

Revisiting “The Need for Negro Lawyers”: Are Today’s Black Corporate Lawyers Houstonian Social Engineers?

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I. INTRODUCTION

The fiftieth anniversary of *Brown v. Board of Education* provided scholars with numerous opportunities to discuss the legal importance and historical implications of this landmark decision.¹ For countless black law students, who obviously benefit from *Brown*, these symposia were the first time many of them had in-depth, scholarly discussions about the impact of the *Brown* participants, particularly Charles Hamilton Houston.² However, while there has been a renewed interest in the life of Houston, who designed the gradual attack on the “separate but equal” doctrine and pioneered the concept of “social engineering” to alleviate black subordination,³ many black law students, and even some black lawyers, still neither know nor understand the legacy of Houston.⁴ Consequently, during various *Brown* commemorations, legal commentators attempting to compare Houstonian social engineers to today’s black corporate lawyers often sanitized

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1. Many law schools, including the University of Virginia, Harvard University, and Howard University, hosted symposia, commemorating the fiftieth anniversary of the *Brown v. Board of Education* decision.

2. Charles H. Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49 (1935). See also GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 122–23 (1983).

3. See Nathaniel R. Jones, *The Sisyphean Impact on Houstonian Jurisprudence*, 69 U. CIN. L. REV. 435 (2001). While Houston designed the legal strategy to end de jure segregation, which culminated in *Brown*, he died in 1950, four years before *Brown* was decided. See also MCNEIL, *supra* note 1, at 84. Houston often reminded his students, “A lawyer’s either a social engineer or he’s a parasite on society.” *Id.*

4. MCNEIL, *supra* note 1, at xvii. A. Leon Higginbotham addressed a group of elite black law students and became very disappointed when he discovered that none of them knew the legacy of Charles Hamilton Houston. *Id.* at xvii–xviii.

Houston's legacy by disregarding his insistence that social engineers must use their careers and an unwavering moral commitment to racial justice to challenge white supremacy.⁵

The misinterpretation of Houston's legacy reflects a growing trend in black America, particularly among black elite, who are rethinking their approaches to collective black empowerment. Noted black authors, including Jabari Asim and Ishmael Reed, have also noted the "changing face of black power"⁶ and have asserted that the black middle class is increasingly turning away from politics in favor of economic development to end racial inequalities.⁷ Public intellectuals, such as Cornel West, have also observed that while the Civil Rights Movement allowed significant numbers of blacks to become middle-class, many "well-to-do black parents no longer sent their children to Howard, Morehouse, and Fisk 'to serve the race' (though often for indirect self-serving ends), but rather to Harvard, Yale, and Princeton 'to get a high-paying job' (for direct selfish reasons)."⁸ Similarly, legal scholars, such as David Wilkins, have remarked that Houston's social engineers, who frequently championed traditional civil rights issues and served primarily black clients, "are slowly being replaced by a new generation of elite black lawyers."⁹

Due to this renewed interest in the life of Houston, coupled with the changing face of black power, critics have debated whether today's black corporate lawyers are Houstonian social engineers.¹⁰ Today's black corporate bar, which is still relatively small, continues to grow steadily, largely due to elite black law students joining large corporate firms.¹¹

5. See David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1609 (2004) (calling black corporate lawyers concerned with racial justice "black corporate social engineers"). See also Luther Brown, Jr., *Charles Houston's Raiders: Lawyers for the 21st Century*, NEW CRISIS, Sept. 1999. Brown writes, "If Charles Hamilton Houston were to return to earth today . . . [h]e surely would be pleased to note that most [black lawyers] consider themselves 'social engineers,' regardless of their specialties." *Id.* at 22.

6. Jabari Asim, *The Changing Face of Black Power*, WASH. POST, June 1, 2004, at A6.

7. BOOKER T. WASHINGTON, UP FROM SLAVERY xvii (2000). In the Introduction, Reed writes, "While the 1960s may have belonged to W.E.B. DuBois, the 1990s are definitely Bookerite . . . [T]his turning away from politics toward economic development and self-sufficiency seems to be the trend among a growing African-American middle class, who've found that electing mayors and other officials to government hasn't changed the lives of the masses of African-Americans." *Id.*

8. CORNEL WEST, RACE MATTERS 55 (1994).

9. David B. Wilkins, *Social Engineers or Corporate Tools? Brown v. Board of Education and the Conscience of the Black Corporate Bar*, in RACE, LAW, AND CULTURE 137, 138 (Austin Sarat ed., 1997).

10. *Id.*; see Wilkins, *supra* note 5; see Brown, *supra* note 5, at 20.

11. David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 1983 (1993) [hereinafter *Two Paths*].

Therefore, some commentators have asserted that today's black corporate lawyer is essentially the dream of Houston, as black lawyers continue to desegregate the corporate bar, work on multimillion dollar transactions, and often seek to channel their moral obligations to the black community through their pro bono work.¹² Others have argued that despite Houston's desegregationist agenda, black corporate lawyers are not social engineers, because they perpetuate the maldistribution of legal resources and sometimes fail to link their everyday work to the larger struggle to end legal racist discrimination.¹³

This Article will assert that today's black corporate lawyers who are concerned with racial justice are not Houstonian social engineers, because Houston's social engineers addressed the "economic, political, and social problems of the Negro" rather than advancing large corporate interests.¹⁴ Part I of this Article will explore Houston's definition of a social engineer and how his influence, coupled with the moral obligation of many black lawyers to serve their communities, shape modern perceptions of the role of the black bar. Part II will demonstrate that while today's small, but growing, black corporate bar is a product of Houston's efforts and often seeks to promote social justice, it nonetheless implicitly recreates some of the racial and economic divides that Houston sought to overthrow. Part III will examine black corporate lawyers' efforts toward racial justice and will provide Houstonian critiques of each. Some of the Houstonian criticisms offered will certainly apply to black lawyers who do not practice corporate law, but the focus of this Article will be on black corporate lawyers.

Undoubtedly, many black corporate lawyers contribute to the social good in numerous ways. Accordingly, this Article will reject the prevailing, binary characterization of black lawyers as either "sellouts" or those who have recklessly "played the race card."¹⁵ Such a narrow construction of black lawyering cripples the ability to critically analyze the history of black lawyers, obscures the current complexity of the value choices that black lawyers make, and creates a dialogue largely based on ahistorical evaluations and alienating constructions of black identity.¹⁶

This Article seeks to dispel a myth among a growing number of lawyers and law students that black lawyers' meaningful desegregationist efforts in the corporate bar and pro bono work constitute Houstonian social engineering. While Houston and others fought to allow blacks the

12. See Wilkins, *supra* note 9; see also Wilkins, *supra* note 5.

13. Cornel West, *The Role of Law in Progressive Politics*, in THE CORNEL WEST READER 269 (1999) [hereinafter *Role of Law*]; see also Wilkins, *supra* note 9; see also Wilkins, *supra* note 5.

14. Houston, *supra* note 1, at 51.

15. See generally Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766 (1997).

16. *Id.*

opportunity to enter all legal fields, current black corporate lawyers are not social engineers, primarily because they perpetuate the maldistribution of legal resources, disproportionately harming the black masses. Houston never intended for social engineers to solve the problems of large corporations. Rather, Houston's social engineers directly challenged the social, political, and economic problems confronting the black masses. Thus, the true heirs to Houston's legacy are legal advocates whose work redistributes legal resources along race and class lines. This group typically includes public interest lawyers committed to advancing racial justice, administrators who are deeply dedicated to the success of black law students, critical race scholars, and black lawyers who serve black communities, particularly in the South. Describing black corporate lawyers concerned with racial justice as social engineers overlooks the maldistribution of legal resources, often fails to note the moral nature of Houston's critiques of white supremacy, and disregards social engineers' personal and professional sacrifices for often unpopular, dangerous, and unprofitable causes.

