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From the Shoulders of Houston: A Vision for Social and Economic Justice Commemorative to Charles Hamilton Houston: Commemorative Articles

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INTRODUCTION

W.E.B. DuBois once prophetically proclaimed in his monumental work, The Souls of Black Folk, that "the problem of the Twentieth Century is the problem of the color line."[1] What DuBois endeavored

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1. W. DUBOIS, *The Souls of Black Folk* xi (1903).

to study was how the legal and social barriers placed around the lives of Afro-Americans would be the single most important domestic issue to be addressed by our democratic republic. As we approach the close of the twentieth century, after celebrating our Constitution's Bicentennial, DuBois' observation, unfortunately, maintains its vitality.[2]

This article proposes a reflection on that "problem" from the perspective of a law professor with an Afro-American heritage in the tradition of Charles Hamilton Houston, a civil rights lawyer and former dean and professor at the Howard University School of Law. Specifically, I wish to consider how we, as teachers of future lawyers and as legal scholars, can best contribute to solving the problem of the color line. I believe that Houston can continue to be a role model for all law professors who are interested in social justice and the democratic ideal embodied in the U.S. Constitution. This then is a study of the life and career of Charles Hamilton Houston as an appropriate source for creating an agenda for scholar-activists who seek to address the problem of the color line.

I. LAW PROFESSOR AS SCHOLAR

We minority law professors are a curious breed. At once, we are part of the law academy, yet we are set apart by cultural, ethnic and racial differences. As W.E.B. DuBois poignantly observed, there is a veil that separates us from those around us.[3] Yet, while separate, we are so much a part of the law institution—our very presence adds to the richness of the academic body. Our different perspectives offer unique, yet quintessentially American, insights on jurisprudence.[4]

2. To state the matter plainly, there is a continuing debate on what to do about "the problem of the color-line." Do racial discrimination and racism still exist and, if so, in what forms? How should laws be structured to remedy racial inequality? Is affirmative action detrimental to Blacks as well as whites, as suggested by the writings of Charles Murray, Thomas Sowell and others? Has the color-line been etched deeper by the economic realities of class distinction as suggested by Nicholas Lemann in his two-part article, "The Origins of the Underclass" in the June and July 1986 issues of the Atlantic monthly? These questions are illustrative and are by no means exhaustive of the issues involved in the debate.

3. DuBois, in describing his childhood, said that he recognized early on that he was different from his white classmates in Barrington, Massachusetts. He exclaimed:

> Then it dawned on me with a certain suddenness that I was different from the others; or like, mayhap, in heart and life and longing, but shut out from their world by a vast veil.

DUBOIS, *supra* note 1, at 44.

4. Again DuBois eloquently captures the point:

> After the Egyptian and Indian, the Greek and Roman, the Teuton and Mongolian, the Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this

Our contributions and souls are necessary to the vitality and the structural integrity of what Derrick Bell, in assessing the legal academy, described as a castle "located high on an impressive mountain."[5]

We are few in number. Our thin ranks suggest an institutional intransigence to removing the veil and creating the diversity alluded to by past American Association of Law Schools president, Susan Westerberg Prager. It was she who challenged the legal academy "to explore how to increase the number of minority law teachers and how to improve the quality of their professional experience."[6] I make this observation, and others have made it more eloquently and thoroughly,[7] to provide a glimpse of the background canvas upon which I wish to paint. I also want to echo Dean Bell's claim that we are indeed "strangers in academic paradise."[8] Yet, if we are strangers, we are strangers who enter paradise by right. Now is the tomorrow that Langston Hughes predicted in the poem "I, Too Sing America," when, as he put it, "I'll be at the table when company comes. Nobody'll dare say to me, 'Eat in the kitchen,' then."[9]

Moreover, while we are strangers in academic paradise, we are strangers with a most important mission. Dean Rennard Strickland poignantly described the awesome tasks law professors face in balancing the demands of teaching, writing and servicing students and the community as follows:

> I believe, believe passionately, that serious scholarship is the duty, the privilege, and the obligation of all who choose to live in the academic community . . . for those of us who have chosen to labor in this vineyard, those who chose to become professors—to profess

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> American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

Id. at 45.

5. D. Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Law Schools*, 20 U.S.F. L. REV. 385 (1986).

6. Prager, *President's Message, Minority Law Teachers*, AALS Newsletter, Nov. 1986, at 1-3.

7. Laurence, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 120 U.S.F. L. REV. 429 (1986).

8. Bell, *supra* note 5, at 385.

9. L. HUGHES, *I, Too Sing America*, *in* I AM THE DARKER BROTHER: AN ANTHOLOGY OF MODERN POEMS BY NEGRO AMERICANS (A. Adoff ed. 1968).

