

affirm our faith in America. For once America completes this democratic revolution, each American will be greater, more generous and more loving.

THE BLACK LAWYER*

Robert L. Carter

The judicial process has towered above all other institutions as the most important and powerful weapon available to blacks in the quest for equality. Until very recently, the political process was closed and the only avenue seemingly available, conducive to producing breaches in the barriers of discrimination, short of armed revolution, was the law. Here, because the constitutional adjudication process, which is the province of the judiciary, requires a sound intellectual basis for its determinations, reason can carry the day. And indeed it did, as the United States Supreme Court began to seek to give realistic effect to the equality safeguards of the fundamental law. The Court rejected sophisticated rationale and arid legalisms in seeking to delineate the reach and scope of the Civil War Amendments (13th, 14th and 15th). This led to broad sweeping declarations of what the Constitution required in respect to equality for blacks. Indeed, the ratio descendendi on which *Brown v. Board of Education* was based was made fully applicable—all forms of discrimination or differentiation would be struck down, and there would be in reality equality under law. The law's promise would be kept.

Unfortunately, the judicial process has not been able to produce equality under law. Legal doctrines, many of them highly technical, have been interposed as roadblocks. Courts have been unwilling or unable to break the resilient resistance of state officials to segregation and discrimination, particularly in the critical areas of public education, employment, and housing. Moreover, power blocks—unions, parents, school personnel, politicians—have from time to time, singly or in combination, been able to blunt or subvert the law, striking down some form of discrimination because it appears to threaten their own interest. This has led blacks to distrust the law.

Another factor has been the cost and amount of time consumed in achieving victory through the courts. The result has been that litigation to secure basic rights for blacks has been painfully time-consuming just at the point in history when American blacks have become increasingly impatient. Moreover, when victory in the courts is achieved, it is often more in form than in substance.

Despite *Brown*, preciously few black children attend integrated or even educationally equivalent segregated black schools—North or South. The white suburban noose has been more tightly drawn around the black inner-

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core cities of this country, notwithstanding judicial opinions outlawing housing discrimination. The relative economic position of the black employee has, in my judgment, deteriorated since the close of World War II, notwithstanding judicial pronouncements imposing a duty on unions to represent fairly the interests of black workers and other sanctions against employment discrimination.

The vast gulf between the rhetoric of the law and the application of the law's stated principles in real life make for an increasing disillusionment. Many blacks regard litigation as no longer useful in the fight for freedom. The limitations of legal action have become all too obvious, but it should not be abandoned. It remains an effective tool, an excellent, supportive weapon. Because white America likes to regard itself as a society ruled by law, its values, morality, and conscience are under constant pressure when the black man's rights are declared in law but disregarded in fact. While it is unwilling to adhere to the law's rhetoric when it necessitates a revolutionary transformation of power within American institutions, the unease, discomfort, and guilt which the conflict between rhetoric and reality has produced in the country could push America to live up to the potential of the law on the issue of racial discrimination. At any rate, that this will come about is the only hope the black community has of attaining all its rights, short of a successful armed rebellion.

Thus, there is a vital role which the black bar can play in transformation of American society. Certainly, it must take responsibility for leading, directing, and mounting whatever legal strategy is required to further the drive for equality. Historically, the Negro bar has been prone to boast of its contribution to the Negro's fight for equality by virtue of legal victories in the 1930's, 1940's, and 1950's, which eliminated constitutional support for racial segregation and discrimination. The late Charles Houston, Judge William Hastie, and Justice Thurgood Marshall—brilliant legal tacticians—were pioneers in this field. These great black advocates were ably assisted by the Howard University Law School, which at that time was the center of intellectual ferment in black legal circles, and succeeded in transforming the 14th Amendment, and to a lesser extent the 15th Amendment, into a Negro Magna Charta.

As long as these men remained active in the cause, the legal effort aimed at securing equal citizenship status for black Americans was under the direction and control of black lawyers. Negroes planned the strategy, undertook the research, tried the cases and argued the appeals. By 1954, when *Brown v. Board of Education* was decided, the civil rights lawyer, chiefly because of the efforts of the Marshalls, Houstons, Hasties, and their Howard University Law School colleagues and protégés, had gained national recognition and respect. Since the foremost civil rights lawyers were black, this newly-attained prestige raised the status of the Negro bar.