Moreover, this Article aims to spark dialogue with black lawyers and law students about balancing their professional interests and responsibilities. These conversations are crucial because fifty years after *Brown*, countless black law students enter elite law schools aspiring to become Houstonian social engineers, yet become corporate lawyers because of substantial educational debt, lifestyle choices, or even a sincere, yet misguided, belief that they will become social engineers in a large corporate firm. Far too frequently, black lawyers and law students do not discuss the conflict between advancing racial justice and representing an employer in a racial discrimination suit, or how educational debt severely restricts one's ability to become a social engineer. Thus, as black lawyers increasingly join the corporate bar, legal scholars must develop a new, critical vocabulary to discuss how black corporate lawyers must balance their professional responsibilities and personal values to advance racial justice.

II. MORE THAN PROVIDING A LEGAL EDUCATION—TRAINING SOCIAL ENGINEERS

Charles Hamilton Houston was born in 1895 in Washington, D.C. to a family deeply dedicated to racial uplift.¹⁷ Houston's grandfather was born as a slave named Thomas Jefferson Hunn.¹⁸ After a particularly gruesome beating at the hands of his slave master, Hunn fled Missouri one night with a badly injured leg and broken ankle.¹⁹ He escaped to Illinois, a free state, and changed his name to Thomas Jefferson Houston "to throw the slave hunters

17. MCNEIL, *supra* note 1, at 15–18.

18. *Id.* at 15.

19. *Id.*

off his track."²⁰ Subsequently, he became a conductor on the Underground Railroad, crossing the Mississippi River repeatedly to help slaves, including many of his own family members, reach Illinois.²¹ Similarly, due to the extreme cruelty of her master, Houston's grandmother, Katherine Theresa Kirkpatrick Houston, was prompted to escape from slavery in 1862.²²

A. Charles Hamilton Houston's Tradition of Resistance

Charles Hamilton Houston, born out of this tradition of resistance, spent his legal career attempting to reconcile the stark contrast between formal guarantees of equality and the second-class status relegated to black Americans. Although blacks during Houston's childhood frequently accommodated white supremacy, blacks during Houston's early adulthood were increasingly New Negroes, who resisted white supremacy and fostered racial pride through self-determination and innovative self-expression.²³ The New Negro sought to be in control of his own social reality and reshape a group psychology wounded by white supremacy.²⁴ Houston, who was certainly influenced by New Negro philosophy, understood that if blacks were to ever level the social order and seek to repair blacks' damaged group psychology, the race needed "capable and socially alert Negro lawyers."²⁵

As Vice Dean of Howard School of Law, Houston helped transform Howard into a first-rate law school designed to uplift the race. During Houston's tenure, he was integral in eliminating the law school's evening program, recruiting black students and professors with very high academic credentials, attaining American Bar Association (ABA) accreditation and American Association of Law Schools (AALS) membership for Howard, greatly expanding the law library, and creating a far more demanding legal education.²⁶ Although Houston was repeatedly criticized for the "Harvardization" of Howard, Houston understood that in order to litigate constitutional cases, well-trained lawyers, whom he called social engineers,

20. *Id.* at 16.

21. *Id.*

22. *Id.*

23. MCNEIL, *supra* note 1, at 8–9. McNeil remarks that Houston was influenced by the New Negro philosophy and even notes, "During Houston's tenure at Harvard Law School, he arranged a luncheon for fellow black students at which Marcus Garvey was the guest of honor."

24. Alain Locke, *The New Negro*, in *THE NEW NEGRO: AN INTERPRETATION* 3, 10 (Alain Locke ed., 1925).

25. MCNEIL, *supra* note 1, at 70–71.

26. Charles J. Ogletree, Jr., *From Brown to Tulsa: Defining Our Own Futures*, 47 *HOW. L.J.* 499, 514 (2004).

would be necessary.²⁷ He envisioned Howard as the institution that would create the black lawyers deeply dedicated to ensuring the constitutional promises denied to black Americans.²⁸

Consequently, social engineering became central to Howard's mission and Houston's vision of the black lawyer.²⁹ Although Houston never fully defined "social engineering" in one speech or article,³⁰ he believed that a social engineer was a highly skilled lawyer who understood how to use the United States Constitution, statutes, and "whatever science demonstrates or imagination invents" to solve the problems of local communities and better the conditions of underprivileged citizens.³¹ Moreover, Houston noted that black communities, particularly in the South, were highly underserved by lawyers, and social engineers addressed the maldistribution of legal resources by serving black clients and "problems of the Negro."³² In *The Need for Negro Lawyers*, Houston noted the following:

Yet it is where the pressure is greatest and racial antagonisms most acute that the services of the Negro lawyer as a social engineer are needed. If a Negro law school is to make its full contribution to the social system it must train its students and send them into just such situations. . . . [This] does mean a difference in emphasis with more concentration on the subjects having direct application to the economic, political and social problems of the Negro. In other words, the emphasis in the law of business associations is on small businesses rather than the larger, more complicated highly financed organizations.³³

Accordingly, to Houston and the Howard University School of Law, black lawyers became social engineers by using their legal skills to challenge racial subordination and by serving black communities. Genna Rae McNeil, a Houston biographer, echoed this sentiment, arguing, "Legal representation of black people and advocacy of their rights were, to Houston's mind, essential to the race's eventual eradication of legal racist

27. *Id.*

28. *Id.*

29. MCNEIL, *supra* note 1, at 70. McNeil writes that Houston boldly maintained that the only justification for the Howard University School of Law, in a city with seven white law schools, was that Howard was doing a distinct, necessary work for the social good. *Id.*

30. Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 25 (1998) (noting an absence of critical scholarship on Houston, because Houston lacked the time to write scholarly articles and was largely unknown before McNeil's biography).

31. MCNEIL, *supra* note 1, at 84, 133.

32. Houston, *supra* note 1, at 51. See also Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161, 180 (1994).

33. Houston, *supra* note 1, at 51.

discrimination, and Howard Law School's 'indispensable social function' was to train lawyers for these tasks."³⁴

B. Serving Black Communities Was Integral to Social Engineering

Charles Houston and other social engineers routinely emphasized that black lawyers should serve black communities which were highly under-represented by the legal community.³⁵ As Jim Crow laws began to dominate Southern governments in the 1890s as a backlash against Reconstruction, black Southerners lost many of their newly acquired rights and the number of black lawyers in the South quickly declined.³⁶ The 1940 census revealed that there were 176,475 white lawyers serving whites, which is one white lawyer for every 670 whites.³⁷ The 1940 census also showed that there were 1052 black lawyers serving 12,865,518 blacks, which was one black lawyer for every 12,230 blacks.³⁸ Furthermore, in the South, the legal under-representation of blacks was extreme; while about 80% of blacks lived in the South, two-thirds of black lawyers lived in the North.³⁹ In 1935, Charles Houston remarked that the most successful black law school graduates often refused to practice in the South or shortly left the South after starting a practice because the South offered black lawyers no opportunity in politics, virtually no voice in determining the officials who administer the law, and no chance to benefit from integrated bar associations.⁴⁰ Charles Houston strongly felt that black lawyers should lead the black masses in the legal struggle, asserting, "[L]eadership must develop from the aspirations, determinations and sacrifices and needs of the group itself." Houston, also wary of many white lawyers, declared:

Experience has proved that the average white lawyer, especially in the [S]outh, cannot be relied upon to wage an uncompromising fight for equal rights for Negroes. He has too many conflicting interests, and usually himself profits as an individual by that very exploitation of the Negro, which, as a lawyer he would be called upon to attack and

34. MCNEIL, *supra* note 1, at 70.

35. Finkelman, *supra* note 32, at 182; see also Charles A. Pinderhughes, *Increasing Minority Group Students in Law Schools: The Rationale and the Critical Issues*, 20 BUFF. L. REV. 447, 453 (1971) (asserting that law schools should create programs to increase the number of black law students, who, in turn, will provide legal services to disadvantaged blacks); see also Earl L. Carl & Kenneth R. Callahan, *Negroes and the Law*, 17 J. LEGAL EDUC. 250, 251 (1965) (maintaining that the black bar needed to grow to ensure "adequate legal representation for Negroes").