> about the law—it is different. Balancing and balancing acts have always been a part of the academy, from its earliest medieval beginnings. No matter how hard the task, scholarship is central to our vocation. (Emphasis in the original.)[10]

If we are to engage in scholarship, we must view the task of scholarship from our unique perspective. Indeed, we can ill afford not to make our scholarship useful to our communities. As Professor Roy Brooks so aptly noted, "each of us (and, indeed, all successful minorities) has a special interest in doing what we can to aid less successful, less fortunate minorities."[11]

This special interest is at the heart of what former Dean J. Clay Smith, Jr., has called "The Houstonian School of Jurisprudence."[12] Charles Houston, as dean of the Howard University School of Law, pioneered an approach for attacking the barriers of racial discrimination.[13] Houston believed that the black lawyer and the black legal scholar ought to use the law as an instrument to achieve social justice and full, equal civil rights for all Americans. He called for those

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10. Strickland, *Scholarship in the Academic Circus or the Balancing Act at the Minority Side Show*, 120 U.S.F. L. REV. 491-92 (1986).

11. Brooks, *Civil Rights Scholarship: A Proposed Agenda for the Twenty-First-Century*, 120 U.S.F. L. REV. 397, 398 (1986).

12. Smith, *In Memoriam: Professor Frank D. Reeves Towards a Houstonian School of Jurisprudence and the Study of Pure Legal Existence*, 18 HOW. L.J. 1 (1973). This article is a memorial celebration of the life and career of Frank D. Reeves, a Howard Law School graduate and professor. Dean Smith provides a beautiful portrait of Professor Reeves and sets it in the rich social justice legacy of Howard Law School and Charles Hamilton Houston.

In defining the Houstonian School of Jurisprudence, Smith describes it as "the analytical process which Houston uniquely and indelibly left imprinted in American jurisprudence." *Id.* at 6-7 n.22. Smith further urges:

> [I]t is incumbent upon the academic community to do what is compelled by history, the deeds and the thinking of those lawyers and judges, who shared or who presently share in common Houston's thoughts, and, that is, to be on with the task of fortifying the Houstonian thought process into a school of jurisprudence.

Id.

13. Howard University, in Washington D.C., was founded by an Act of Congress in 1867 and was named for General Oliver Otis Howard (1830-1909), the head of the post Civil War Bureau of Refugees, Freedmen and Abandoned Lands (Freedmen's Bureau) and who influenced Congress to appropriate funds for the school. Howard University was created to offer educational advantages without regard to race, creed, color or sex, but with a special obligation to provide advanced studies for Blacks. Howard offers classes in the liberal and fine arts, law, medicine, engineering, religion, human ecology and architecture. The School of Law had its first class in 1869, graduating 10 students, including the first black woman lawyer, who became the fourth woman to be admitted to the bar in the United States. The School of Law strives to provide professional leadership for ongoing social changes in the country and in the world.

trained in the law to be "social engineers."[14] As presented in Dr. Genna Rae McNeil's biography of Houston:

> A social engineer was a highly skilled, perceptive, sensitive lawyer who understood the Constitution of the United States and knew how to explore its uses in the solving of 'problems of . . . local communities' and in 'bettering conditions of the underprivileged citizens.' As he explained to his students, discrimination, injustice, and the denial of full citizenship rights and opportunities on the basis of race and a background of slavery, could be challenged within the context of the Constitution if it were creatively, innovatively interpreted and used.[15]

If the goals of the Houstonian School of Jurisprudence are to actualize the civil rights of all Americans, solve local problems, and improve the quality of life, then how are these goals to be achieved by those who practice or profess the law? A review of the monumental works on Dean Houston by Judge William H. Hastie, Judge Spottswood W. Robinson III, Dean Smith and Dr. McNeil, provides an excellent blueprint for building a scholarly career purposefully directed toward social and economic justice.[16] Using their work as a fertile source, I will examine Houston's personality, the activist methodologies he used to pursue social engineering goals, and the substantive philosophy and principles that undergird the Houstonian School of Jurisprudence. I will then consider how the model of Houston as scholar-activist can be applied to today's problems of the color line.

II. THE PERSONALITY OF CHARLES HAMILTON HOUSTON

To comprehend fully the Houstonian School of Jurisprudence,

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14. G. MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 84 (1983) [hereinafter MCNEIL].

