenses in the defense of Crawford. To legitimate this request, the NAACP proposed:

> To the general colored public the George Crawford case may be only a colored man on trial for murdering two white women, but to lawyers and students of Negro rights, it is the most important legal fight for constitutional rights and justices in the courts that has come up in recent years.[25]

Houston knew of the press release because a letter from White accompanied a copy of the release stated that he had followed Houston's advice on "stressing the reactionary stand of Virginia on the jury question and emphasizing the raising of an expense fund…"[26]

Boardman's article in *The Nation* questioned Houston's failure to adequately represent the interest of George Crawford. To Boardman Houston should have challenged Crawford's chances of getting a fair trial in Virginia given the hostile racial environment. There was an ever present threat of white violence. Houston does not

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[24] Ibid., 730.

[25] Press Service of the National Association for the Advancement of Colored People, "Crawford Case Called Test of Negro Service on Juries: Unless Funds are Raised to Carry on Fight, All Gains May be Lost Throughout the South, Defense Counsel Houston Declares," *Papers of the NAACP: Discrimination in the Criminal Justice System, 1910- 1939*, Reel 7, frame 00235.

[26] Walter White to Charles Houston, November 15, 1933, Ibid., Reel 7, frame 00237.

mention this threat, however, content that Crawford received a fair trial. The problem is that Virginia differed from Deep South states such as Mississippi. As Lisa Dorr opines in *White Women, Rape, and the Power of Race in Virginia, 1900-1960*, Virginia officials viewed lynchings and other forms of white lawlessness unbecoming. This did not mean that Virginia was a racially progressive state. Powerful white men promoted the idea that in Virginia African American men accused of raping white women could receive a fair trial. African American men could, and often did, escape the death penalty in Virginia, Drachman demonstrates. Moreover, African American men often received commutations of their sentences; but, it was always after conviction by all-white, male juries and always under the supervision of a legal system dominated by elite while men.[27] Loudon County officials, including Brigadier General William Mitchell, called for "a speedy, orderly trial."[28]

Crawford received a procedurally fair trial, but not a substantively fair trial. Houston did not use the jury exclusion argument nor did he attempt to impeach prosecution witnesses. Bertie de Neal, the chief witness against Crawford, had been arrested and jailed soon for months following the murders. During the days following the murder, posses of white men combed the area, rousting African Americans out of their homes and placing some, including de Neal, in jail.[29] During the trial, the state had again

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[27] Lisa Dorr *White Women, Rape, and the Power of Race in Virginia, 1900-1960* (Chapel Hill: University of North Carolina Press, 2004).

[28] Helen Boardman, "The South Goes Legal," 259.

[29] Helen Boardman, "The South Goes Legal," 259.

placed de Neal in jail because she was a material witness in the case.[30]

Houston interviewed de Neal in her jail cell where she confirmed that Crawford had been in town the night of the murder.[31] The sheriff was present during the interview casting possible doubt on the validity of this claim. Based on what he had heard, Houston went to the cell of George Crawford and "confronted" the defendant about what de Neal had said. Only then, did Crawford admit to Houston that he had committed the murder of Agnes Ilsley. Boardman believed Houston, representing Crawford for the NAACP, should have considered the possibility that a poor African American woman held in a southern jail cell, with the County sheriff watching her, might not have told the truth.[32] Moreover, de Neal and other African Americans who initially made accusatory statements about Crawford did in the midst of a southern, white male posse.[33] Instead, Houston decided that Crawford was guilty and took the jury exclusion issue off the table to be saved for a more presentable African American client.

Houston responded to these accusations the following week, in *The Nation*.[34] He retorted that Crawford choose not to appeal the guilty verdict. Though this may be true, he failed to address Boardman's accusation that he believed Crawford guilty and thus stopped mounting a defense. Houston it appears did not possess much faith in his client.

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[30] Helen Boardman and Martha Gruening, "Is the NAACP Retreating?," 731.

[31] Helen Boardman and Martha Gruening, Ibid.

[32] Ibid.

[33] Ibid.

[34] Charles Hamilton Houston and Leon A. Ransom, "The Crawford Case: An Experiment in Social Statesmanship," *The Nation*, vol. 139, no. 3600, July 4, 1934, p. 17-19.

Early in the article, he informed the reader that Crawford was a serious repeat offender. He does so by providing details of prior crimes committed by Crawford previously unknown in public.[35]

The second half of Houston's writing focused on the NAACP's role in the case. He explicitly addressed the question of whether the NAACP had been justified in compromising with Virginia officials to imprison George Crawford for life.[36] Here Houston begins to delineate his understanding of the role of lawyers in the legal system. Boardman wondered why Houston had not appealed the guilty verdict, casting aspersions upon the role the NAACP played in obtaining justice for Crawford. Houston makes it clear that to him that, "the decision whether to appeal involved not only questions of law but also question and good-will of the dominant majority."[37] To Houston it is feasible for a lawyer to consider the reality that powerful forces often set the narratives that ultimately drive lawsuits. Though he does not explicitly state so, it is apparent that Houston believes his decision to not pursue an appeal was partly influenced by the location of the trial. In Virginia, African American lawyers had to push their cases only so far, hoping primarily to spare their clients the worst fate, yet conceding the likelihood of a guilty verdict.