36. Finkelman, *supra* note 32, at 182.

37. *Id.* at 181.

38. *Id.*

39. *Id.*

40. *Id.*

destroy.⁴¹

To Houston, the presence of capable black lawyers serving black communities, particularly in the South, was integral to social engineering because the legal representation of these highly under-served areas confronted the maldistribution of legal resources between blacks and whites.

While some social engineers, like the lawyers for the National Association for the Advancement of Colored People (NAACP), routinely litigated cases with civil rights overtones, most black lawyers, who served the race as social engineers, usually had less overtly political legal careers.⁴² According to Houston, black lawyers should be trained to advise black businesses “for the protection of the scattered resources possessed or controlled by the group.”⁴³ Because the white commercial community rarely used black lawyers during the Jim Crow era, many black lawyers served small, black-owned retail stores, barbershops, beauty salons, and funeral homes.⁴⁴ Moreover, black lawyers during Houston’s life were concentrated in the practice of criminal law.⁴⁵ Historically, the criminal justice system has disproportionately enforced the law against blacks, and black lawyers routinely guarded the rights of black defendants.⁴⁶ While certainly some black defendants were guilty of crimes, black lawyers worked feverishly to lighten criminal sentences of black defendants, who were often only guilty of being black and accused of committing a crime.⁴⁷ In addition, black communities typically expected black lawyers to defend a black defendant charged with a capital crime regardless of the defendant’s ability to pay legal fees.⁴⁸ Although some social engineers litigated highly visible cases with civil rights overtones, most social engineers provided more mundane legal services to black communities, which were commonly under-served by lawyers.

41. MCNEIL, *supra* note 1, at 123.

42. Finkelman, *supra* note 32, at 181.

43. MCNEIL, *supra* note 1, at 71.

44. J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, 11 (1993).

45. *Id.* at 12.

46. Finkelman, *supra* note 32, at 185–86.

47. See generally OLIVER W. HILL, SR., THE BIG BANG: BROWN V. BOARD OF EDUCATION AND BEYOND (1999).

48. SMITH, *supra* note 44, at 12. The maldistribution of legal resources between blacks and whites was clear, and Southern blacks and the black poor were even more under-served than Northern blacks and the black bourgeoisie, respectively. Smith notes that black lawyers were “luxuries” to the black poor but were undoubtedly necessary in capital cases. Black lawyers, in turn, obliged, because black communities commonly emphasized, “[T]o him that is given much, much is expected.” *Id.*

C. Social Engineers Challenged Racist Structures Directly Through Litigation and Other Forms of Legal Advocacy

Charles Hamilton Houston declared that social engineering required black lawyers to be more than capable lawyers handling ordinary tasks.⁴⁹ Houston maintained that the "primary social justification" for the black lawyer was "the social service he [could] render the race as an interpreter and proponent of its rights and aspirations."⁵⁰ Houston knew that although white legislatures would resist racial reform, some courts would compel segregationist regimes to take black lawyers seriously.⁵¹ In addition, he remarked that the United States Constitution, and particularly, the difficulty of amending it, provided blacks with some power to alter the existing racial caste.⁵² Houston insisted that black law students be trained rigorously, especially in the "legal aspects of Negro economic, social and political life," because black lawyers had a moral obligation to understand the intricacies of race and justice.⁵³

Social engineers attacked legal racist discrimination in assorted ways. In the "Road to *Brown*" legal strategy, Houston and the National Association for the Advancement of Colored People (NAACP) lawyers coordinated a national campaign to dismantle segregation by using test cases in various local communities.⁵⁴ Social engineers also defended activists, who were commonly arrested for their civil disobedience or participation in civil rights organizations.⁵⁵ Other black lawyers, who were not renowned as "civil rights lawyers," also contributed to the struggle when they challenged all white juries, racist judges, and unfair enforcement of criminal laws.⁵⁶ To Houston, and many other social engineers, the civil rights movement was a legal campaign, and accordingly, pursuing equality under the law became critical to the advancement of blacks.⁵⁷

49. MCNEIL, *supra* note 1, at 217–18.

50. *Id.* at 218.

51. *Id.* at 217–18.

52. *Id.* at 85.

53. *Id.* at 71, 85.

54. Genna Rae McNeil, *Before Brown: Reflections on Historical Context and Vision*, 52 AM. U. L. REV. 1431, 1450 (2003). McNeil notes the diverse constituency of the NAACP lawyers: "Community leaders—editors, journalists, teachers, clergy, entrepreneurs, politicians, attorneys, impatient youth—brought cases dealing with educational inequality to the attention of the NAACP." *Id.* See also MCNEIL, *supra* note 1, at 116–17.

55. See JULIAN BOND & ANDREW LEWIS, *GONNA SIT AT THE WELCOME TABLE* 566–69 (2d ed. 1995). "From its beginning, the direct action movement has involved . . . the right of an individual to disobey the law." *Id.*

56. SMITH, *supra* note 44, at 12.

57. Wilkins, *supra* note 9, at 148–49. Although many black activists criticized the NAACP

Furthermore, Houston thought that social engineers must realize that while “the race problem [was] one of the most fundamental . . . in American life,” it was also important for social engineers to address the structural barriers facing the socio-economically disadvantaged.⁵⁸ Houston recognized that blackness was generally a proxy for socioeconomic disadvantage, but he also understood that poor whites were sometimes victims of economic oppression. Thus, he declared that, where possible, blacks and poor whites must unite on issues of common oppression.⁵⁹ Houston and other social engineers routinely took the cases of indigent black defendants pro bono or for a significantly reduced fee and accordingly addressed race and class as they redistributed America’s legal resources.⁶⁰

In addition, Houston regularly questioned economic exploitation and American imperialism in Asia, Latin America, and Africa, and this clearly reflected the New Negro spirit. He held positions on international support organizations, including the Council on Inter-American Affairs and American Continental Congress for World Peace.⁶¹ In his column in the *Afro-American*, a Washington newspaper targeted to blacks, Houston relentlessly attacked American and European colonization and regularly acknowledged the similarities between the effort to end legal racial discrimination in America and other liberation struggles throughout the world.⁶² Similarly, social engineers have used their legal skills to benefit African countries seeking independence. Thurgood Marshall, one of Houston’s chief disciples, helped draft the Kenyan Constitution in 1963 after Kenya gained independence from Britain,⁶³ and the current South African Constitution, among many other national constitutions, contains many anti-subordination principles emphasized by America’s critical race scholars.⁶⁴ In the legacy of Houston, social engineers have not only sought to invert the social order as it related to America’s race problem, but they also typically embraced wealth redistribution and anti-imperialist movements throughout

for being too moderate and focusing significant resources on litigation, the NAACP frequently responded by noting that the NAACP’s legal aid facilitated greater amounts of civil disobedience. *Id.* See also, BOND & LEWIS, *supra* note 55, at 419.

58. MCNEIL, *supra* note 1, at 207, 216.

59. *Id.* at 216.

60. SMITH, *supra* note 44, at 15–16.

61. MCNEIL, *supra* note 1, at 201.

62. *Id.*

63. Thurgood Marshall, U.S. Jurist, WASH. STAR, Sept. 25, 1962, at A-11. From January through February 1960, Justice Marshall served as a legal consultant at the Constitutional Conference on Kenya.

64. Clifford Scott Green & Stephanie L. Franklin-Suber, *Keeping Thurgood Marshall’s Promise—A Venerable Voice for Equal Justice*, 16 HARV. BLACKLETTER L.J. 27, 37–38 (2000); see also A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479 (1990).

the world.