15. *Id.* at 84-85.

16. The following works were used as primary source material for this article: Robinson, *No Tea for the Feeble: Two Perspectives on Charles Hamilton Houston*, 20 HOW. L.J. 1 (1977). This article is the printed version of an address given by Judge Spottswood W. Robinson on April 30, 1976 to the Washington Bar Association. Judge Robinson was chosen as a substitute speaker due to the untimely death of Judge William H. Hastie. Judge Robinson utilized a portion of a manuscript Judge Hastie had originally prepared for the address.

Smith, *supra* note 12, and Smith, *Toward Pure Legal Existence: Blacks and the Constitution*, 30 HOW. L.J. 629 (1987). These two works explore the jurisprudence of Charles Hamilton Houston and develop Dean J. Clay Smith's theory of pure legal existence.

G. MCNEIL, *supra* note 14. This is a comprehensive biography of Charles Hamilton Houston.

one must appreciate the "complex bundle of those inner qualities"[17] that formed the marrow of Houston's personhood. Certainly, his family background and excellent educational preparation readied him for his life's work.[18] However, personal experience and observation of the

17. Robinson, *supra* note 16, at 7.

18. Houston was born on September 3, 1895 in Washington, D.C., the son of William LePre Houston, who had completed his law studies and had been admitted to the bar of the District of Columbia in 1892, and Mary Ethel Hamilton Houston who was trained as a hairdresser. Charles received his primary and secondary education in the segregated Washington school system.

> Charles' parents were hardworking and sought to move whenever possible to better neighborhoods until they and their boy were situated comfortably in the narrow and secure environment of Washington's black middle class. From the example of a father who worked ceaselessly to place his family beyond the reach of severe economic proscriptions and assume a notable position in the professional class, Charles learned much about the industry and persistence of strong black men. From his mother's example, Charles learned much about the dignity of being identified as a negro. . . . She never hesitated to inform [her] patrons that she expected to be called 'Mrs. Houston', not 'Mary', [and] that she be admitted through their front doors, and to work without having to listen to disparaging remarks about the Negro race. From his father's and mother's frequent and fond references to a mainspring, a parental source of strength, Charles learned that there was a cause for great pride in his own heritage.

G. MCNEIL, *supra* note 14, at 27.

Charles attended M Street high school, "the classical high school for black children throughout the district." *Id.* at 28. M Street had as its purpose to prepare boys and girls for college. The curriculum was based on college entrance requirements and the faculty was composed of exceptionally well trained teachers. Though Charles was not a brilliant student, he did well in many subjects. "His English performances, for example, fluctuated from excellent to good to fair to good, while he excelled in such subjects as algebra and Greek. . . . On 11 June, 1911, at the age of fifteen, Charles was graduated from M Street High School." *Id.* at 30.

Charles was accepted at Amherst and attended there from September, 1911 to June, 1915.

> A year as the only student of African descent at Amherst had taught Charles lessons not assigned by any professor . . . [and] [a]lthough his race set him apart in some ways. Charles was known to his teachers because of his good work, not merely his race . . . the alienation born of racism continued to be a Catalyst for Charles' academic and personal self-reliance. On his own at Amherst College, he refused to harbor any debilitating feelings of inferiority. 'Let us . . ., since we believe that we are as divine as possible in this generation, resolve . . . to depend upon ourselves exclusively as much as possible, in all walks of life,' he declared to his father. Occasionally there were professors who simply could not believe that a black student could be worthy of a better-than-average grade, but the Houston standard was always excellence.

Id. at 32.

In his senior year, because of his excellent grades and good moral character, he was elected to Phi Beta Kappa and chosen as one of the revered "Bond Fifteen" scholars. Charles was graduated magna cum laude with a Bachelor of Arts degree. As a result of the influence of his father, Charles was given the position of Supply Instructor in English for the 1915-16 academic year at Howard University where he taught not only the required English courses, but also developed a specialized course in "Negro Literature." *Id.* at 33-36.