Our portrait of Houston as the architect of the *Brown* decision that invigorated the civil rights movement is not enhanced by his actions in *Crawford*. Houston actually confirms the theories about *Brown* put forth by some of its most prominent legal critics.

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[35] Ibid., 17.

[36] Ibid., 18.

[37] Ibid.

When Houston writes that, "the law itself is a powerful weapon, but it has certain definite limitations when it comes to changing the *mores* of a community."[38] Here he sounds very similar to Gerald Rosenberg, who in *The Hollow Hope* argues that *Brown* and its progeny led to little change in race relations because the judicial branch is not the optimum site to effect social change.[39] In the end, Houston, despite previous assertions that Crawford chose his own fate, proves the NAACP placed larger concerns above the defendant's life when he writes, "Sometimes in major social movements it may be necessary to sacrifice the peace of a community in the greater interests of the whole, but the decision should be made after great deliberations."[40] In *Crawford*, Houston chose not to upset the white supremacist environment of Loudon County, Virginia. To him, victory in *Crawford* was that, "when the case closed, the atmosphere had completely changed, and both white and colored now report race relations in the county better than ever before."[41]

*Crawford* was ultimately an example of NAACP lawyers going into the South without properly preparing their case. More important was the lawyers, in defeat, demonstrated a focus on larger objectives beyond winning the case for their defendant, George Crawford. These larger objectives would persist in the thinking of NAACP lawyers throughout their road to *Brown*. Oftentimes there would be open criticism of the

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[38] Ibid.

[39] Gerald Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

[40] Ibid., 19.

[41] Ibid.

NAACP's performance, as in *Crawford*. Usually this criticism came from members of the civil rights community against the top-down approach of the NAACP. In Brown, however, these voices were largely quieted. There was in Brown an intra-racial interest convergence.

The NAACP was concerned about the general impression that African American lawyers were less competent than white lawyers.[42] The *Crawford* case was an opportunity to prove the fallacy of this belief and in the end George Crawford probably did not receive the most zealous defense possible because victory for the NAACP did not ultimately mean getting Crawford acquitted.

The NAACP and Houston's decision to place larger objectives above the immediate concerns of it supposed constituency in *Crawford* was not an isolated occurrence, but part of larger tendencies. For example, while the drama in Virginia was ongoing, the NAACP dispatched William Hastie, the Harvard Law graduate cousin of Houston, to North Carolina to help Conrad Pearson and Cecil A. McCoy, both of whom attended Howard Law School, prosecute a case against the University of North Carolina (UNC) School of Pharmacy. Hastie won rave reviews among most court observers, creating quite an impression among the white law students of Duke University.[43] Walter White, the head of the NAACP, considered the case a victory largely because it, as did *Crawford,* highlighted the skills of African American NAACP lawyers in southern courts.[44]

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[42] Walter White A Man Called White, 152-153.

[43] Walter White *A Man Called White, 158.*

[44] Ibid., 156-159.

Admittedly, Hocutt was not the optimal client. In fact, Pearson approached the principals of local high school to find the top students hoping to avoid a challenge by the registrar of the applicant's qualifications. But he could not get persuade any of them to join the suit because, "we went to all of them and they turned it down. They were afraid of reprisals."[45] Unable to find a client in this manner, Pearson then approached Thomas Hocutt who was at the time working in a Durham pharmacy providing for his own education at North Carolina College, an institution for African Americans.[46]

However, the NAACP miscalculated the resentment local African American elites would have to its presence in the case. According to Pearson, "It divided the town, because, you see, we were just emerging out of the Reconstruction period. And there had been riots in this state. The Wilmington Riot is well known."[47] The fear of upsetting the social order caused local African American leaders to distance themselves from the NAACP. Dr. James Shepard, President of North Carolina College, held immense political power because of his position at the college and the patronage of elite whites. Pearson and McCoy informed Dr. Shepard that they intended to file a claim against UNC but begged his silence, to which he agreed. Pearson realized his mistake later when, "We pledged him to confidentiality and silence. And the next morning we woke up and the *Greensboro Daily News* had broken the story."[48] Dr. Shepard, remaining loyal to the

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[45] Oral History Interview with Conrad Odell Pearson, 18 April 1979, Interview H-0218, Southern Oral History Program Collection, p. 2.

[46] Ibid. North Carolina College is now North Carolina Central University (NCCU).

[47] Ibid., 3.