It must be pointed out, however, that while black lawyers spearheaded the development of constitutional doctrine favorable to the Negro's cause, and their success raised the status of the Negro lawyer, only an infinitesimal percentage of the Negro bar actively participated in this effort or made any real contribution to the development of the civil rights law.

There were, of course, valid reasons for this. Opportunities for blacks

to secure rigorous legal training were extremely limited. The average black lawyer remains even now relegated to a neighborhood law practice, which drastically limits his clientele, the scope of his practice, and keeps his financial returns at the marginal level. In order to maintain a viable legal practice, the Negro lawyer has had to concentrate on volume and quick turnover. His clients are, as a rule, unable to pay the costs that preparation of a complex trial requires, or to finance protracted litigation.

Civil rights litigation requires concentration on difficult legal and constitutional issues, and long hours of research and preparation. To succeed, a civil rights case usually has to go to the highest appellate court at the state or federal level. Thus, extended litigation is the norm. Most of this kind of litigation was handled on an institutional basis by the National Association for the Advancement of Colored People; and because of limitations of budget, the fees it could pay local lawyers could not be unduly generous. Since a declaration of rights or an injunctive relief, not remunerative damages, was the usual form of relief sought, financial rewards based on the outcome of the litigation were not a feature of civil rights litigation. Very few local lawyers could live on their earnings from their civil rights practice. Prestige, perhaps, was theirs, but that could not be cashed in to pay the rent, or one's secretary. To many struggling black attorneys, involvement in civil rights cases meant loss of income, which neither they nor their families could readily afford.

Moreover, during those early years, there was a universal misconception that the black man's struggle for equality would be won if the effort to destroy the constitutional basis for support of the open racism of the South succeeded. The best design for success in this regard seemed to be the carefully selected test case—one victory would erode legal support for an oppressive constitutional doctrine and upon that another test case would be built to eat further into the underpinnings. There seemed no necessity for involvement of the entire Negro bar except as supporters and well-wishers. Indeed, even the active participation of blacks themselves en masse seemed not needed. With the few active black civil rights legal specialists scoring important legal gains, that was all that seemed necessary. It was not discovered until much later that success on the legal front did not mean equality in a realistic sense to the average black man. That is a finding of the present.

While success of the black civil rights lawyer brought respectability to the Negro lawyer, it also produced a drastic change in civil rights legal circles. The Houstons, the Hasties, and the Marshalls are gone from the civil rights arena. The great black legal minds of the 30's, 40's and 50's are not now, with few exceptions, involved in the cause. Howard University Law School no longer functions as the center for training, research, or planning of legal strategy in race relations. And perhaps the most significant change of all, the Negro lawyer no longer directs and controls civil rights litigation, even though decisions in this field can still affect how and under what conditions the entire black community will function in American society.

Today's typical civil rights lawyer is white by race and values. Economically, socially, and emotionally, he is part of the white middle class. Certainly he has few, if any, ties to the community he purports to serve. More important, he is a part-time civil rights lawyer—helping out when he

can but always on his terms. Critical decisions made by him, which often spell the difference between victory and defeat, are necessarily the result of his point of view and evaluations, and are undertaken on the basis of his priorities. These views, evaluations, and priorities, although possessed of a surfeit of the best of good will, often have no relationship to the interests or needs of the black community. The dominance of the white lawyer in this field is underscored by the fact that even our most vigorous proponents of black power hire white attorneys to get them out of trouble.