In 1919 Houston began his study of law at Harvard where he was elected to the editorial board of the *Harvard Law Review*, the second of his race to be so honored. *Id.* at 49-51. He was awarded the Sheldon Travelling Fellowship and studied in Spain at the University of Madrid for nine months in 1923-24. *Id.* at 53-54. He was admitted to the District of Columbia bar in 1924 and went into practice with his father. *Id.*

fires of racial injustice forged the steel of his motivation.[19] The bitter gall of segregation often drained him emotionally and physically.[20] For Houston, there was no other conclusion but that, "Racism must go!"[21]

Houston realized that "the fight for human freedom [was] interminable."[22] The struggle required great personal and professional sacrifice.[23] Moments with his family were rare. On his death bed, Houston wrote the following message to his then five-year-old son, Charles, Jr., in the Joshua Liebman book, PEACE OF MIND:

> Tell Bo I did not run out on him but went down fighting that he might have better and broader opportunities than I had without

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19. Houston and others had to fight to win the right to be commissioned as officers in the Army during World War I. See G. MCNEIL, *supra* note 14, at 36-40. In fighting for his country and the cause of democracy and freedom in a yet segregated U.S. Army, Houston contended with the racism of his compatriots. Judge Robinson observed:

> In France he suffered all of the insults, humiliations and crass injustices that his White American comrades in arms, 'both commanders and those in the ranks, heaped upon Black wearers of our country's uniform. It secured him to be treated as despised inferior, a lesser breed, by whites to whom he was vastly superior by any measure. His comfortable and rather protected upbringing made the shock of this experience greater in his case than for most black soldiers. In any event, the hurt and the bitterness of the young army officer would never be far from the consciousness of the eminent civil rights lawyer. Whatever his intellectual contribution to the law might have been, his enduring passion for racial justice and equality could not have been the same without this searing wartime experience.

Robinson, *supra* note 16, at 3.

20. Houston found the widespread segregation of public accommodations particularly galling. Benjamin Amos was a young lawyer with Houston's firm who recalled lunch on a particular day:

> At the time they had the Executive . . . at the corner of Fifth and F, and we had to go in by the fountain and watch clerks [of various] judges, and other whites belong[ing] to the court go in there, sit down, and eat. We'd have to stand there and take it out. This . . . day, Charlie, I, and a third person . . . got the lunch. We went up to the office, and he got inside and he couldn't stand it. . . . He stood in front of Gloria Young [who was at the switchboard]. . . . She was there with Lucretia Jackson [one of the secretaries] and said, 'I just can't take it any longer,' and threw stuff on the floor in the center of the office . . . and burst into tears. [In that] very emotional moment for him he said, one day, we'll see these streets open and Negroes . . . go anywhere and eat.

G. MCNEIL, *supra* note 14, at 185 (quoting an interview with Benjamin Davis).

One day, Houston's wife, Henrietta, left his son, Charlie Jr., with Houston while she kept an appointment. Joseph Waddy, Charlie Jr.'s godfather and a partner in Houston's firm recalled:

> Charlie had to go to the drugstore for something and he took the boy along. While Charlie was being taken care of, the boy climbed up on a stool by the soda fountain and the man behind the fountain said to him "Get down from there, you little nigger—you got no business here." When they got back to the office, we had to take Charlie into the backroom and give him a sedative.

Id. at 186-87 (quoting an interview with Joseph Waddy).

21. *Id.* at 183.

22. *Id.* at 185.

23. Houston sacrificed a lucrative private practice for the cause of justice. *Id.* at 59.

prejudice or bias operating against him, and in any fight some fall.[24]

The wretched experience of injustice provoked in Houston "a fierce determination—to succeed in all that he undertook to accomplish."[25] Houston's strength of will and depth of character drove him doggedly to pursue cases in the face of monumental obstacles. Even when hospitalized with a life-threatening heart attack, "Charles [would] disobey his doctor's orders and his father's wishes by having people from the office bring work in for him to do and receiving visitors with business concerns."[26]

Finally, Houston was a "perfectionist; . . . [who did not] allow any margin for mediocrity."[27] "Careful analysis, thorough research and intensive preparation" were Houston hallmarks in any lawyering experience.[28] While others may worry about meeting minimum levels of competency,[29] for Charles Houston, the call to the practice of law "was a call for the superlative."[30]

III. THE METHODOLOGY OF HOUSTON

Houston set about the task of making the Constitution a viable document for all Americans. To accomplish this monumental feat he utilized the following methods: (1) he developed a cadre of lawyers trained in the art of social engineering; (2) he designed strategies com-

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24. *Id.* at 212.

25. Robinson, *supra* note 16, at 6.

26. G. MCNEIL, *supra* note 14, at 209 (See discussion of the meeting with Gardner Bishop of the Consolidated Parent Group, Inc., an organization formed to attack segregation in the public school system of Washington, D.C.).

27. Robinson, *supra* note 16, at 6. Houston was adamant in his demand that his Howard students strive for perfection in their practice of law and in their pursuit of social justice.