D. Social Engineers Defied the Concept of Black Inferiority Through Their Presence as Black Lawyers and Capable Legal Advocacy

In 1934, Houston was appointed as special counsel to the NAACP and, in this capacity, he and his cadre of social engineers continued to challenge the prevailing notion of black inferiority through their legal representation of black people in civil rights cases.⁶⁵ Before the selection of Houston, black NAACP leaders explicitly favored using noted white lawyers in civil rights cases.⁶⁶ However, Houston's appointment, which placed America's major civil rights litigation in the hands of a black person, was significant because increasingly, blacks felt that the organization that frequently represented their interests in court should reflect the community's composition.⁶⁷ Blacks not only wanted substantive representation from the NAACP but also descriptive representation within the organization. This clearly echoed the New Negro spirit in America, bringing renewed interest in the NAACP by blacks and promoting black self-determination.⁶⁸ Margaret Russell affirmed this notion by stating: "This conceptualization of theory as practice . . . [is] premised upon the recognition that African-American intellectual work and cultural production are fundamentally radical acts in a society which historically has defined African-Americans as subhuman and incapable of self-definition."⁶⁹

Moreover, Houston, like his former Harvard professor Roscoe Pound, strongly believed that sociological jurisprudence could help create a new social order, and Houston used sociological jurisprudence to address both structural barriers and the psychology of racism.⁷⁰ In the legal struggle against educational discrimination, he focused on inequalities in

65. SMITH, *supra* note 44, at 16–17.

66. *Id.* Smith observes that W.E.B. DuBois was among the black NAACP leaders who preferred white lawyers, and DuBois even criticized black lawyers who did not turn over their cases to white lawyers at the appellate level. However, Smith comments that perhaps DuBois was merely being practical and realized the need to win major civil rights cases. In several cases where black lawyers refused to turn over their cases to white lawyers, Smith notes that the black lawyers lost. See also Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 104–05 (2002) (observing that the NAACP used preferred white lawyers, because blacks could not attend the most elite law schools and faced racism within the courtroom).

67. MCNEIL, *supra* note 1, at 217; Ogletree, *supra* note 26, at 516.

68. MCNEIL, *supra* note 1, at 217; Ogletree, *supra* note 26, at 516; SMITH, *supra* note 44, at 16–17 (noting that Houston's appointment attracted new NAACP members and renewed interest in the NAACP by former members and Howard Law graduates).

69. Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749, 753–54 (1992).

70. Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1, 9–10 (2002).

transportation between black and white rural schools.⁷¹ He noted that when white children, who ride buses to schools, pass black children, who walk to school, “[a]n inferiority complex is installed in the Negro children without one word being said about the difference between the races.”⁷² Similarly, the Legal Defense Fund relied heavily on sociological jurisprudence in litigating *Brown* to address how segregation promoted notions of black inferiority.⁷³ The Supreme Court used the results of the Legal Defense Fund’s social science data, and its holding noted the detrimental effects of segregation on black children.⁷⁴ White supremacy not only affected the way whites treated blacks, but also how blacks viewed themselves. Consequently, Houston and his social engineers confronted the concept of black inferiority present in both black and white societies through their sociological jurisprudence in *Brown* and most importantly, their legal confrontation of de jure segregation.

III. THE “PARADOX OF OPPORTUNITY:” RECREATING THE MALDISTRIBUTION OF LEGAL, POLITICAL, AND ECONOMIC CAPITAL⁷⁵

Historically, the divide between private practice and social engineering was not very wide.⁷⁶ Until the 1960s, the largest private firms had less than 100 lawyers, and many private lawyers did public practice at some point in their careers, as they typically believed that public service was integral to their professional development and helped maintain the reputation of the legal profession.⁷⁷ In the black legal community, black lawyers in private practice routinely took cases pro bono to aid indigent black clients.⁷⁸ When black lawyers challenged racist courtroom practices, such as all-white juries or prejudiced judges, black lawyers and the black community viewed these

71. MCNEIL, *supra* note 1, at 136–37.

72. *Id.* at 137.

73. Jones, *supra* note 70, at 9–10 (describing Kenneth and Mamie Clark’s study entitled “The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement”).

74. *Brown v. Board of Education of Topeka, Kan.*, 347 U.S. 483 (1954). The Supreme Court held: “Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn.” *Id.* at 493.

75. Wilkins, *supra* note 5, at 1603.

76. Finkelman, *supra* note 32, at 180.

77. David B. Wilkins, *Doing Good by Doing Well?: The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1, 20 (2004) [hereinafter *Doing Good by Doing Well*]. Wilkins remarks that public service not only offered a psychic reward for doing good, but that public service could aid lawyers’ professional development by providing them with valuable experience, visibility to potential clients, and contacts. *Id.*

78. SMITH, *supra* note 44, at 12.

struggles as civil rights battles.⁷⁹ While black lawyers felt that they were fulfilling their moral obligation to serve the black community through their public service, they, like white lawyers, gained more legal experience, greater visibility in the community, and valuable contacts.⁸⁰ Public service was mutually beneficial for black lawyers, whose potential clientele was restricted by segregation, and for black communities, which benefited from relatively inexpensive, much-needed access to legal aid.⁸¹

Nonetheless, the gap between private practice and social engineering is rapidly expanding. Historically, most Americans have been unable to have adequate legal representation due to the relatively low number and high cost of lawyers,⁸² but David Wilkins asserts that the "gap between the legal haves and have-nots is arguably wider than ever before."⁸³ While half of all private legal services supported corporations and similar entities in the mid-1970s, nearly two-thirds of today's private legal services support corporations and similar entities.⁸⁴ Thus, as private law firms, which normally attract the most elite law students, continue to grow and represent corporations far more frequently, corporations are increasingly receiving disproportionate amounts of high quality legal representation.⁸⁵ Moreover, the tradition of the lawyer-statesman has declined as today's corporate lawyers work more billable hours than ever before, have less time to serve the public, and tend to view time outside of private practice as an obstacle to their success in the private sector.⁸⁶ This further exacerbates the maldistribution of legal resources. Because race and class are highly correlated, blacks are disproportionately disadvantaged by this shift in legal resources.⁸⁷

David Wilkins has rightly noted that Houston's efforts to end racial subordination have created a "paradox of opportunity" where today's black corporate lawyers, who obviously benefit from Houston's vision, ironically perpetuate the maldistribution of legal resources and wealth through their

79. *Id.*

80. Wilkins, *supra* note 77.

81. *Id.*; SMITH, *supra* note 44, at 12.

82. See generally, A.A. Berle, Jr., *Modern Legal Profession*, in 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 340 (Edwin R.A. Seligman et al. eds., 1933); see generally K.N. Llewellyn, *The Bar Specializes—With What Results?*, 39 COM. L.J. 336 (1934).

83. Wilkins, *supra* note 5, at 1601 (citing JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976)).

84. John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751, 767 (1998).

85. Wilkins, *supra* note 5, at 1601–02.

86. *Doing Good by Doing Well*, *supra* note 77.

87. See THOMAS HOLT, *THE PROBLEM OF RACE IN THE 21ST CENTURY* 25 (2000); see also Wilkins, *supra* note 5, at 1602.

corporate practice.⁸⁸ For many years after other industries began to desegregate, the corporate bar remained highly segregated.⁸⁹ Even when blacks were hired, they were often not allowed to assume high-profile roles in cases or even meet the client.⁹⁰ The existence of today's small but growing number of black corporate lawyers demonstrates the success of social engineering and its desegregationist emphasis, which asserts that black lawyers should have the same professional opportunities as white lawyers.⁹¹ However, because law is a means to solidify economic, social, and political power over others, Wilkins asserts that black corporate lawyers may indirectly perpetuate the subjugation of blacks by helping corporations, which have a disproportionate share of power in society, entrench the current overall distribution of wealth and political power.⁹² Thus, while desegregation is inherently Houstonian, black lawyers arguably perpetuate historical inequalities between whites and blacks by practicing corporate law.⁹³

Moreover, a corporation's interests may directly conflict with ending racial subordination. This is often exemplified when a black corporate lawyer works for an employer in a racial discrimination suit.⁹⁴ While a black corporate lawyer may feel a moral obligation to end racial subordination and thus may attempt to balance the interests of the corporation with their moral obligation, the black corporate lawyer is undoubtedly in a position where he or she may impede real racial justice.⁹⁵ The professional interests of the black corporate lawyer arguably oppose Houstonian efforts to end racial subordination.⁹⁶

Houston intended for social engineers to address the "economic, political, and social problems of the Negro," rather than large corporate interests.⁹⁷ Thus, the elite black talent, who are increasingly joining large corporate firms, sharply contrasts with Houston's notion of social

88. Wilkins, *supra* note 5, at 1603.

89. GERALDINE R. SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* 24 (1983) (noting that Secretary of Labor Willard Wirtz characterized the legal profession in 1963 as "the worst segregated group in the whole economy").