Undoubtedly, the white lawyer is intellectually, politically, and morally committed to the elimination of open racial discrimination; but whether he is committed to the total removal of all vestiges of racism or even understands what that means, must be subject to question. First of all, being white, he has never experienced racial discrimination at the level of intensity or as relentlessly as blacks. Moreover, he is a relative newcomer who became active in the late 50's and early 60's, when civil rights advocacy had acquired a certain popularity in white circles. Then, droves of white lawyers went South for "two weeks" to make their contribution to the elimination of racial injustice in this country. In doing this, many fulfilled a necessary personal need. They pacified their own conscience without facing the hazard involved in fighting discrimination and prejudice in various Northern communities where they made their homes. Many of those who made brilliant contributions as legal tacticians in Mississippi, Louisiana, and Alabama, now stand aloof from the Northern struggle, although the legal programs devoted to the rights of the poor and welfare clients are permitting many of this breed of white lawyer to participate in Northern issues. These programs, while important, do not meet the pervasive problem of racism facing the black community. That issue, insofar as the law is capable of affecting it, will not be solved by establishing legal rights for the poor or welfare clients, even though large numbers of Negroes are involved.

In any event, the black man finds himself today in the unenviable position of having Caucasians in control of the legal apparatus that will determine his fate and the fate of his children. History, moreover, is showing ominous signs of repeating itself by giving birth to a second wave of anti-black hysteria and repression. Thus, American politicians seek to court voters by appealing to white-racist ideas. The New York legislature refuses to enact a gun control law that would apply to everyone. Yet those who spoke against a general gun control law are advocating a law to bar guns on the campus. These legislators are reflecting the nation's mood of horror and shock on the showing of pictures of black students openly carrying guns on the campus of Cornell University. Yet there was no similar national revulsion to reports of cross burnings on lawns of homes housing Cornell's black coeds. Neither cross burnings nor guns have a place on the university campus. Both are objectionable, but it will not do to dismiss the cross burnings as the pranks of playful white youth while condemning the resultant show of force by black youth as beyond the pale.

The oft-spoken desire for a return to "normalcy" is nothing but a half-veiled wish that the "Negro problem" disappear. Those who object to the "speed" with which recent racial changes have occurred in American society are, in reality, asserting that the rights of black people should be limited, to

apply only sometimes *in futuro*. Others, who claim that "education" must come before true equality, but who steadfastly deny equal educational opportunities to black children, are attempting to condemn future generations of blacks to the same fate as that of their forefathers.

Perhaps more to the point is the current disaffection and hostility of white liberals, traditional allies of civil rights forces, to black militancy and aggressiveness. The truth that blacks and whites must recognize is that whites, however sympathetic and concerned, are beneficiaries of a system and structure that grinds black people down. Blacks want a total change, and while sympathetic whites see the need for reform because the pinch is one of conscience or of a specific felt need, most have reservations about going as far as blacks deem necessary, or have far greater patience in waiting for needed change. All this means is that Negroes and whites can work together to the point where interest and understanding diverge. At that point, blacks had better be ready and prepared to protect their own interests. It is in the interest of white Americans as much as of blacks that the effort to obtain a truly democratic society here succeed, but the white man's interest seems more remote, more theoretical and less urgent. He seems under less immediate threat, and therefore can postpone dealing with the problem.

The meaning of this for black lawyers is that they must reassume control over the decision-making process when black interests are at issue in a law suit. Otherwise, legal strategy being in the hands of white lawyers could well dictate the temporary subordination of black interests in favor of some other overriding consideration. Even if blacks could—and they clearly cannot—rely upon white lawyers and white legal institutions to represent their interests vigorously and fully, it is the personal responsibility of black lawyers—because they are black—to devise and forge the legal tools that are necessary to improve the lives of their own people. Otherwise, however strident the rhetoric may be, the black lawyer is not assuming the responsibility which is his in the struggles of the black community. While this is America's problem, it is peculiarly that of the black American, and the Negro bar must take on more visibility as legal tacticians, strategists, planners, and doers in the days ahead.

In this as in other areas of American life, the assumption of black leadership will not be easy. Messrs. Christopher Jencks and David Riesman are now authorities on what is wrong with, and how to "rehabilitate" Negro colleges and universities. Black educators who ought to know at least as much about the problem were not those awarded the funds to study the needs of black educational institutions; and if such a study by blacks had been funded, it is doubtful that it would have been accorded the status of authority that the Jencks-Riesman findings have been given. Similarly, Patrick Moynihan has leapt into national prominence because of his "study" of the inadequacies of the Negro family. Mr. Moynihan's thesis was well-received in some circles because of a misconception that he was saying that blacks, not whites, were primarily responsible for the Negroes' depressed socio-economic status. The point to be made about these two examples is that here are whites—well-meaning, of course—whose own works demonstrate ignorance of the dynamics of black life in American society; and yet their "scholarly" findings are accepted as the last word on the subject.