[48] Ibid., 4.

white elites who provided him with his job, understood that defeating the NAACP could work to his advantage. With racial segregation in graduate schools upheld, the state could establish graduate programs at the African American college. As Pearson recalled:

> "He capitalized on it to get, I think, the state to pass a statute to allow him to have a school of pharmacy. And he also got a law school out of it. He capitalized on it. He wasn't in sympathy with it at all."[49]

During the trial, white politicians and conservative African American leaders grew increasingly intransigent on the issue. In the end, Hocutt lost his petition to enter UNC primarily because Dr. Shepard refused to release his transcripts to the UNC registrar. In return, Shepard made a deal with the state to receive funding to open African American graduate schools at his Durham campus.

Meanwhile, the NAACP had its own agenda. *Hocutt* was a legal defeat for the African American applicant to the UNC Pharmacy School. Yet, the NAACP departed this case proclaiming a moral victory for African American lawyers in their quest for respectability. Ironically, the North Carolina Conference of Branches of the NAACP issued a resolution the month following the lost to honor Hastie and the other African American lawyers who helped argue the case. Thomas Hocutt received no further mention. Gilbert Ware found out through his research that Hocutt died in 1974 after working as a subway tower man for twenty-nine years in New York City.[50] Hocutt never attended pharmacy school and remained a member of the working class.

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[49] Ibid., 9.

[50] Gilbert Ware, "Hocutt: Genesis of Brown," *The Journal of Negro Education*, vol. 52, no. 3 (Summer 1983), 233.

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[57] Ibid., 4.

[58] Ibid., 9.

other African American lawyers who helped argue the case. Thomas Hocutt received no further mention. Gilbert Ware found out through his research the Thomas Hocutt died in 1974 after working as a subway tower man for twenty-nine years in New York City.[59] Hocutt never attended pharmacy school and remained a member of the working class. Again, the organization had larger objectives in mind beyond that of winning the case for its client.

Both Walter White and Pearson acknowledged that Hastie performed admirably at trial. White said that, "Judge Barnhill told me after the case was finished that it had been one of the most brilliantly argued trials in his experience of twenty-two years on the bench."[60] He also noted that "the courtroom was crowded to utmost capacity, and contained a large number of students of the University of North Carolina and of near-by Duke University."[61] And after the trial, "we saw a new development in the South when young white students from Duke and North Carolina University surrounded Hastie and his fellow counsel for Hocutt to congratulate them, much to the annoyance of the Attorney General."[62] Pearson agreed that, "He was really a brilliant man, no question about it, a scholar. And he amazed…The courthouse was filled. And his performance just amazed people."[63]

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[59] Gilbert Ware, "*Hocutt*: Genesis of Brown," *The Journal of Negro Education*, vol. 52, no. 3 (Summer 1983), 233.

[60] Walter White, *A Man Called White*, 158.

[61] Ibid., 157.

[62] Ibid., 158.

[63] Oral History Interview with Conrad Odell Pearson, 18 April 1979, Interview H-0218, Southern Oral History Program Collection, p. 5.

Hastie did not, however, believe the case had much merit. Pearson remembered that Hastie's inability to believe the case could be won because "he didn't think we had laid the proper groundwork, and he didn't think the Supreme Court was ready to hear a case of that sort."[64] Here Pearson notes Hastie's belief that Pearson and McCoy had not prepared a good case. But Hastie and the NAACP still chose to handle the case when they were known for turning down many offers. Walter White clears up any confusion of why the NAACP chose to participate in the *Crawford* and *Hocutt* cases when he writes:

> "Charlie and I talked long and often over the strategy to be used in Crawford's case. Up to that time Negro lawyers, particularly in the South, were seldom employed even by their own people, on the grounds that they lacked, among other things, experience. But these same lawyers could not obtain experience for reasons of nonemployment…We decided that the die must be cast sometime soon on the issue of the use of Negro lawyers in important cases. We knew that for many years to come there would be certain types of cases in which there would be an advantage in having a white lawyer in preference to a Negro attorney, but our real objective was to hasten the time when an attorney's color in a court of law would be of no importance and where the only criterion would be his ability."[65]

In *Crawford* Houston put the priorities of the NAACP above those of George Crawford. The NAACP's legal strategy was to take cases in which an upstanding African American citizen has been wronged (not always the case), and to prosecute and defend cases in a manner that would not harm the use of these theories in later cases. George Crawford went to prison for life because his situation failed on both counts; he was a previously convicted felon and pushing the jury exclusion issue at the time would

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[64] Ibid., 6.

[65] Walter White *A Man Called White*, 152-153.

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In *Crawford* and *Hocutt*, the lawyers put the priorities of the NAACP above those of George Crawford. The NAACP's legal strategy was generally to take cases in which an upstanding African American citizen had been wronged and to prosecute and defend cases in a manner that would not harm the use of these theories in later cases. George Crawford went to prison for life because their situations failed on both counts; he was a previously convicted felon and pushing the jury exclusion issue at the time would not

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[66] Walter White, *A Man Called White,* 158.

[67] Ibid., 157.

[68] Ibid., 158.