90. See ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 45 (2d ed. 1969).

91. *Two Paths*, *supra* note 11, at 1986.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Houston, *supra* note 1, at 51.

engineering.⁹⁸ This situation is truly a "paradox of opportunity," because today's black corporate lawyers, who are beneficiaries of Houston's efforts, perpetuate the maldistribution of legal resources.⁹⁹ While racial justice and personal autonomy demand that black lawyers should have all opportunities to practice corporate law, today's black corporate lawyer, a product of Houston's work, implicitly reinforces the race and class-based subordination that Houston sought to destroy.

IV. ADVANCING RACIAL JUSTICE THROUGH LEGAL ADVOCACY AND PROFESSIONAL DEVELOPMENT

Today's black lawyers routinely acknowledge that Houston's vision has influenced their own careers. Many black lawyers, regardless of their current practice, often state that the need for social justice prompted them to consider attending law school.¹⁰⁰ Further, due to Houston's concept of social engineering, many black corporate lawyers feel a moral obligation to advance the cause of racial justice and seek to accomplish this goal through a variety of means through their corporate practice.¹⁰¹ This section will examine the social justice efforts generally pursued by black corporate lawyers and provide Houstonian critiques of each.

A. Desegregating the Corporate Bar

Blacks were traditionally shut out of large private firms, and consequently, many of today's black corporate lawyers believe that their presence in these firms is itself a contribution to social justice.¹⁰² Desegregation is inherently Houstonian, and as Harry Edwards has powerfully argued, urging black law students to "return to their communities" fails to challenge the corporate bar for its lack of diversity.¹⁰³ Additionally, Edwards emphasized that urging black law students to "return to their communities" falsely suggests that racial justice is only a "black" concern and unfairly limits the opportunities available to black lawyers.¹⁰⁴ To Edwards and David Wilkins, *Brown* promoted an integrationist vision

98. *Id.*

99. Wilkins, *supra* note 5, at 1603.

100. See Wilkins, *supra* note 9, at 137–38.

101. *Id.* at 138–39.

102. Wilkins, *supra* note 5, at 1610.

103. Wilkins, *supra* note 9, at 140–41.

104. *Id.*

and did not place the entire weight of remedying discrimination on blacks.¹⁰⁵

Some black corporate lawyers are hailed as social engineers who, because of a sense of moral obligation, participate in a variety of initiatives designed to increase the number of black lawyers and increase the professional opportunities for existing black lawyers. Firm diversity committees generally develop strategies aimed at recruiting and retaining black lawyers, who are routinely under-represented in the firm and typically have high attrition rates.¹⁰⁶ Experienced black corporate lawyers often informally mentor young black associates to ensure the success of the young lawyer. The American Bar Association (ABA) has established assorted projects and programs designed to “creat[e] leadership and economic opportunities for racially and ethnically diverse lawyers within the ABA and the legal profession,” and several of these are specifically directed at aiding minorities in corporate law.¹⁰⁷ These efforts are clearly desegregationist. Yet, despite the gains made within recent decades, blacks remain under-represented in the corporate bar.

However, as Wilkins asserted, worthwhile efforts to desegregate the corporate bar do not address the continuing significance of Houston’s pressing concern that black communities, particularly in the South, were highly under-served by lawyers.¹⁰⁸ Presently, America’s black population is highly concentrated, as blacks tend to live inside of central cities of major metropolitan areas, and 54% of blacks live in the South.¹⁰⁹ Although blacks in major urban areas suffer tremendously from the maldistribution of legal resources, this situation is arguably more acute in the rural South where there are generally fewer attorneys per capita. Poverty in rural America is

105. *Id.*

106. See U.S. Equal Employment Opportunity Commission, *Diversity in Law Firms* (2003), <http://www.eeoc.gov/stats/reports/diversitylaw/index.html> [hereinafter EEOC]. African-Americans presently comprise 7.2% of all Juris Doctorates awarded but only constitute 4.4% of corporate lawyers. See also, THE NALP FOUNDATION FOR LAW CAREER RESEARCH AND EDUCATION, *KEEPING THE KEEPERS II: MOBILITY AND MANAGEMENT OF ASSOCIATES* (2003). This study concludes that both male and female minority associates are more likely, and in some cases, far more likely, than their white counterparts to depart their jobs within the first five years of employment. See generally, David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms: An Institutional Analysis*, 84 CAL. L. REV. 493 (1996).

107. American Bar Association, Commission on Racial and Ethnic Diversity in the Profession, <http://www.abanet.org/minorities/home.html> (last visited Mar. 16, 2006). ABA initiatives designed to benefit black corporate lawyers include: the Conference of Minority Partners in Majority Corporate Law Firms, the Minority Counsel Program, and the Minority In-House Counsel Group.

108. Finkelman, *supra* note 32.

109. UNITED STATES CENSUS BUREAU, *CURRENT POPULATION SURVEY, Table 21: Population by Metropolitan and Nonmetropolitan Residence, Sex, and Race and Hispanic Origin: March 2002* (Mar. 2002), available at <http://www.census.gov/population/socdemo/race/black/pp1-164/tab21.pdf>.

also far more severe than in urban areas.¹¹⁰ Mississippi, which has the highest percentage of black citizens of any state, ranks forty-third among all states in its lawyer-to-person ratio.¹¹¹ While 36.3% of the state population is black, only 8% of the state bar is black.¹¹² Thus, there is roughly one white lawyer for every 333 whites but only one black lawyer for every 1996 blacks.¹¹³ In Jefferson County, which is 86.5% black, the ratio of all lawyers to all residents is approximately 1 to 3247.¹¹⁴ Moreover, large, nationally known firms, which are typically located in major metropolitan areas, have higher proportions of minority corporate lawyers than other private firms.¹¹⁵ Accordingly, black corporate lawyers most likely represent rural blacks far less than urban blacks through their pro bono services. Consequently, Houston's concern that most elite black lawyers were not serving Southern black communities remains relevant, as evidenced by the continued maldistribution of legal resources, most notably in the South.

Reasonable persons may disagree as to whether black lawyers should have to address the continuing gap between the "legal haves and have-nots."¹¹⁶ Certainly blacks should not bear the entire burden of the "race problem," especially since blacks are the victims of racism. The point here, however, is much simpler and far less normative. Houston trained elite black lawyers to become social engineers as a redistributive measure designed to benefit the black masses by providing them with high quality, accessible legal services. Moreover, while desegregating the corporate bar is racially redistributive, it, at best, benefits the black masses indirectly. Corporate firms most frequently recruit associates from the most selective law schools, and as the best black law students increasingly become corporate lawyers, corporate firms are increasing their monopoly on elite, black legal talent.¹¹⁷ Certainly, Houston did not intend for elite black legal talent to perpetuate the

110. See American Bar Association, Rural Delivery, http://www.abanet.org/legal_services/probono/rural_delivery.html (last visited Feb. 18, 2006). The ABA notes, "Impoverished persons living in rural areas are often overlooked in the delivery of legal services, despite the prevalence and persistence of poverty in these areas. According to the 2000 Census, rural counties with poverty rates above the national average outnumber urban counties in that category at nearly a 5 to 1 ratio. Of the 500 poorest counties in the country, 459 are rural, and, of the 500 lowest per capita income counties, 481 are rural."