> He had given his students a slogan: in the legal arena there would be 'no tea for the feeble, and no crepe for the dead.' And as earlier he had written to the law school prospect, he realized that he himself had not only [to] be good but superior, [and] just as superior in all respects as time, energy, money and ability permit[ted] and that he could 'not tolerate any ceiling on his ambitions or imagination.'

Id. at 6.

28. *Id.*

29. American Bar Association, FINAL REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON PROFESSIONAL COMPETENCE (1983).

30. Robinson, *supra* note 16, at 6.

> A prodigious worker, he dedicated himself fully to the task, shutting out all else around him and directing all of his unbounded energy to it. Long hours, incessant toil and meticulous attention to each element of the problem were the keys. Through them, the result invariably was a self-satisfying product, and a sterling performance in a case.

Id.

mensurate with the task; and (3) he sought to mobilize the masses in support of this "interminable struggle." I will briefly discuss each of these methods.

A. *Developing A Cadre*

As noted by Judge Robinson (quoting Judge Hastie), when Charles Houston was appointed vice-dean of the Howard Law School, then Howard President Mordecai Johnson expressed his hopes for the Law School:

> a vision of superior professional training and extraordinary motivation calculated to prepare the professional cadres needed to lead successful litigation against racism as practiced by government and sanctioned by law.[31]

With the fierce determination that was his stock-in-trade, Houston led the transformation of Howard Law School from a part-time evening program to a fully-accredited, day program of the first rank.[32] Houston succeeded in crafting a legal education program that produced the best trained black lawyers in the nation.[33] Distinguished lawyers such as Thurgood Marshall, Spottswood Robinson, Oliver Hill, and Pauli Murray graduated from the Howard University School of Law and went on to lead the fight for social justice.[34]

Houston also cultivated relationships with practicing lawyers around the nation. As Special Counsel for the N.A.A.C.P., he worked with counsel from around the country developing test cases.[35] Later, as a private practitioner who was "free to hit and fight wherever the

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31. *Id.* at 3-4 (quoting William H. Hastie).

32. *See* G. MCNEIL, *supra* note 14, at 69-75.

33. Charles Houston proposed that the 'immediate objective' of the school should be 'to make itself a more efficient training school' in order to fulfill the race's need for 'capable and socially alert Negro lawyers.' As a training school, Howard Law School should seek to 'equip its students with the direct and professional skills most useful to them' and, stressed Houston, to 'give them as deep and as broad a societal background as possible.' . . . Forced out into private practice directly from school, because racism usually eliminated most clerkship opportunities, black law students needed training with particular attention to the 'legal aspects of Negro economic, social and political life.'

Id. at 71 (quoting Houston).

34. *See generally* Comment, *Justiciable Cause: Howard University Law School and the Struggle for Civil Rights*, 22 HOW. L.J. 283 (1979); P. MURRAY, SONG IN A WEARY THROAT 220-31 (1987).

35. G. MCNEIL, *supra* note 14, at 140.

circumstances call[ed] for action,"[36] Houston worked with numerous lawyers, including Thurgood Marshall and Spottswood Robinson, on many of the landmark civil rights cases.[37] These working relationships were always an educational experience for those lawyers fortunate enough to participate in a litigation endeavor with Houston. As Judge Robinson has observed:

> The truth is that Charlie was a law teacher all of his days. To join him in some legal undertaking was a valuable educational experience. Surrounded by an aura of extreme competence, his very presence in legal dialogue commanded respect. His wise advice, accompanied by explanation of the analysis and synthesis forerunning it, was a revelation in itself. Just to watch him in action was to witness a demonstration of the way it ought to be done.[38]

B. *Designing Strategies*

To bring his broad-ranging vision of social justice to full reality, Houston needed a carefully designed plan of action. In fact, he faced every task, big or small, with a preconceived, thorough plan designed to accomplish a given end. Again, Judge Robinson described the process most succinctly: "To his extraordinary mind and talent he added imaginative approaches, thoughtfully conceived plans of action and decisive modes of execution."[39]

An important part of Houston's jurisprudence was to apply "imaginative approaches" to basic constitutional principles in the struggle for social justice. For example, in the struggle for equality in educational opportunity, Houston confronted the "separate but equal" doctrine of *Plessy v. Ferguson*,[40] the rule of law in the states that honored Jim Crow. Some, like Nathan Margold, Houston's predecessor as Special Counsel to the N.A.A.C.P., sought a frontal assault on the bastion of segregation.[41] Houston, however, recognized the limits of this approach given the tenor of the time and the pervasiveness of ra-

36. *Id.* at 149 (quoting Houston).