[69] Oral History Interview with Conrad Odell Pearson, 18 April 1979, Interview H-0218, Southern Oral History Program Collection, p. 5.

have been beneficial, thought Houston. But to the NAACP this case was a victory, as was that in North Carolina. William Pickens, the NAACP Field Secretary further proves this point in a letter to the Associated Negro Press:

> "Take note: N.A.A.C.P methods, with colored lawyers at that, saved a colored man who was clearly guilty, although the Communists with their methods seem unable to save nine Negroes, with the use of white lawyers who are supposed to have a better break with the courts…"[70]

In the early 1930s, we witness the disconnect between NAACP aims and those of others that are later silenced during *Brown*. Yet the differences were ever present and would resurface soon after *Brown*. During the 1940s and 1950s there emerges a convergence of disparate forces within the African American community. The local NAACPs, national office, and local working class African Americans all possessed different and conflicting needs. African American historiography has increasingly emphasized the politics of the African American working class. Most prominently, Robin D.G. Kelly, provides the useful theory of infra-politics, which claims that marginalized people resist the more powerful in ways not readily acknowledged by existing standards of scholarly observation.[71] Subsequently, the historiography has shifted slightly to a focus on the African American middle class and its relations with the poor.[72] Kevin Gaines best exemplifies this latter group of scholars who speak of "uplift"

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[70] William Pickens to Associated Negro Press, 18 Dec. 1933, NAACP Papers Reel 7, frame 00360.

[71] Robin D.G. Kelley *Race Rebels: Culture, Politics, and the African American Working Class* (New York: The Free Press, 1994), 8.

[72] Evelyn Brooks Higginbotham *Righteous Discontent: The Women's Movement in the African American Baptist Church, 1880-1930* (1993); Janette Thomas Greenwood *Bittersweet Legacy: The African American and White "Better Classes" in Charlotte, 1850-1910* (1994); Deborah

discourse in which the African American middle class positions itself above the African American masses while simultaneously professing a desire for African American social advancement within mainstream America.[73] All of these complex interactions within African American America prevented the easy unification along racial grounds despite the common ground created by Jim Crow segregation in the South, and its de facto counterpart in the North and West. Seen in this light, the failures of the NAACP in the 1930s seem logical rather than anomalous. How then, did Thurgood Marshall, lead lawyer for the NAACP in *Brown*, create the atmosphere conducive to victory? A sketch of his qualities and a consideration of his writings will illuminate how he achieved what Houston and Hastie could not.

Although a member of the African American elite, Marshall who could speak to the masses. In fact, Marshall emphasized the need to speak to the masses. He called for the political education of the masses to coincide with the legal actions of the NAACP. He demonstrated a respect for southern ways. He also used psychological tests that claimed African Americans were damaged which was elitist. But the tests were also a means of demonstrating the connection between segregation and the failure to ensure African Americans equal protection. Marshall believed educating the masses of African Americans on their legal and political rights as necessary for the success of the NAACP's legal campaign against racial segregation. This desire paralleled Houston's attempt to

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Gray White *Too Heavy a Load: African American Women in Defense of Themselves, 1894-1994* (1999); Glenda Gilmore *Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896-1920* (1996); Patricia Schecter *Ida B. Wells-Barnett and American Reform, 1880-1930* (2001); Michele Mitchell *Righteous Propagation: African Americans and the Politics of Racial Destiny After Reconstruction* (Chapel Hill: University of North Carolina Press, 2004).

[73] Kevin Gaines *Uplifting the Race: African American Leadership, Politics, and Culture in the Twentieth Century* (Chapel Hill: University of North Carolina Press, 1996).

create social engineers. Both men understood the symbiosis between the law and the outside world.

Houston sought not only to produce lawyers, but social engineers. Thurgood Marshall was a student of Houston's at Howard Law and performed well academically. Marshall won the coveted assignment of assistant at the law library, a position that allowed him to work closely with Houston. The theory of social engineers proposed that African American lawyers had a unique duty to practice law in a manner that emphasized the needs of the disfranchised African American community rather than the corporate interests usually central to legal education.[74]

Marshall, the prize student, conceived of social engineering a little differently. To him, lawyers did have a responsibility to serve as community leaders. But he also believed in the need for lawyers to educate the African American community, as well as the larger communities where African Americans lived, as to the nature of the US legal system. He arrived at this conclusion while at Howard during a lecture by famed attorney Clarence Darrow. The lecture involved the Canon of Ethics, derived by elite members of the American Bar Association (ABA), that set the appropriate standards of professional behavior. Darrow explained to the African American students how the ABA Canon prevented lawyers from approaching the average citizen and initiating a discussion of a possible lawsuit. To do so would violate the rule against barratry, often referred to as ambulance chasing. But few people have the opportunity to attend law school and thus do not know of their constitutional rights. And in the Jim Crow South, African American

[74] Genna Rae McNeil *Groundwork*, 84-85.

people, for the most part, were rendered ignorant of most these rights by an unfair educational system. Hence, Marshall believed lawyers, and African American lawyers in particular, had to educate whole communities of the explicit rights enjoyed under the constitution so that people would then challenge state encroachments on these rights.[75]