111. The Mississippi Bar Association, <http://www.msbar.org> (last visited Mar. 16, 2006).

112. See United State Census Bureau, State Population Estimates, <http://www.census.gov/popest/states/asrh> (last visited Mar. 16, 2006); see also The Mississippi Bar Association, *supra* note 110.

113. *Id.*

114. See Martindale-Hubbell, <http://www.martindalehubbell.com> (last visited Mar. 16, 2006); see also The Mississippi Bar Association, *supra* note 110.

115. See EEOC, *supra* note 106.

116. Wilkins, *supra* note 9, at 138-41.

117. *Id.* at 138, 155.

gap between the “legal haves and have-nots.”

There is also evidence that many desegregationist initiatives in the corporate bar have had limited success for blacks. The number of black law students has increased significantly over the past few decades,¹¹⁸ yet the black corporate bar remains small despite diversity committees, corporate recruiting at minority job fairs, and other similar efforts.¹¹⁹ Over the same period, the percentage of women and Asians in large corporate firms has increased substantially.¹²⁰ Despite powerful rhetoric from the corporate bar, which hails a strong commitment to diversity in the workplace, the corporate bar has been slow to employ large numbers of black lawyers.¹²¹

B. Leveraging Economic and Political Capital to Aid Blacks and Other Racially Oppressed Peoples in the World

The presence of blacks in corporate law erodes the income disparity between black and white lawyers and certainly represents a social justice gain.¹²² The small growth in the number of black corporate lawyers has helped black America’s middle class to grow and has provided individual black lawyers unprecedented access to corporate deals.¹²³ Wilkins and Edwards both maintain that allowing black lawyers access to the corporate bar’s professional, economic, and political capital may benefit blacks.¹²⁴ Thus, according to Wilkins and Edwards, black corporate lawyers may have the ability to direct money and other resources to help blacks, or even use the power and prestige embedded in corporate law practice to gain political office or influence in order to assist blacks.¹²⁵ Following this line of reasoning, black corporate lawyers can assert their involvement in redefining the legal field as a means to achieve social justice.

118. See EEOC, *supra* note 106. African-Americans earned 4.2% of all Juris Doctorates in 1982 and 7.2% of all Juris Doctorates in 2002.

119. *Id.* The percentage of African Americans working in large law firms has increased from 2.3 percent in 1975 to 4.4 percent in 2002. J. Cunyon Gordon, *Painting by Numbers: “And, Um, Let’s Have a Black Lawyer Sit at Our Table,”* 71 *FORDHAM L.REV.* 1257, 1267–68 (2003).

120. See EEOC, *supra* note 106. The percentage of women and Asians working in large law firms has increased from 14.4% and 0.5%, respectively, in 1975 to 40.3% and 5.3%, respectively, in 2002.

121. American Corporate Counsel Association, *A Call To Action: Diversity in the Legal Profession*, <http://www.acca.com/public/accapolicy/diversity.pdf> (last visited Mar. 26, 2006). An array of in-house counsel united to declare, “[I]n addition to our abiding commitment to diversity in our own departments, we pledge that we will make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms.” *Id.*

122. Wilkins, *supra* note 11, at 1991.

123. *America’s Top Black Lawyers*, *BLACK ENTERPRISE MAG.*, Nov. 2003, at 121.

124. Wilkins, *supra* note 9, at 140–41.

125. Wilkins, *supra* note 11, at 1991.

This view of social justice is decidedly elitist. Desegregating the corporate bar to expand the black middle class directly benefits black law students and black lawyers rather than the black underclass. Houston himself was subject to the critique that the Howard University School of Law served the black bourgeoisie when he arrived and arguably became more elitist after his "'Harvardization' of Howard."¹²⁶ However, unlike today's black corporate lawyers, Houston's efforts directly translated into improving the plight of the black masses, particularly in the South. While most black corporate lawyers live in the top ten legal markets and serve corporate clients, Houston believed that black lawyers should primarily serve Southern black communities, which faced the greatest maldistribution of legal resources and most racial antagonisms.¹²⁷

Many black corporate lawyers have been severely criticized for advancing their own professional and political interests rather than directly and holistically challenging the racial caste system. Historically, this has been a salient criticism of the black bourgeoisie.¹²⁸ Randall Robinson has remarked that when some blacks become privileged, they neglect their moral obligation to the black masses because they fear political marginalization from the white establishment.¹²⁹ Although Robinson's words were harsh and not helpful in creating positive dialogue, the essence of his criticism is Houstonian. Robinson's comment has often had particular significance with regard to black corporate lawyers who run for political office. They frequently depend on white legal and business support to finance their campaigns, and consequently, must often play within the political bounds of their financial backers.¹³⁰ In addition, black corporate lawyers have incredible workloads and commonly are marginalized within their firms.¹³¹ Thus, they typically do not have the time or job security to engage in the grassroots organizing that Houston sought in his campaigns against legal racist discrimination, to publicly criticize the clash between racial subordination and corporate interests, or to use their legal skills to benefit racially and ethnically oppressed peoples enduring international crises.¹³² These Houstonian criticisms certainly do not apply to all black corporate

126. Ogletree, *supra* note 26, at 514.

127. MCNEIL, *supra* note 1, at 123.

128. See Malcolm X, *Message to the Grassroots*, in MALCOLM X SPEAKS (George Breitman ed., 1990); WEST, *supra* note 8, at 59–60. "In short, race-identifying protest leaders in the post-Civil Rights era function as figures who white Americans must appease so that the plight of the black poor is overlooked and forgotten."

129. RANDALL ROBINSON, *DEFENDING THE SPIRIT: A BLACK LIFE IN AMERICA* 265–66 (asserting that some privileged blacks contract "Vernon Jordan Disease").

130. *Doing Good by Doing Well*, *supra* note 77, at 52–53.

131. Wilkins & Gulati, *supra* note 106.

132. *Id.*; MCNEIL, *supra* note 1, at 135–37; Ogletree, *supra* note 26, at 515.

lawyers, as there are numerous successful black corporate lawyers who are socially conscious.¹³³ Nonetheless, Houston believed that black lawyers should push for social justice in ways that do more than promote their own interests.¹³⁴

Devon Carbado and Mitu Gulati have also noted that some black corporate lawyers are selected by firms because they are virtually similar to their white peers “but for” the fact that these black corporate lawyers are black.¹³⁵ Thus, some black corporate lawyers limit or even reject being associated with “black issues” in certain institutional cultures.¹³⁶ Without such a commitment to racial justice, the corporate bar will be more descriptively diverse, but some of the black corporate lawyers, who benefit from the corporate bar’s desegregationist initiatives, ironically will not promote group advancement.¹³⁷

C. Pro Bono Work as Redistribution of Legal Services

Many black corporate lawyers provide pro bono legal services, which directly address the maldistribution of legal resources. Pro bono services are increasingly important as America experiences the decline of the lawyer-statesman model.¹³⁸ Historically, social engineers in private practice performed pro bono work for black communities, particularly criminal defendants.¹³⁹ When today’s black corporate lawyers perform pro bono work, this is arguably racially redistributive. Blacks, who are disproportionately poor, stand to benefit greatly from pro bono services. Consequently, providing pro bono legal services is inherently Houstonian.

The Lawyers’ Committee for Civil Rights Under the Law (Lawyers’ Committee) exemplifies how many corporate lawyers unite to provide pro bono legal services that address racial discrimination.¹⁴⁰ The Lawyers’ Committee advocates for racial justice in voting rights, housing, lending,

133. Wilkins, *supra* note 5, at 1611–13 (describing some of the socially conscious endeavors of several black corporate lawyers).

134. *Id.* at 1609–10.

135. Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1819 (2003).