37. *See* discussion *infra* note 14 and accompanying text.

38. Robinson, *supra* note 16, at 7.

39. *Id.* at 5-6.

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

41. G. MCNEIL, *supra* note 14, at 135.

cial discrimination.[42] He reckoned that one should take the law as it stood and push the doctrine of separate but equal to its logical limits. Houston knew that separate was never intended to be equal, and that under its strict application, the doctrine would fall of its own weight, as it did in *Brown v. Board of Education*.[43]

Houston held the view that "the program of litigation [should] be conducted as a protracted legal struggle to secure favorable legal precedents, and thereby lay a foundation for subsequent frontal attacks against racial discrimination and segregation."[44] He proceeded by "devising 'positionary tactics' or 'the steps [one] takes to move from one position to another'—and clearly articulating the rationale for these tactics."[45] In the arena of segregated educational systems, this strategy called for challenging the differentials in salaries between white and black teachers in the same system, the "inequalities of transportation facilities" provided to black and white school children, and the "inequalities in graduate and professional education usually offered white students in universities supported by state funds."[46]

To effect this imaginative approach, Houston also crafted "thoughtfully conceived plans of action." These plans formed the map for the march towards equality in education.[47] The road Houston took was much broader than the narrow path usually travelled by litigating lawyers. The masses of black people had to see the plan as a viable one. Furthermore, the people had to adopt the plan fervently and participate intimately in the struggle.[48]

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42. Houston realized that the law and those who interpreted the law were often bound by precedent and therefore slow to change. He observed:

> We must never forget that the public officers, elective or appointive, are servants of the class which places them in office and maintains them there. It is too much to expect the courts to go against the established and crystallized social customs, when to do so would mean professional and political suicide. . . . We cannot depend upon the judges to fight our battles.

Id. at 135 (quoting Houston).

43. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

44. *Id.* at 134.

45. *Id.*

46. *Id.* at 136; *See also* KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976). *See generally Brown, supra* note 43, at 135-54.

47. *See generally* G. MCNEIL, *supra* note 14, at 141-42 for Houston's eight-step procedure for attacking discrimination in county school systems.

48. *Id.*

> Houston indicated steps black citizens could take to secure better schools. He emphasized that 'the first item on any program for improvement of public schools for Negroes

Finally, Houston insisted on "decisive modes of execution."[49] He was highly selective about the test cases he chose.[50] The fact situation and the procedural background had to be strong enough to avoid a dismissal on mere technicalities.[51] On the other hand, losing a discrimination suit could have ancillary benefits such as having laws placed on the books to provide school transportation for black students or out-of-state scholarships for graduate or professional education.[52] Merely filing a suit was sometimes a method for obtaining access to vital information such as a state's dual salary guide for teachers.[53]

C. *Mobilizing the Masses*

An integral part of carrying out this strategy of positionary tactics was to bring the social justice message to the forefront of the pub-

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must be convincing the mass of Negroes themselves that they are a part of the public which *owns*, and *controls* the schools.' Although there were some public schools administered and attended exclusively by whites, 'both schools belong to one and the same system, and the system belongs to the public. . . .'

Id. at 141.

49. Houston's program for the legal struggle against educational discrimination was as follows:

> He selected 'three glaring and typical discriminations as focal points for legal action' . . .; [(1)] differentials in teachers' pay between white and Negro teachers having the same qualifications, holding the same certificate, and doing the same work; [(2)] inequalities in transportation facilities which lie at the basis of all problems of consolidated rural schools; [(3)] inequalities in graduate and professional education usually offered white students in universities supported by state funds, while Negro education is cut off with the undergraduate work in college.

G. MCNEIL, *supra* note 14, at 136 (quoting Houston).

50. *Id.*

51. The first graduate school case brought by Houston and the NAACP, that of Donald Gaines Murray against the University of Maryland Law School in 1935, fulfilled the requisite qualifications of a solid test case:

> The situation represented a 'sharply defined issue' which could be 'supported by demonstrable evidence.' It presented 'key discriminations' while it both provided an opportunity for enforcement though 'auxiliary legal proceedings' and 'furnished a focus or springboard for extending attacks on a larger front. . . .' Houston believed it, 'a chance to develop under oath by examination of witnesses and . . . documents, the discriminations from which Maryland Negroes suffer.'

