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CAREER PATTERNS OF BLACK LAWYERS IN THE 1980'S

J. Clay Smith

I. INTRODUCTION

Historically, the number of minority law students and lawyers in this country has always been out of proportion to the needs of many communities and the nation as a whole.¹ Until recently, just about all blacks who graduated from law schools in this nation graduated from black law colleges, e.g., Howard University School of Law in Washington, D.C.² Although black people make up well over eleven percent of the overall population of the United States,³ there are fewer than 11,000 black lawyers at the bar in the nation comprising less than two percent of the collective bar,⁴ and maybe fewer.

In a study prepared in 1934 by the late Dr. Charles Hamilton Houston, former Dean of the Howard University School of Law, and the first counsel to the NAACP, he established that there was a need for Negro lawyers.⁵ Houston's study shows that in 1934 blacks comprised ten percent of the population, but that Negro lawyers comprised .007 percent of the total lawyer population in the United States.⁶ Nearly a half century has passed since Dr. Houston's valuable study and there have been no significant changes in the percentage rate of black lawyers in the United States.⁷ It is significant to note, however, that in 1934 there were, according to Dr. Houston, 159,735 white lawyers in the nation.⁸ The number of white lawyers in the nation has more than doubled in the past forty years—so much so that a news article states that the social indicators show no need for additional lawyers for the next ten years.⁹

1. Smith, *In Memorial—Professor Frank D. Reeves—Toward a Houstonian School of Jurisprudence and the Study of Pure Legal Existence*, 18 HOWARD L.J. 1 (1974).

2. Tollet, *Black Lawyers, Their Education and the Black Community*, 17 HOWARD L.J. 331.

3. U.S. BUREAU OF THE CENSUS, CENSUS OF THE POPULATION (1970).

4. According to the Bureau of Statistics of the United States Department of Labor, there were 478,000 lawyers in the United States in 1979. Of this number only 2.5% were non-white. See U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS 174 (1980).

5. Houston, *The Need for Negro Lawyers*, 4 J. NEGRO ED. 49 (1935). See also Styles, *THE NEGRO AND THE LAW*, 232 (1937).

6. *Id.*

7. Shuman, *A Black Lawyer's Study*, 16 HOWARD L.J. 225 (1971).

8. Houston, *supra* note 5 at 50.

9. *Prospects are Bleak for Many Law Grads*, The Washington Star, November 16, 1975, § D at 8.

On the other hand, the need for minority and women lawyers in this nation is very much out of proportion to the zone of reasonableness when compared with their numbers in the total population.

II. THE PRESENT STATE OF THE BLACK LAWYER IN THE WORKFORCE

There are, give or take a few hundred, approximately 11,000 black male and female lawyers in the nation. The 11,000 black lawyers can be broken down into the following general categories:¹⁰

	BLACK MEN	BLACK WOMEN	TOTAL ¹¹
Federal/State Government Lawyers	2,800	700	3,500
Federal/State Judges	325	75	400
Corporations/Non-Legal and Legal .	2,000	300	2,300
Public Interest Law Firms	350	150	500
Law Teachers	125	25	150
Non-Legal/Non-Corporate Jobs or			
Unemployed	2,150	500	2,650
Private Practice	1,400	100	1,500
Total	9,150	1,850	11,000

When *Brown v. Board of Education*¹² was decided in 1954, a substantial number of the black bar were in private practice, and most of the cases involving the rights of black Americans were being brought by and argued by black lawyers.¹³ The trend has changed. The majority of black lawyers today are in government, and fewer black lawyers are opting for private practice or to public interest law firms. No black lawyers argued the case of black Americans before the U.S. Supreme Court in *Baake*¹⁴ or the *Weber*¹⁵ case, except as counsel for *amicus*.¹⁶ The reasons for this trend away from private practice in the black community are outlined below.

10. The figures allocated per category were not arrived at by survey. However, the author has discussed these figures with several people, including members and officers of the National Bar Association, who believe that these figures are fairly accurate, except some would dispute the 1,500 figure as slightly too low in the area of private practice, others believe that there may be 12,000 black lawyers in the nation.

11. The total does not take retirement into account. However, if retirement is taken into account the total number of black lawyers may be reduced by 1,000 leaving an estimated total of 10,000 black lawyers. While the figure of 1,850 black women lawyers may appear to be low, it is not when evaluated against the dearth of black women lawyers in the midwest, the northwest and southwest of the nation. However, there could be another 200-300 black women lawyers in the nation who are discouraged workers, or who may enter or reenter the job market after raising families, or who cannot get into or back into the profession because of family demands. This is an area for additional survey.

12. *Brown v. Board of Education*, 347 U.S. 483 (1954).