136. *Id.*

137. Wilkins, *supra* note 5, at 1609–10.

138. See generally *Doing Good by Doing Well*, *supra* note 77.

139. SMITH, *supra* note 44, at 15–16.

140. Lawyers’ Committee for Civil Rights Under the Law, Mission, <http://www.lawyerscommittee.org/aboutus/mission.html> (last visited Feb. 18, 2006). “The Lawyers’ Committee for Civil Rights Under the Law, a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination.” *Id.*

community development, education, environmental conditions, and employment.¹⁴¹ Local branches of the Lawyers' Committee also advise state legislators on issues affecting minorities and the poor and provide pro bono legal services to low-income people, individuals seeking asylum and refugee rights, and individuals with disabilities.¹⁴² Similarly, black corporate lawyers serve various other civil rights organizations and causes pro bono.¹⁴³

There is also some empirical evidence that black corporate lawyers may perform more pro bono work than their white counterparts.¹⁴⁴ While this data is not conclusive, these studies, coupled with historical analyses, suggest that social engineers like Houston and Marshall, who modernized the public interest movement, have influenced many black corporate lawyers.¹⁴⁵ Moreover, some black corporate lawyers, such as Kenneth Frazier and William Coleman, have demonstrated deep dedication to racial justice and human rights through their pro bono work.¹⁴⁶

Nonetheless, while pro bono work is inherently Houstonian, black corporate lawyers still perpetuate the maldistribution of legal resources through their paid legal practice. Black corporate lawyers might perform more pro bono work than their white counterparts, yet pro bono legal services still account for only a small fraction of most black corporate lawyers' yearly legal services.¹⁴⁷ In any case, pro bono work directly reflects Houston's legacy, because it is racially and economically redistributive.

141. Lawyers' Committee for Civil Rights Under the Law, Projects, <http://www.lawyerscommittee.org/projects/projects.html> (last visited Feb. 18, 2006).

142. Lawyers' Committee for Civil Rights Under the Law, Local Committees, <http://www.lawyerscommittee.org/localcommittees/localcommittees.html> (last visited Feb. 18, 2006).

143. See, e.g., NAACP Legal Defense and Educational Fund, Inc., Board of Directors, <http://www.naacpldf.org/content.aspx?article=2> (last visited Feb. 18, 2006).

144. *Doing Good by Doing Well*, *supra* note 77, at 10–11.

145. *Id.* at 14.

146. Wilkins, *supra* note 5, at 1611, 1612.

147. *Doing Good by Doing Well*, *supra* note 77, at 10. A University of Michigan study showed that its minority law school graduates "performed an average of 121 hours per year of pro bono service compared to 98 hours performed by white graduates." *Id.* Similarly, a Harvard Law school study showed that its black graduates in private practice performed an average of 133 hours per year of pro bono service. *Id.* See also Elizabeth Amon, *The State of Pro Bono 2001*, NAT'L L.J., Jan. 7, 2002, at A12 (noting that lawyers in top private firms only spend approximately three percent of their total billable hours to pro bono work).

*D. Presenting Moral Arguments for Racial Justice: Comparing
Grutter to Brown*¹⁴⁸

Over the past three decades, affirmative action has drawn considerable criticism and attacks.¹⁴⁹ During the 1990s, conservatives mobilized against affirmative action, largely through public interest law firms such as the Center for Individual Rights (CIR). The CIR targeted academic institutions that used race in the admissions process, sued those institutions that it deemed most vulnerable, and used the victory as a precedent in a larger battle to end racial preferences in college admissions.¹⁵⁰ Ironically, the CIR's legal strategy mirrored Houston and Marshall's litigation tactics.¹⁵¹ As courts narrowed the scope of affirmative action, desegregationist advocates increasingly relied on the diversity justification for affirmative action as articulated by Justice Powell in *Bakke*.¹⁵²

When the University of Michigan successfully defended its admissions process in *Grutter*, black corporate lawyers rightfully pointed to the influence of the corporate briefs in saving affirmative action and promoting diversity.¹⁵³ Dozens of corporations and several corporate firms authored amicus briefs supporting affirmative action, because majoritarianism and corporate concerns often influence Supreme Court opinions.¹⁵⁴ Essentially, these corporate briefs asserted that "diversity is good for business" because diverse employees make businesses more sensitive to diverse markets, increase a company's ability to recruit and retain diverse employees, and improve the working relationships needed to problem solve effectively in the

148. This section will compare *Grutter v. Bollinger* to *Brown*, because *Grutter* and *Brown* arguably represent the most significant race-based litigation for black corporate lawyers and social engineers, respectively.

149. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Johnson v. Bd. of Regents*, 263 F.3d 1234 (11th Cir. 2001); *Smith v. Univ. of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

150. Ogletree, *supra* note 26, at 532–33.

151. *Id.* at 532–33.

152. *Bakke*, 438 U.S. at 311–15.

153. Wilkins, *supra* note 5, at 1551–52. John Payton, a black corporate lawyer, was the University of Michigan's lead lawyer in the lower courts for both *Grutter* and *Gratz*. He argued *Gratz* before the Supreme Court. Rowan Wilson, Cravath, Swaine & Moore's first and only black partner, signed the American Bar Association's brief authored by Cravath. *Id.* at n.25.

154. See Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter* (No. 02-241), *Gratz* (No. 02-516), available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/Fortune500-both.pdf (last visited March 24, 2006); Brief of General Motors Corp. as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241), *Gratz* (No. 02-516).||

business.¹⁵⁵ Justice Sandra Day O'Connor, who wrote the majority opinion in *Grutter*, cited repeatedly from the corporate briefs and asserted that diversity is a compelling governmental interest.¹⁵⁶

In the Houstonian tradition, black corporate lawyers were using their legal skills in the *Grutter* case to address racial subordination. Affirmative action is within the legacy of *Brown* because it desegregates predominantly white academic institutions. Affirmative action also redefines racial status relationships because it increases the number of elite underrepresented minority lawyers.¹⁵⁷ Accordingly, it follows that affirmative action addresses the maldistribution of legal resources among racial groups, thereby reducing racial and socioeconomic inequalities.¹⁵⁸

Although the business case for diversity was obviously beneficial to blacks, such market-based arguments are inherently un-Houstonian.¹⁵⁹ In *Brown*, social engineers used a moral argument to promote racial justice. Desegregation was simply "the right thing to do."¹⁶⁰ To Houston, the law should redress past wrongs and the legacy of such injustices.¹⁶¹ Yet, the corporate briefs in *Grutter* did not discuss the need to remove historically-rooted group disadvantages and remedy their continuing significance.¹⁶² Because black corporate lawyers did not address the immorality of the legacy of historical wrongs, they implicitly gave credence to the conservative argument that racism no longer inhibits the educational opportunities of blacks. Thus, the business case for diversity rejects Houston's understanding of racism, because to him, slavery and its progeny were moral wrongs that needed a judicial remedy.¹⁶³

Moreover, what if diversity does not maximize corporate profits? What if diversity is even empirically shown to hurt the profits of a particular business? Should the company stop recruiting a diverse workforce? Wilkins commented that this was arguably the case when Harold Washington was elected mayor of Chicago, because there was a business justification for

155. Wilkins, *supra* note 5, at 1576.

156. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

157. Tomiko Brown-Nagin, *A Critique of Instrumental Rationality: Judicial Reasoning About the "Cold Numbers" in Hopwood v. Texas*, 16 LAW & INEQ. 359 (1998). See also David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005).

158. *Id.*

159. Wilkins, *supra* note 5, at 1610.

160. *Id.*

161. Jones, *supra* note 3, at 435.

162. See Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1626 (2001).

163. MCNEIL, *supra* note 1, at 133.

employing and promoting black lawyers.¹⁶⁴ Wilkins remarked that when another administration was elected after Washington's death only four years later, the business justification for black lawyers largely disappeared.¹⁶⁵ No longer was there a need for black lawyers who could "understand" and "serve" the city.¹⁶⁶ Resting desegregation on business justifications is insecure, at best, and does not advance Houston's moral vision of racial justice.