Id. at 138 (quoting Houston).

52. *Id.* at 136.

53. *Id.* McNeil emphasized this point with a quote from Houston:

> We have very little money, very few trained investigators. But all we need is about $10.00, then we can file a case in court. Five dollars more, and we can bring the whole state education department into court with all its records, put each official on the stand under oath and wring him dry of information.

Id.

lic forum.[54] Not only did the law need to be reformed, but the entire social milieu had to be transformed to make equal justice under the law a reality.[55] Accordingly, local organizations across the nation were encouraged to fight against systemic educational inequities.[56] McNeil makes the following cogent observation about Houston's philosophical and strategic approach when she recounts a discussion Houston had with Howard Thurman, then dean of Howard University's chapel:

> No teacher's salary case would be won without significant mass support, and mass support could be generated only if he [Houston] and the NAACP cared about mass education. How could one use a hostile or indifferent press to educate the masses to a sympathetic understanding of the constitutional rights of Negroes? [Houston] answered his own question: Make the civil rights struggle news by proceeding with meeting after meeting and case after case that the media would have to cover because it involved elected or appointed officials. Maximum exposure would work on the public and create a new sensitivity, a new apperceptive mass. Effective legal strategy was more than courtroom technique and knowing the law.[57]

Finally, there were some times when direct action was necessary. Public officials had to be confronted directly. Black parents had to boycott the schools. Sacrificial action was required if it would grab the public's attention and focus it on the horrors of segregation.

IV. THE SUBSTANTIVE JURISPRUDENTIAL GROUNDING OF HOUSTON

To know what Houston doggedly fought for is to understand the jurisprudential undergirdings of his efforts. He stood on sound, funda-

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54. Houston routinely made public speeches and wrote articles for THE CRISIS, the NAACP's official magazine. He correctly sensed the necessity of raising the consciousness of all Americans.

> Houston's suggestion regarding a remedy for this problem was that black people, their friends, and civil libertarians seek opportunities to state their case to the white public since the old channels of publicity were inadequate and the radio was not customarily open for discussions of speeches promoting the concept of racial equality. Houston also encouraged blacks to 'cooperate in public forums, . . . agitate for more truth about the Negro [in education institutions and] . . . [a]long with this educational process . . . be prepared to fight, if necessary, every step of the way.'

Id. at 139 (quoting Houston).

55. *Id.* at 152.

56. *Id.* at 153.

57. *Id.*

mental constitutional principles—most significantly the fourteenth amendment—at the center of which is the essence of American democracy:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[58]

In essence Houston saw the rights of citizenship and the privilege of full enjoyment of those rights as belonging to all citizens. Any dimunition of those rights or the prevention of the enjoyment of them did violence to the Constitution and worked a grave injustice to the individual citizen. The principle has been described by Dean J. Clay Smith as the "pure legal existence."[59] In discussing the fact that African-Americans have endured disparate and discriminatory treatment under law and custom, and how such treatment negated citizenship rights, Smith articulated the principle of pure legal existence as follows:

> Today, by-and-large, the lack of recognition of the metaphysical worth of black people stems from the mistaken belief that black people are less than human . . . . To the extent that the uneven and disparate application of the law has left any notion of the lack of the worth and human dignity of black people, or has interfered in any way with their natural right to freely participate in a republic born on a philosophical base that all men are created equal under law—to that extent, black people have been denied a pure legal existence. Pure legal existence looks to the future but studies the past of the law that touches black people and those similarly situated, in order to trace, to ascertain, and to analytically assess the growth of how near they are to an existence which is free from racial discrimination. Pure legal existence, then, is an existence, under law, which is barren of racial discrimination in law and in its application; it encompasses being in a society in which the accouterments of slavery are no more.[60]

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58. U.S. Const. amend. XIV, § 1.

59. Smith, *supra* note 12, at 4-5.

60. *Id.* at 5. Professor Smith further argues that the decision not to grant pure legal existence dates back to the Framers of the Constitution. Smith, *Towards a Pure Legal Existence,*

Smith, like Houston, premised his definition on the realization that anyone, regardless of race, color or creed, who meets the criteria of United States citizenship, must be treated equally under the law.[61] Each individual has the same bundle of rights and each individual may not be denied those rights without the due process of law.