Another facet of this revised understanding of "social engineering" was its emphasis on the failure of lawyers to affect change beyond the courtroom. In a speech in 1950, Marshall argued that despite having "civil rights statutes which prohibit discrimination on the basis of race, creed, or color…the law is openly violated, and nobody does anything about it."[76] Marshall saw this as a symbiotic problem where lawyers had to educate whole communities about the law because only then would you get legal challenges by the common citizen as well as community enforcement of the legal victory. Without full community support the legal victories would remain isolated successes. To prove this point, Marshall pointed to his own successful integration of the University of Maryland Law School, located in urban Baltimore. Though African Americans could now attend the law school, the larger University of Maryland campus, located in College Park, Maryland remained all-white. His legal victory remained an aberration rather than the rule because communities such as College Park did not have community leaders who emphasized the law.[77] Marshall understood the necessity of

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[75] Thurgood Marshall, "From Law to Social Reality," opening remarks at the Seventh Annual Institute of Race Relations, Fisk University, Nashville, TN, June 26, 1950, reprinted in *Thurgood Marshall: Supreme Justice*, edited by J. Clay Smith (Philadelphia: University of Pennsylvania Press, 2003) , 28-30.

[76] Ibid., 29.

[77] Ibid., 31.

educating both the African American community as well as the larger community where African Americans lived in order to win court cases and sustain these victories.

Within African American America, Marshall embodied the convergence of various forces comprising the African American community. His father, Will Marshall, was the head waiter of the Gibson Island Club, a bastion of the Maryland white power structure. His mother worked as school teacher in the Baltimore Public School System.[78] In African American America, these positions were representative of those held by those of elite status. At the Gibson Club, Will Marshall could make important connections with prominent whites who could protect his family. Meanwhile, as a school teacher, Thurgood's mother held a job that allowed her to avoid working as a domestic servant, the usual occupation open to African American women.

When Marshall became a lawyer, he had to earn his living in mainstream America leaving the confines of elite African American Baltimore. With his legal education, he could and did speak the language of his profession. Yet, Marshall received his professional education at Howard Law School after attending all-African American Lincoln University. At Howard, Marshall learned the objective, race neutral language of the legal profession but also the importance of the law to the Negro people. Howard was thus a prime spot for the creation of legal subversives who would use the system's symbols and discourses to challenge that same system in the South.

Attending Howard also provided Marshall with entrée into the African American community that he otherwise might not have enjoyed. Howard was the site of the most

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[78] Richard Kluger *Simple Justice*, 172.

prestigious African American university in the world.[79] There was a known connection between Howard Law School and the NAACP. Howard was the school of choice for many African American elites who exercised power within their respective communities. Marshall basically nationalized his elite status by attending Howard Law.

It would be incorrect, however, to assume that the African American elite did not speak to the African American masses. Instead, racial segregation created an environment in which all African Americans seemed to share a common fate. The African American elite decided, ultimately, what is acceptable within their communities.[80] The masses responded and acted on these decisions but the elite use this power to both distinguish and legitimate themselves from the masses. Marshall was accepted as a full member of every African American community he visited because he possessed all of the requisite characteristics—skin tone, education, marriage to a African American woman.

As a legitimate member of the African American elite, both by birth and through education, Marshall seemed to comprehend his relationship in America. He personified

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[79] There has been surprisingly little written on African American elite status and how it is attained. Otis Louis Graham's *Our Kind of People: Inside America's African American Upper Class* (New York: Harper Collins, 1999) is an informative book aimed at a general audience. See pages 66-72, for Graham's section on Howard and the large number of African American social elites who have attended the school. But it is undeniable that Washington, D.C., historically has been the center of African American elite life and that that life centered geographically around Howard University; see, Gatewood *Aristocrats of Color*, 46 and 59.

[80] E. Franklin Frazier *Black Bourgeoisie* (New York: The Free Press, 1957), 86-111, was probably the first in-depth study of the African American elite's role within the African American community. Since then historians have continued to explore the discourses set in African American America through the African American elite. As noted previously Kevin Gaines's book, *Uplifting the Race*, has most prominently, of late, demonstrated how African American elites used the theme of racial progress to both distance themselves from the African American masses and call attention to white racism against African Americans as a group. The point to be made here is that the elite class has historically set the political agenda for the African American community and racial segregation created a group consciousness ripe for "exploitation."

the trickster of African and African American folktales by employing wits to defeat his enemies and achieve his objectives. Marshall possessed the ability to interact with members of diverse constituencies without conceding any of his principles. He thus served in the middle ground between African American elites, African American masses, white professionals, and mainstream America.

Ironically, Charles Houston, for many African Americans, embodied African American elitism. Though mainstream histories have seemingly resurrected Houston as a man of the people, his years as a dean at the Howard Law School were quite tumultuous. Assuming the position of resident vice-Dean as Howard sought accreditation by both the American Bar Association (ABA) and the Association of American Law Schools (AALS), Houston had tricky decision to make about the growth of the school. The ABA and AALS requirements for accreditation were difficult, but not impossible to surmount.