The black lawyer *must* take over legal advocacy of the rights of the black community. While this is no assurance that white legal scholars or tacticians may not overshadow him and be regarded as the legal authority in white communities on black problems, he will not be leaving a void to be filled by them, as is true at present.

Today, there are no black-run, civil rights law offices in the country. The several white-controlled legal institutions that represent black legal interests are grossly understaffed, have extensive dockets with an alarmingly high average case load per lawyer, and are pitifully inadequate to meet the overwhelming institutional needs of America's black people for legal assistance.

The reasons behind this alarming situation are central to the problem under discussion. First, during the late 1950's and early 1960's, particularly because of state-sponsored efforts to destroy the civil rights movement and the student sit-in movement, the civil rights lawyer was forced into a posture essentially defensive in nature. Much of the offensive litigation, therefore, had to be curtailed. More recently, prosecutions resulting from widespread civil disorders placed still a further accent upon the defensive nature of their docket, and the present effort to silence the more radical leaders of the black community has added to this pressure to utilize effort and energy in defense.

Since civil rights lawyers were required to expend so much of their time and energy on defensive matters, little or no time has been left to engage in legal planning and experimentation—a function that historically black lawyers representing major civil rights groups had fulfilled.

For instance, little effort is presently being devoted to developing and planning research and litigation designed to require the state to assume in full its constitutional obligations to insure equal educational opportunity for Negro children. This requires, at a minimum, per pupil equality at least at the input level in the allocation of all the states' educational resources, including funds, teachers, and all activities geared to academic excellence.

Recently, black lawyers helped develop a novel approach to discrimination in housing which the United States Supreme Court adopted in a far-reaching holding, construing the 1866 Civil Rights Act as banning discrimination in the sale and rental of all housing in this country as an impermissible relic of slavery. Now that statute and the Civil Rights Act of 1968 can be used at least to combat discrimination in housing, but segregated residential patterns will not be altered until the means are found to break the back of discrimination with respect to land use. Here is where the most insurmountable barrier to the Negro's securing equal access to the housing market occurs. Only when that barrier comes down will housing patterns change. Thus, legal research to find the means for a breakthrough in that area is a prime necessity.

In a related field, black lawyers have set aside evictions which were prompted by a tenant's report of housing violations to the health authorities. Yet, such a victory means little until courts become willing to create trusts so that the rent denied the landlord by the tenants' strikes can be used to reclaim deteriorating structures or allow "set-offs" against rent due for repairs necessary to meet housing codes. The concept of mutual promise—rent for

code-standard quarters—long absent from our housing laws, must be impressed upon the landlord and tenant.

On the other hand, many precedent-setting cases that black lawyers have been responsible for have not been implemented on the scale required. Examples are the several cases in which courts interpreted the National Labor Relations Act to bar racial segregation by unions and to require unions and employers to remove all differentials between blacks and whites with respect to the terms and conditions of employment. An even more recent case established the principle that governmental agencies, federal and state, were barred by the Fifth and 14th Amendments from underwriting public construction unless or until the government makes certain that the contractors and sub-contractors employed to undertake the work obtain their labor supply from a non-discriminatory source.

These landmark holdings that could be a basis for forcing a "new deal" for the Negro worker have not had widespread application up to now. Obviously, the existing civil-rights institutions are structurally incapable of bringing about massive implementation of court decisions. Indeed, they were never intended to function in that capacity. They are best suited to undertake research and to plan legal strategy and experimentation in litigation.

Both massive implementation of breakthroughs in the law and research and experimentation are necessary if the law is to be put to use to help bring about any substantial improvement in the black man's depressed status in the foreseeable future. The legal needs of black people are infinitely greater today than ever before, and the opportunities for the use of the judicial process to meet a variety of these needs are correspondingly higher.