13. See generally KLUGER, *SIMPLE JUSTICE* (1975).

14. *Bakke v. University of California Regents* 438 U.S. 265 (1978).

15. *Steelworkers v. Weber*, 443 U.S. 193 (1979).

16. Wade McCree, Solicitor General of the United States, who is black, argued the cause of the United States in the *Bakke* case. Drew Days, III, Assistant Attorney General in charge of the Civil Rights Division at the Department of Justice, is credited with doing a substantial amount of work on the *Bakke* brief, also. Days is black, also. Other black lawyers were involved in the case representing the National Medical Association, the National Bar Association, the National Conference of black lawyers.

A. *More Graduates From Predominantly White Law Schools*

I believe that it is safe to say that the hard labor of the black bar opened the door of white law schools and sensitized other law schools to increase the recruitment and admission of black law students. Some of these students have not nor do they have any desire to return to the black community to spend time representing the interests of the poor. Some of these graduates, exposed to different legal philosophies, and living in a more prosperous era do not see the need to represent the poor or to participate in legal causes or organizations designed to preserve the presence of the black practitioner.

B. *Discrimination in Hiring By Law Firms*

Perhaps a barrier to the entry of the black lawyer into private practice is the failure of established white firms to hire minorities, such as black Americans. Hence, some firms which began fifty years ago remain white and predominantly male. These firms neither recruit blacks nor women and boast about the metaphysical homogeneity.

During the late 1960's and early 1970's several blacks became the first blacks to be recruited on Wall Street and in the largest firms in the major cities in America. These firms were considered large enough to withstand the client complaints of having a black man or woman handle their problem. Jewish lawyers have faced similar treatment—so this discussion may transcend race, but the effect on the black lawyer is substantially greater because there are fewer black lawyers in the nation.

Today, if a survey were taken of the number of blacks who were in specific law firms seven years ago, my prediction is that you would find that eighty-five percent of these lawyers are no longer with these firms.¹⁷ Although you would find that these firms have not replaced the black lawyers who have departed. You will find that the recruitment patterns have shifted to a superficial system calculated to talk with the black prospects, resulting in no hires, even from the Ivy League institutions.

C. *Hiring by State and Federal Government*

The effect of the lack of hiring by law firms and corporate concerns has created a larger pool from which states and the federal government recruit and hire black lawyers. Today, it is my view that some of the best and brightest black lawyers are being hired by government. While this result looks good, it may have negative implications.

1. *Failure to Hire in Policy Level Jobs*

One of the negative impacts of black lawyers going into government is the channelling of black lawyers into non-management/legal positions. Until recently, few black lawyers were recruited into government—federal, state or local governments into policy level positions. For example, it took Presidents of the United States thirty-seven years to nominate a Benjamin L.

17. The dearth of black lawyers remains a national issue. A 1979 survey showed that of the 3,700 partners in the largest fifty law firms only twelve are black. See Burke, *Law Journal Survey of 50 Largest Firms: 3,700 Partners, 12 are Black*, 2 NATIONAL LAW JOURNAL § 1 at 1 July 2, 1979.

Hooks.¹⁸ Most other government agencies remain in the zero category.

These years of exclusion of black lawyers from jobs in the regulatory agencies and departments in both federal and state governments have created a tremendous void in specialized areas in the private sector. Hence, for over fifty years white lawyers have had an opportunity to move from government to the private sector and practice the law in the area in which they were trained in the government. These lawyers have been able to generate business and create law firms representing substantial clients interested in these specialized areas.

On the other hand, black lawyers were recruited into specialized areas in government to run the elevators at the Department of Justice carrying other lawyers to the antitrust division, to sort mail at the post office building at night to support a private practice during the day, and to be a messenger boy in many other departments of government. Black women lawyers have been limited to sex based jobs, such as secretaries and telephone operators.

Hence, today, as private law firms clamor about qualifications in the areas of antitrust, communication law, utility regulation, tax—they forget that it was their senior partners who had or maintained an exclusionary policy when they were policy-makers in the government.

2. *The Old Boy Network*

As in the private sector, the old boy network has existed in government. Senior executives have recruited from their law schools or from their geographic locations to the disadvantage of blacks, and other minorities.

D. *Effect of Increased College Tuition*

I believe that one of the greatest deterrents to increase ranks of blacks as lawyers in the workforce may be the growing cost of tuition in state and private colleges. In recent years, the cost of attending private institutions and state colleges has increased sharply. Blacks and other minorities simply cannot afford to attend schools where the tuition rates are \$100 per credit hour and \$7,000 per year. Law school admissions may be dropping because black students cannot afford to enroll. Increased fees by law schools coupled with the *Bakke*¹⁹ decision and the general mood of negativism should cause alarm as such a combination of factors may further reduce the ranks of not only black lawyers, but emerging professionals in other minority groups as well. Increased college fees render affirmative action unnecessary. An institution does not need an affirmative action program if their tuition rates are so high as to discourage minority applicants. Of course, such a trend points up the continued need for survival of black colleges in America. The decline of the black college may well render educational and equal employment opportunities for blacks in several communities in America nugatory.