The business case for diversity does not reflect the black self-determination embedded in social engineering. Diversity justified by business reasoning advances the notion that black interests can be protected only when they converge with dominant society.¹⁶⁷ Such reasoning only continues to compromise any genuine attempts to invert America's racial hierarchy.¹⁶⁸ Consequently, "legitimate" racial politics becomes the politics of compromise, where only black political thought that does not challenge the superior societal status of elite whites is politically feasible.¹⁶⁹ In addition, when the presence of blacks in America's most selective institutions is partly premised on how they might help corporations profit in the future, real racial justice is reduced to materialism. The market-based justifications for diversity are anti-Houstonian because they have allowed business, rather than blacks, to define the terms of racial justice.¹⁷⁰

E. Challenging Notions of Black Inferiority

Because the practice of corporate law is highly prestigious in American society, black corporate lawyers, like social engineers, challenge lingering notions of black inferiority. Affirmative action remains a highly contentious topic in American politics, and many whites believe the pervasive myths of black intellectual inferiority.¹⁷¹ Yet, the successes of today's black corporate lawyers defy the assumption that blacks are unqualified or unwilling to

164. Wilkins, *supra* note 5, at 1596.

165. *Id.*

166. *Id.*

167. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

168. *Id.*

169. *Id.*

170. MCNEIL, *supra* note 1, at 215–16. "Charles Houston never questioned the propriety of black self-determination. Having come from a long line of black people who decided what was best for themselves and their families . . . it was evident to Houston that Americans of African descent [should] . . . develop their own strategies and tactics in the fight, make their own decisions about goals, ideologies, allies, causes, sacrifices, and resources, explain their own positions, interpret their own aspirations, and set their own priorities." *Id.*

171. *Doing Good by Doing Well*, *supra* note 77, at 23.

perform corporate work.¹⁷² Black corporate lawyers, who now work on multimillion-dollar cases and have unprecedented political influence, are role models for young blacks, who seek to be successful.¹⁷³

Moreover, the *Grutter* litigation had some striking similarities to the *Brown* litigation. Like *Brown*, *Grutter* relied significantly on social science. The University of Michigan lawyers compiled a comprehensive record and presented extensive expert testimony, which showed the successes of a diverse student body at highly selective institutions.¹⁷⁴ John Payton, a black partner from Wilmer, Cutler & Pickering and student of the Houston/Marshall litigation strategy, helped lead the legal team for the University of Michigan.¹⁷⁵ Like Houston's appointment as special counsel to the NAACP or Marshall's Supreme Court arguments in *Brown*, Payton's role in the Michigan cases placed America's most significant civil rights litigation largely in the hands of a black lawyer. The successful defense of affirmative action undoubtedly challenged the lingering notions of black intellectual inferiority, which, ironically, were often central to the anti-affirmative action backlash.

*F. If Black Corporate Lawyers Are Not Social Engineers,
Are They Parasites?*

On numerous occasions, Charles Hamilton Houston remarked to his students at Howard, "[a] lawyer's either a social engineer or he's a parasite on society."¹⁷⁶ The logical inference from Houston's statement is that today's black corporate lawyers, who are not social engineers, are parasites on society. However, this assumption is far from the truth. Although there remains a maldistribution of legal resources largely along race, class, and regional lines, overt racism was much worse during Houston's life.¹⁷⁷ Faced with a legalized racial caste system, severe economic hardship for most blacks, segregated job opportunities for black lawyers, and an extremely low number of black lawyers "to meet group needs," particularly in the South, Houston concluded that the blacks who were privileged enough to become lawyers had a moral obligation to improve the quality of life for the black masses.¹⁷⁸ Yet, today's black lawyers enjoy more opportunities and manage a wider range of professional responsibilities than ever before.

172. Wilkins, *supra* note 5, at 1574.

173. *Id.*

174. Ogletree, *supra* note 26, at 533-34.

175. *Id.*

176. MCNEIL, *supra* note 1, at 84.

177. Finkelman, *supra* note 32, at 181.

178. MCNEIL, *supra* note 1, at 70-71.

Consequently, many of today's black lawyers are neither social engineers nor parasites, because these categorizations do not fully reflect the spectrum of roles that blacks occupy within the legal profession.

Nonetheless, today's black corporate lawyers, who are concerned with racial equality, are not Houstonian social engineers. Rather, largely due to changed historical and social contexts, they are a relatively new development in the American legal structure. Although Houston and Marshall have inspired many of these lawyers, using the term "social engineer" to describe them is not historically accurate. Words, terms, and other forms of historical memory are revolutionary, as they provide the critical vocabulary necessary to describe complex social arrangements, inform both elites and grassroots movements, and inspire actors to create social change. Truly progressive lawyers, like Houston and Marshall, must reject historical amnesia, because memory of resistance is requisite for future social movements.¹⁷⁹

V. CONCLUSION

During numerous *Brown* commemorations, legal commentators repeatedly and erroneously referred to today's black corporate lawyers, who seek racial justice, as social engineers.¹⁸⁰ Such a mistake is profound. *The Need for Negro Lawyers* clearly evinces that Houston never intended for social engineers to promote large corporate interests.¹⁸¹ Rather, Houston believed that black lawyers became social engineers by redistributing legal resources along race and class lines. Despite some commitment to racial justice, black corporate lawyers generally perpetuate the maldistribution of legal resources, which disproportionately harms the black masses.

Moreover, some black corporate lawyers are subject to a variety of other Houstonian critiques discussed in Part III. Although desegregation is inherently Houstonian, desegregating the corporate bar perpetuates the maldistribution of legal resources and is elitist. Although some black corporate lawyers advance racial justice through politics, many others simply fear political marginalization from the white establishment. Black corporate lawyers work large numbers of billable hours and often lack job security. Consequently, they frequently cannot, or in some cases, will not engage in grassroots organizing or provide legal aid to other racially and ethnically oppressed people facing international crises. Pro bono lawyering is Houstonian, and some evidence suggests that black corporate lawyers are very involved in serving indigent clients. However, most black corporate lawyers live in major metropolitan areas and the most underserved

179. West, *Role of Law*, *supra* note 13, at 274.

180. Wilkins, *supra* note 5; Brown, *supra* note 5.

181. Houston, *supra* note 1, at 51.

populations are arguably blacks in the rural South. Lastly, the black corporate lawyers in *Grutter*, like social engineers, challenged notions of black inferiority through their litigation, and their efforts obviously promoted racial justice. Yet, unlike social engineers, their arguments in *Grutter* largely relied on a market-based justification for racial justice, whereas the reasoning in *Brown* showed the moral nature of desegregation. Black corporate lawyers who promote racial justice are neither social engineers nor parasites. Houston died in 1950, and thus referring to black corporate lawyers as social engineers or parasites ignores how the legal and political landscapes have changed over the past half century.

While it is undoubtedly important that black lawyers both desegregate the corporate bar and have the ability to choose their career without being strung to the past, it is similarly important that black law students have a critical perspective on how their professional obligations will limit or promote their personal politics. Too often, elite black students enroll at prestigious law schools with the hope of engaging in social engineering, yet become corporate lawyers due to heavy educational debt, desired lifestyle choices, or worse, thinking that they will actually become Houstonian social engineers in a large, corporate firm. Critical race studies must continually develop vocabulary to help black law students, lawyers, and scholars understand new political environments and inspire these individuals to pursue racial justice.

Black lawyers profoundly influence black politics, because they have traditionally worked toward ensuring racial justice under the law. Thus, it is imperative that black law students, who will eventually help to shape black political values, understand the historical and present causes of the current racial dynamic and articulate how the law has hindered or helped the quest for racial justice.¹⁸² If not, they will, ironically, become well-intentioned black lawyers who unknowingly reinforce the social problems they wish to overthrow.

182. West, *Role of Law*, *supra* note 13, at 274.