The time is past when a few black lawyers can adequately protect and advance the cause of black people. A few carefully selected test cases will not suffice. Scores of cases must be filed across the country to follow-up every breakthrough in the law. This requires the active participation of the entire black bar in the Negro's struggle for *first-class* citizenship.

Black lawyers must reassert themselves and regain control and direction of civil rights litigation. They must combine their talents to seek massive implementation of new precedent-setting decisions and other holdings that offer promise of reducing the outstanding areas of racial discrimination. They must be prepared to defend those engaged in the politics of confrontation, whose infractions of the law occur in the attempt to bring about the elimination of some aspect of institutional racism. Black lawyers must seek to develop in the black bar a legal institution capable of undertaking this monumental task. Sacrifice will be necessary. Those who are financially able must donate their time and services, as so many white lawyers do, to handling of one or more cases a year aimed at protecting the interest of the black community. For those who are unable to donate their services, a minimal fee schedule, similar to the Federal Criminal Justice Act of 1966, must be considered.

It is here that the real challenges lie, especially for the new breed of young black lawyers just emerging from law school. An increasing number of young black lawyers have spurned lucrative offers from private industry and government to devote their skills to the service of their communities. At

a minimum, the black legal community must move creatively to encourage and accelerate this trend and provide these newcomers with the support and guidance they need. Most important, the black community must insure that its legal talent is not diverted from its historic course. In the past, all too many of the black intellectual elite have, with the prominence that accompanies success, faded away from service to their people. Although there does not appear to be any intentional or systematic scheme at work, the effect of the American system has been to absorb the best black brains into institutions only tangentially related to black people. Thus, Negro colleges have lost their most talented faculty members to more prestigious white universities; highly skilled Negro physicians have left the ghetto to practice in hospitals and communities which are inaccessible to the masses of poor blacks; and successful black entrepreneurs have quickly been assimilated into American corporate life. Thus, personal success and advance seemed to conflict with community service. One cannot expect all of the black elite to forego the satisfactions and emoluments that success in America's mainstream brings. The problem is that we have not devised a method for mainstream success and community service to go hand in hand.

Fortunately, the legal profession is very well suited to the development of a workable solution to this problem. If every black lawyer were to commit himself to handling one or two race cases per year, he need not reject lucrative financial offers from industry or government or be required to forego practice in prominent white law firms. He could do both without conflict or inconsistency and with great personal satisfaction. Financial and political support for any such enterprise from the black community is necessary, since a coordinated system of insular reliance, which is the cornerstone to any system of self-determination, must be developed here if what emerges is to be a black-controlled legal enterprise in the true sense.

Today, America seems to have lost its way. Its hypocrisy and venality in race relations seem to have corroded every aspect of life. Certainly, there is no democracy, no justice, no opportunity, indeed no hope, for the black poor. Whatever American institution one chooses to inspect, black people are disadvantaged due to a lack of innovative change that can only come from those whose function is to guide the society towards valued goals.

The black bar has in part been responsible for the growing loss of faith in the law in the black community. Its failure to involve itself more conspicuously in the problems of the black community has permitted white America to avoid confronting the fact that what have been hailed as historic constitutional decisions eliminating differences between blacks and whites on racial grounds, have had no meaningful impact in the black community. One of the true causes for the cynicism of the blacks and the fantasy of whites about law is that real progress in race relations in the United States will not spring from a single victory in a precedent-setting case, but only as a result of massive follow-up litigation. That critical need has not been, and cannot be, met through existing institutions, white or black.

The courts should be flooded with litigation seeking equal educational opportunity for Negro children, the elimination of job discrimination by the government, by industry, by labor, and the end of housing discrimination. Every court in this country should be faced daily with some lawsuit seeking

redress against one of the aspects of discrimination existing in the jurisdiction it serves. Black lawyers must be prepared to become involved in the critical area of implementation litigation, and in supplying the necessary manpower and professional help which is now woefully lacking. This is the only way that the law's rhetoric of equality and justice will ever be translated into reality. Only when this country is required to face on a daily basis in the courts everywhere the distance between protestation and reality is there hope that the law's sanctions of equality, presently evaded or avoided by various power enclaves, will be effectuated.