In general schools had to restrict admission to students who had attained at least two years of prior college-level work, provide housing for the majority of its entering classes, offer fulltime courses leading to a degree in three years, maintain a law library with current court reporters, legal digests, and other scholarly publications amounting to at least 10,000 volumes.[81] As Jerold Auerbach argues persuasively, the white, Anglo-Saxon, men who dominated the ABA and AALS no matter their intent promulgated rules that were not in the best interest of socially marginalized groups; African Americans, women, and Jews, specifically.[82] Houston, the Harvard-trained lawyer, seemingly trusted

[81] Auerbach *Unequal Justice*, 112-129; McNeil *Groundwork*, 74-75; Stevens *Law School* 112-122.

[82] Auerbach, *Unequal Justice*, 102-127.

the system and advocated singularly for Howard to adopt the ABA/AALS standards.

In one instance, Houston railed against the "incompetence" of the head law librarian, James C. Waters. Houston noted Waters's "lack of formal education" as a primary concern with the school attempting to model itself after mainstream elite, white institutions.[83] According to Houston biographer Genna Rae McNeil, Waters and many others, referred to Houston's attempts to "Harvardize" Howard as elitism and classism.[84] McNeil implies, however, that the dissenters failed to acknowledge that there might have been objective reasons behind Houston's dislike for men such as Waters. What McNeil does not consider is veracity of the claims from African American people such as Waters who more than likely had not had the opportunity to attend college. Ironically, the course of modernization set by Houston would make Howard Law as unreachable for most African American people as were mainstream white schools. Most prominent of the changes was the closing of the night school, which had previously allowed men such as Houston's own father to attend law school while working during the day to provide for their families.

During the 1930s and 1940s Marshall traveled throughout the South laying the groundwork for the case against segregated schools. Marshall handled various cases in often out-of-the way Southern jurisdiction in the decades prior to *Brown*. Though he challenged Southern mores inside the courtroom, Marshall maintained a degree of cordiality with court officials. Capitalizing on the southern white male penchant for

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[83] McNeil *Groundwork* 78.

[84] Ibid.

bourbon whiskey, he would often leave a small package for the white lawyers and judges with whom he practiced.[85] Though a African American lawyer would never attain the status of "good old boy," Marshall came as near as possible. There existed in the South, a certain superficial civility to which all had to aspire regardless of race, class, or gender. In southern towns and cities, the races lived in close contact and could not daily allow personal grievances to prevent interaction. The violence and hatred that has become legend in memories of the South was rendered invisible through codes of cordiality and gentility. Marshall used these necessary salves as entrée to southern courtrooms.

This is not to say that Marshall did not face danger while operating in the Deep South. In 1946 while in Tennessee, Marshall and his accomplices got stopped by the police. Of the three men in the car, the police arrested Marshall, only after confirming that he was "Thurgood Marshall." At one point the officers ordered Marshall from the patrol telling him to walk down a dark road where he would find a justice of the peace to handle his case. Often southern police would "release" African American suspects, shoot them, and then claim the suspect had escaped. Marshall, knowing too well about southern police corruption, refused to leave the car. Later, after being released by a real judge, Marshall and his accomplices borrowed cars from local African Americans, split up, and drove home. The unfortunate man left driving the original car got stopped and beaten by local police.[86]

Marshall also maintained a positive rapport with southern, working class African Americans. During the 1930s Marshall went south to document the injustices and

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[85] Kluger *Simple Justice*, 223.

[86] Kluger *Simple Justice*, 225-226.

inequality of public education. Using his down-home manner probably honed living within a African American environment in Baltimore, attending college at Lincoln University, and working as a waiter during summer vacations, Marshall could speak the language of the people.

Empathy for accused African American criminals was also a quality that helped Marshall produce the environment conducive to success in *Brown*. When the NAACP head office began handling cases in the South it, as mentioned here, placed organization interests before those of its clients. Legal scholar Mark Tushnet observes in his award-winning book, *Making Civil Rights Law*, that in criminal cases Marshall placed the interests of the African American defendant above those of the NAACP. Tushnet argued that:

> Though Marshall believed that the NAACP's resources should be used to benefit large numbers of African-Americans, he never lost sight of the fact that in each case, particularly in criminal cases, there was an individual defendant whose interests were involved.[87]

Marshall was known for his concern for protecting African Americans held in southern jails. He refused to use the publicity assured the NAACP in cases where he believed a African American defendant would suffer retaliation from the state. In some instances Marshall would not send letters to prisoners because he knew prison officials would read them, leading to increase difficulty for the accused. Likewise, Marshall had to ignore the pleas for a response from prisoners who the NAACP could not afford to help because he

[87] Mark Tushnet *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (New York: Oxford University Press, 1994), 42.

knew that prison officials would then realize the prisoner had no other options.[88]