The future of the black lawyer in America may be as bright today as it was in 1935 when Dr. Charles H. Houston wrote his article on the "Need for

18. Benjamin L. Hooks served as a member of the Federal Communications Commission from 1972-78.

19. *Bakke*, *supra* note 18.

Negro Lawyers." A combination of the factors suggest that there may be much cause for concern if the number of black applicants to law schools continues to decrease with each academic school year.

The reduction of the number of black lawyers in America has far reaching implications to black America, and there is a need for all of us to begin to encourage the young to consider law as a career. In the meantime, bar associations are charged with the responsibility to review the record, to evaluate the existing conditions to determine if they bespeak the future conditions for black lawyers in the American workforce in years to come. The lawyer in any community is the guardian of the public trust against lawlessness and deprivation. Black American lawyers stand between justice and lawlessness in this nation on behalf of its restless hearts and wounded souls.

E. *Appointment of Judges to the State and Federal Bench*

If civil rights gains made in the last ten years mean anything, it must mean that judges sitting on the state and federal bench have made substantial contributions to the law.²⁰ The judiciary must be integrated if the law is to be integrated and diverse. Segregated courts may result in the maintenance of a segregated jurisprudential system. Segregated staff personnel of the judicial system may be interpreted as a badge of slavery unwilling to die.

The concept of liberty and justice for all is embodied in a jurisprudence bottomed on diversity. The exclusion of minority judges from the judiciary and administrative law judges positions over the years does not need to be repeated. There are far too few black judges in the state judicial system; there are far too few minorities working in the court system of this nation. This must change and lawyers of all races must demand that this change occurs in the near future.

On a positive note, the appointments that President Carter made to the Federal bench are encouraging; I hope that his leadership in this area will be copied by state leaders and judicial selection panels.

III. FUTURE CAREER PATTERNS OF BLACK LAWYERS

There are a number of areas of legal practice that black lawyers are not actively pursuing. I have outlined below what career patterns are dictated by the economy with full recognition of the barriers discussed above.

A. *Telecommunications Law*

There are several hundred radio and television stations in the nation and a small, but growing, number of black-owned radio stations. Hence, some exposure to communications law is feasible. This is so, not only in the area of television and radio licensing, but also in the area of rate-making in the common carrier area. There is a great need for minorities to demand that black lawyers be trained and exposed to rate-making areas in law firms

20. Black lawyers gathered at the Annual Meeting of the National Conference of Black Lawyers in New Orleans in July, 1978 commented on the harassment black judges are receiving from some bar associations because of what these associations believe to be decisions cut against their vested interests. Hence, the sentiments of several members of NCBL is that some black judges are being harassed and are considering whether to resign from the bench.

representing common carriers. An example is telephone companies—all of which have departments fully dedicated to rate-making.

In addition, public policy may be affected by the proper application of the Fairness Doctrine and knowledge about the Equal Time provisions of the Communications Act of 1934.²¹ The Equal Time provision protects candidates from preferences given to one candidate over another in the use of broadcast facilities. With the growing number of minority political candidates, black lawyers must have some exposure to these areas.

B. *Energy*

It is conceivable that in the 1980's a civil right may attach to the access to and the possession of fuel and other energy sources. Black lawyers must channel their careers into these areas and companies must open their doors to allow these lawyers to learn the ins and outs of energy policy and law. The political pressure from communities will mount due to high fuel bills in the current economy. Policy makers acting on rates may be met with great suspicion as they continue to boycott black lawyers in this area. Black lawyers must begin to seek, and people must begin to allow, to advocate, or to agitate—for the good of the nation—for the exposure of black lawyers into energy sensitive positions.

C. *Transportation Law*

The application of laws governing the ability of people or things to move from one place to another is basic to American commerce and to survival. Black lawyers must begin to investigate transportation law more carefully; such an investigation relates to the tradition of the minority lawyer to probe and unlock doors which hinder the poor, and powerless underclass. On the other hand, representation of corporate clients requires some exposure to the regulatory area of the Interstate Commerce Commission, as well as state government commission.

D. *Labor Law*

Labor law is one of the most lucrative practices of any specialized areas of the law. Large numbers of blacks, other minorities and women now hold major positions in unions, in both the public and private sectors. In fact, unions campaign for membership on the basis of the benefits they can provide to their members and their political power.