In summary, black lawyers must join together to create the necessary institution for legal research and development, and to supply the manpower necessary for massive implementation and defensive legal action. Legal panels must be formed on a geographical basis to handle litigation without undue burdens being placed on a few. Such panels should be constituted in every community having a measurable black population. (A similar proposal was implemented last year in New York City when 40 lawyers met by invitation and agreed to proceed as a unit, under institutional auspices and with minimal fee requirements, to defend the 85 black Columbia students who had been arrested as a result of the recent disturbances there.)

The panels proposed could function as local legal redress committees. The primary purpose and design of these panels will be to insure massive implementation of precedent-setting decisions. They should not merely wait for case assignments, but could also act to guide and stimulate local civil rights organizations, whose function it would be to prepare the groundwork for litigation in employment, education, and housing. Local civil rights or activist groups can serve as an invaluable resource to aid in necessary preparation and to assist in raising funds to underwrite the litigation.

If there is a dearth of legal talent in a particular area, regional committees may be able to fill the void until a black attorney can be located for the community. In conjunction with Howard University, a placement service could be established to bring more young black attorneys into black communities. Such a program should concentrate on areas that have significant black populations but are without black legal assistance. In this way, the Howard University School of Law can begin to reassume its role as the leading law center of intellectual ferment in the struggle for civil rights. Provision for continuing legal education should also be made so that cooperating lawyers can be kept abreast of recent legal developments in the race-relations field. This role, too, could be undertaken by Howard or by some instrument of the black bar.

As black men and women, Negro lawyers should be committed to achieving black power. As black lawyers, they have to believe in developing black legal power. What is necessary is not a slogan, but a method whereby such power can be achieved in fact. If this can be accomplished, it will be possible to revolutionize the law and change the face of America. More importantly, black lawyers will be taking a giant step towards what should be their basic objective and fundamental obligation—setting their people free.

What is proposed is not a form of black separatism. The black lawyer has an overriding social, personal, and moral responsibility to utilize his tal-

ents to benefit the black community. In doing so, he works in his own interest as well. In assuming this responsibility, he does not bar white legal talent from the field but merely assumes that over-all leadership, control, and direction that should be assumed by blacks. Whatever the valid reason for the black bar's failure to assume this responsibility in the past, it has to stir itself and undertake that task today. If nothing else, the visibility of black lawyers all over the country, engaged in some form of litigation designed to lighten the racial burden, will lift the morale of the black community and add to its courage and inner strength.

THE ROLE OF THE BLACK ATTORNEY IN THE 1980's: A CHALLENGE TO BECOME SPECIALISTS, ASSOCIATES, AND RENOVATORS

Cardiss Collins*

Black Americans are beginning to realize that the problems which confront them in the 80's will be just as difficult, if not more difficult, than those encountered in the past. During the decade of the 80's, the civil rights accomplishments of the 50's, 60's and the 70's will be placed under a microscope for close scrutiny as a direct result of an ultra-conservative attitude among Americans. This has always been the cause of the barrier which blacks have faced throughout the history of America. Black attorneys have historically come to the aid of their people in the past, and it is highly probable that the black attorneys will come to the aid of black Americans once again. However, as the times have changed, so should the approach the black attorney pursues in combating these barriers.

During the decades of the 1950's, 1960's and 1970's, the black lawyer's role primarily consisted of securing equality for black Americans. During those decades, black lawyers were concerned with the removal of the barriers of segregation and racial discrimination. The great pioneer attorneys, the late Charles Hamilton Houston, Judge William Hastie and Justice Thurgood Marshall, along with the assistance of the Howard University Law School, took the burden upon themselves to surmount the obstacles of racial oppression. They used the United States Constitution and the Civil Rights Acts of the 60's as the primary weapons in their arsenal to combat inequality in the areas of education, employment and housing.

In 1954, the pioneers made a historical achievement in the field of education with the landmark decision of *Brown v. Board of Education*,¹ which

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1. 347 U.S. 483 (1956).