Within the NAACP there was often friction between local branches and the head office, located in New York City. This friction often arose during legal campaigns over disputes on the compensation of local lawyers assisting the cases. As mentioned previously, A.P. Tureaud of New Orleans ran into problems with local NAACP members over his compensation during the *McKelpin* case. Marshall was able to forge a middle ground between the competing factions, because he owed allegiance to neither one and held legitimacy within the larger African American community, asking the local NAACP to respect Tureaud who had, "gone into places in upper Louisiana and Mississippi where few other people would have gone." He asked that New Orleans's African Americans would, "work…with a spirit of cooperation rather than a spirit of distrust."[89] A direct contrast with the patience shown here by Marshall occurred in the 1930s when White "promoted" A.T. Walden of Atlanta from his position as head of the local NAACP to a national post seemingly at the request of local elites, including some White family members.

Likewise, Marshall, at the helm of the legal team, coordinated the LDF so that it was not a top down operation. Addressing the NAACP at the 40th Annual Conference in 1949, Marshall delineated his program for achieving victory against racial discrimination, in general, and in schools in particular. He began the speech with laudatory comments on the role of his predecessor, Charles Houston. Houston, Marshall said, "put into operation

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[88] Thurgood Marshall to Samuel Battle, October 1, 1941, cited in Tushnet *Making Civil Rights Law*, 326.

[89] Thurgood Marshall to Simpson Tate, Feb. 3. 1950, Ibid. 43.

a real legal program with affirmative action to remove all racial discrimination in American life."[90] But Houston remained focused on the nation level, admitted Marshall.[91] Then Marshall laid out his understanding of what a more balanced strategy entailed:

> "In recent years, we have concentrated our efforts to spreading our legal program so that it will no longer be merely a national office responsibility but will be a coordinated legal program working through the branches, state conferences, regions and the National Office."[92]

Here Marshall described the unification of the African American community around a common goal, eradicating racial discrimination. Only through this cooperative intra-racial unification, Marshall believed, would the NAACP achieve success in the court system. After explaining to his audience the need for unity, and for the national office to listen to the needs of local African Americans, he opines that, "We are now ready to enter that stage which I hope will be the final one resulting in the removal of all racial discrimination that can possibly be removed through legal action."[93]

To implement this approach at unification Marshall as the head of the legal defense team realizing, "success can only be achieved by complete cooperation," ordered that "All our branches…will not enter upon any legal case until they first clear with their state conference and the national office to the end that…we will have the combined

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[90] Thurgood Marshall, "Remarks Before the 40th Annual Conference of the National Association for the Advancement of Colored People," July 14, 1949.

[91] Ibid., 2.

[92] Ibid.

[93] Ibid.

judgment of each of the groups."[94] This approach was more democratic that displayed by Houston and White in earlier years.

Marshall embraced Fourteenth Amendment Equal Protection arguments in *Brown*. The Fourteenth Amendment provided "equal protection" of the laws for all people within state boundaries; states could not create laws that disadvantaged specific groups over other groups. Faced with the "separate but equal" doctrine that arose in *Plessy*, Marshall had a difficult task. In *Plessy*, the court had made it clear that absent any significant material inequality, racial segregation by states was constitutional. To overturn *Plessy* would require either demonstrating the pernicious effects of racial segregation on a macro-level, or providing sufficient evidence of unequal tangible differences on a micro-level. To prove the latter, the NAACP would have had to bring, and win, litigation in every southern city, county, and state. Seemingly taking the more prudent course, in 1951, Marshall and the NAACP declared that combating racial integration was the primary objective of the organization. Any NAACP officials undertaking other efforts that did not address desegregation would face disciplinary action.[95]

Equal Protection arguments may seem radical, and did to many white Americans in the 1950s; however, there is a hint of legal conservatism. African Americans had never enjoyed true legal equality with white Americans. Marshall and the NAACP were now focusing their energies on ensuring each state's laws had to be in harmony with the spirit of the Fourteenth Amendment, which its framers wrote to end legalized

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[94] Ibid.

[95] NAACP 42nd Annual Convention, June 30, 1951, NAACP Papers, part 18.

discrimination against the freed slaves under the infamous African American Codes.

But by singularly focusing on equal protection, the NAACP ignored the impoverished conditions most African Americans knew. Securing the right of African Americans to attend lily-white colleges in Dixie was a victory for the NAACP, but in reality, few African Americans, or whites for that matter, possessed the economic resources to attend. Equal Protection arguments did not challenge the wealth of white America and thus became acceptable to white racial moderates in ways policies to reallocate resources generally do not. Under Marshall, the NAACP only demanded that laws be equalized, not that there be equity to address the needs of the impoverished.

African American masses united behind the NAACP out of racial solidarity. They suffered the indignities of Jim Crow and could perceive of the battle over equal protection as theirs. Finally, the small but growing African American middle class long suffering from unrealized expectations, understood that equal protection arguments best suited their agenda. It would be this middle class that would eventually desegregate southern college campuses, boardrooms, and legislatures.