Labor law is a high demand area. Black lawyers have been deeply involved in labor law over the years, but the involvement has been in the fight to integrate the unions as opposed to representing them.²² Labor law or personnel management principles are nearly one and the same. It is now therefore time to demand from unions a greater and more effective utilization of black lawyers and black law firms in particular.

21. Communications Act of 1934, § 315, 47 U.S.C. § 151 (1934).

22. Most people do not realize that the "fair representation doctrine" was the result of the legal advocacy of Charles Hamilton Houston in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

E. *Tax and Probate*

Blacks are making more money today and have need of estate planning. Many black people are giving their money to the state because they are not sophisticated to the ways of tax and estate planning. Black lawyers have been discouraged from pursuing tax and estate planning areas because the assumption is that all black people are poor. This, of course, is not so. And with the increase of minority businesses and the *inter vivos* transfer or testamentary disposition of property, minorities need help to assure that their heirs are properly protected against governmental enrichment caused by ignorance.

F. *International Law*

Black lawyers, although they are first Americans, also have foreign interests. When the food and energy costs soar due to international diplomacy or international commercial trade transactions, black lawyers must speak to the economic policies of the nation or corporate America. In order to do this, the black lawyer must be allowed to enter trade and banking areas where the actual international law and policy decisions are articulated and made. This legal area can no longer be considered esoteric advocacy; it is as real as the cost of fuel and food.

Other specific career patterns within this sphere in which black lawyers must be directed include the law of space and the law of the sea. There is as much a need to agitate for inclusion in the law of space, where one day people may dwell, as there is in the law of the sea, where important minerals are lodged which may give rise to a more healthy environment.

G. *Government*

Employment of minority lawyers in the Federal and state governments, undoubtedly, will continue to be attractive in the 1980's. This is so because the government is the largest employer in the land and therefore should affirmatively attract minorities. However, career patterns in government should be evaluated very carefully.

In the more specialized government regulation areas, such as the Federal Communication Commission, the Federal Trade Commission and the Securities and Exchange Commission, with a few exceptions, black lawyers are moving into critical policy areas which affect the political process and the broad public interest.²³ In addition, private industry is not recruiting black lawyers from the government in the same skill areas. Law firms specializing in securities, labor law, or antitrust are not hiring blacks and other minorities now employed by the government with these specialized skills. For black lawyers, it is a myth that government is a good avenue to the private sector.

In recent years, several black lawyers have been appointed by presidents of the nation to solid leadership positions. However, among the bar, it is generally known that these superstars, many of whom gave up lucrative

23. See discussion above at II-C on the hiring patterns of black lawyers in the federal government.

jobs to serve the public are often surprised when upon completion of their government service they face difficulties in obtaining equivalent positions for equivalent pay. These matters need to be studied; they must be evaluated.

IV. CONCLUSION

Although I would like to reach a more positive conclusion, I believe that the future of the black lawyer in America is as bleak in the 1980's as it was in the 1940's. The number of black lawyers is proportionately the same; however, the issues facing the poor have multiplied beyond the black lawyer's ability to deal with them all. The new tactic being waged by the opposition is to take the offensive away from the black lawyers by placing both the black lawyer and his or her client on the defensive.

I believe that black lawyers and the black community must continue to ask our friends to assist in the prosecution of civil rights for minorities in America. The future of the black legal practitioner is the dogged battle for survival.

However, the black lawyer does him or herself no good by bemoaning the past. The past should provide us with the necessary will to be better thinkers, better leaders and more devoted followers. The black community looks to the black bar to assist them in the development of their future. The future of the black lawyer may well be inextricably tied to the growth and development of the black community.

GREAT EXPECTATIONS AND DUBIOUS RESULTS: A PESSIMISTIC PROGNOSIS FOR THE BLACK LAWYER

Ralph R. Smith*

I. INTRODUCTION

The over one million black students enrolled in United States colleges and universities constitute "the largest single pool of black intellectual manpower in the world."¹ Similarly, the black students enrolled in the nation's law schools present an unprecedented opportunity to alter substantially the relationship between the communities from which they come and American law and legal institutions. However, this is an opportunity that might well

* The author gratefully acknowledges the assistance in editing the manuscript and preparation of footnotes of his colleague, Karen Porter, J.D., 1974 Northeastern University School of Law.

1. C.R. Wharton, Jr., *Education and Black Americans: Yesterday, Today and Tomorrow* (Feb. 19, 1978). See W.J. Wilson, *The Declining Significance of Race? Implications for the 1980's* (Jan. 5, 1979) (paper presented to Section on Minority Groups, Association of American Law Schools and published currently in 7 BLACK LAW JOURNAL, *supra*.)