After *Brown*, we see the breakup of the coalition. African American civil rights lawyers were incapable largely of assuming the role that Marshall had held. Marshall became a federal judge in 1961 and then President Lyndon B. Johnson sent him to the Supreme Court in 1967. Also, the NAACP legal team underwent dramatic changes in the years following *Brown*. The success of Marshall and his lieutenants in 1954 created a resistance effort amongst southern state officials seeking to weaken the NAACP. State Attorneys General argued that the Fund was guilty of conjuring up its own cases--

generally prohibited under various champerty ("anti-ambulance chasing") laws.[96] Another complaint centered on the tax-exempt status of the NAACP Legal Defense Fund. Hoping to protect this status for its donors, the LDF eventually split with the NAACP in May 1957. This situation created problems for civil rights activism because the LDF was now beholden to its donor base rather than the African American community. As noted here, there had always been problems between the NAACP national heads and the African American mainstream. Now the LDF had little accountability to the needs of average African Americans.

It is this disconnect that Derrick Bell wrote about in his article, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation."[97] Bell, who worked as a lawyer in NAACP school desegregation cases, argued that the new LDF tried to serve the interests of both its donors and the African American masses but the donors interests seemed to always take precedence. In post-*Brown* desegregation cases, civil rights lawyers began to equate the racial balancing plans implemented by the federal courts with desegregation.[98] But as Bell notes, achieving racial balance among whites and African Americans in schools may not only have been impossible but also not necessarily mean improving the educational quality for the majority of African American

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[96] Gilbert Ware, "The NAACP-Inc. Fund Alliance: Its Strategy, Power, and Destruction," *The Journal of Negro Education* Vol. 63, No. 3, Brown v. Board of Education at 40: A Commemorative Issue Dedicated to the Late Thurgood Marshall (Summer, 1994), 325-328.

[97] Derrick Bell "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," *Critical Race Theory: The Key Writings That Formed the Movement*, ed. Kimberle Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas (The New York: The New Press, 1995), 5-19.

[98] Bell, "Serving Two Masters," 5-6.

students. Cities with majority African American populations, for example, Atlanta, would obviously not have been able to place all of its African American students in classrooms with whites.

In 1973 Atlanta's African American elites and white politicians devised a desegregation plan that called for partial integration but allowed much greater African American representation and autonomy over Atlanta's public school system.[99] Upon hearing of this compromise plan and its acceptance by the federal district court, the LDF and the national NAACP office questioned the validity of agreements among local African Americans white officials.[100] Local African Americans apparently considered themselves, or their children, the clients in these cases but the NAACP and the LDF had larger societal goals in mind. This pattern arose in numerous localities, as noted by Bell, a lawyer who worked on many of these desegregation cases for the LDF. In effect, the NAACP had come back full circle, and was now reacting to situations involving law in localities from the top down: things had fell apart.

I have tried here to begin a discussion of the convergence of interests within the African American community that facilitated the victory in *Brown v Board of Education* (1954). Scholars have explored and developed complex theories the convergence of factions with the African American community but not the intra-racial convergence necessary for success in *Brown*. As was shown here, the NAACP did not initially succeed in unifying various elements in black America. Most significantly, working

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[99] Ibid., 9-10. See also, Tomiko Brown-Nagin, "The Impact of Lawyer-Client Disengagement on the NAACP's Campaign to Implement *Brown v. Board of Education* in Atlanta," in *From the Grassroots to the Supreme Court:* Brown v. Board of Education *and American Democracy*, ed. Peter F. Lau (Durham, NC: Duke University Press, 2004), 227-244.

[100] Nagin-Brown, 240-241.

class African Americans, such as George Crawford, often could not rely on the organization holding their best interest at heart. Faced with increased chances of arrest poor African Americans such as Crawford could find NAACP lawyers less than sympathetic. In Crawford's case it seemed Charles Houston was actually investigating Crawford to prove his guilt rather than provide a defense. With the ascension of Thurgood Marshall to head of the NAACP legal defense team we see a shift to a more united front against racial discrimination.

In the decades after *Brown*, with Marshall on the Supreme Court and the LDF-NAACP split, things changed. Moreover, as the Civil Rights Movement became increasingly militant after 1965, federal and state governments began aggressively endorsing moderate approaches to civil rights. Even administrations today considered conservative, most notable being that of President Richard M. Nixon, advanced initiatives to benefit stable, middle class minorities. Affirmative action programs, for example, became mechanisms for ensuring the appearance of equality of opportunity. Nixon embraced these programs because he believed they would produce peace and respect for the law. Unfortunately, as the liberal coalition that united in the Cold War era of the 1950s began to diverge, those at the bottoms of our society, the George Crawfords, again saw their life chances curtailed. We should study the factors that created a united front against racial segregation in the *Brown*-era to ascertain possibilities for unification in the future. But first we must demystify the pre-*Brown* era to demonstrate the lack of cohesion that existed.

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