Moreover, our fundamental national charter is premised on a doctrine of inclusion. Each individual is an inseparable part of the body politic. Each individual is a fellow countryman or countrywoman to the next individual. When the Constitution proclaims "We the People," it announces that this is a nation of people with a rich, common heritage and shared values. Although our direct ancestors came over on different boats, as it has often been said, we are all in the same boat now.[62] More than anything else, Houston fought for the full in-

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supra note 16, at 631-33. Smith categorizes this as a "moral flaw." *Id.* at 631. Similarly, Ralph Ellison, in considering Thomas Jefferson's hypocrisy in writing the Declaration of Independence's indictment of King George III's support of the slave trade, recognized the moral failings of the Framers:

> Thus the new edenic political scene incorporated a flaw similar to the crack that appeared in the Liberty Bell and embodied a serpent-like malignancy that would tempt government an individual alike to a constantly recurring fall from democratic innocence. . . . Portentously, the founding fathers' refusal to cleanse themselves was motivated by hierarchical status and economic interests. It was rationalized by the code of social manners that went with their inherited form and manner of speech, their linguistic style. Revolutionary fervor notwithstanding, they were gentlemen, and Jefferson's indictment provided these men the convenient excuse for not violating their private interests and their standards of good taste. Thus the glaring transparencies of Jefferson's rhetoric afforded them a purely formal escape from the immediate dilemma posed by the conflict between freedom and slavery, and allowed them to use social tact as a tactic of moral evasion.

Ellison, *Perspective on Literature*, 18 CARLETON MISCELLANY 69, 76-77 (1980).

61. McNeil emphasizes the point in presenting a speech given by Houston to the YWCA annual convention on May 5, 1934. She quotes:

> I ask you to take the question out of the realm of abstractions and to restate it in terms of human relationships. . . . [U]nderstand that it is a question of reconciling the wants and desires of different human beings, each equally entitled to life, liberty, and the pursuit of happiness. . . . We are not, asking you to take up the cross out of only sentimental interest in the Negro. . . . We do expect you to throw all you energies twenty-four hours a day in a fight for elemental justice without regard to race, class or creed.

G. MCNEIL, *supra* note 14, at 100.

62. Perhaps the biggest obstacle to overcome in the struggle to become part of American society is the fear white Americans have of black Americans. In explaining this fear of blacks, especially by the Framers of the Constitution, Dean Smith argues:

> Black people were not considered originally free. If slaves were to revert to their free status, a belief always held by Blacks, this would have vested them with the same rights and privileges as whites. The thought of such reversionary rights created a fear of Blacks. Some believed that Blacks posed dangers to the State and such discourse was used to prolong the institution of slavery.

Smith, *supra* note 12, at 634.

clusion of African-Americans into the fabric of the American community.[63] He wanted all Black children, especially his own son, to partake fully of the same menu of opportunities regularly provided to white children.[64] For Houston, struggle was to become part of the American action, to have a proportionate piece of the American pie and not have to settle for mere morsels. Houston believed that it was imperative that "no Negro tolerate any ceiling on his ambitions or imagination."[65]

The principle of pure legal existence and the doctrine of inclusion were clearly evident in the three major fields upon which Houston fought his battles: housing, education, and employment.

A. *The Right to Secure Housing*

The ability to choose freely an abode is the ability to take care of body and soul—to provide shelter and warmth for one's family and to choose freely the best home available within one's means. On a more subtle level, what is at issue is the opportunity to live in a place with clean water and sanitary conditions and with access to medical services, food and shopping facilities. These are all part and parcel of "the pursuit of life, liberty and happiness."[66]

Houston's major housing fight was against restrictive covenants,[67] agreements between contiguous land owners not to sell their property

63. Professor Smith, in commenting on the Bicentennial of the United States Constitution, reminds us that the struggle to make America live up to its jurisprudential principles continues:

> Black Americans join the nation in celebrating the bicentennial of our instrument of rule. However, this year will cause black Americans to speak the truth about the agony, the violence, the human disregard, the ignorance, and the economic and human despair resulting from the exclusions of Blacks from the definition and the panoply of causal effects can be easily documented.
>
> While many Americans will dwell on the writings and political activities of Jefferson, madison, Jay, and leading contemporary constitutional law scholars, many Black Americans will use this bicentennial year to honor the unsung national heroes and heroines, the men and women of color who were deprived of their liberty by the phantom whims of segregated systems whose doors closed to other than white faces.

Id. at 630.

64. G. MCNEIL, *supra* note 14, at 168.

65. Robinson, *supra* note 16, at 5 (quoting Houston).

66. Declaration of Independence, para. 2 (U.S. 1776).

67. As part of his private practice, Houston whittled away at *Corrigan v. Buckley*, the 1926 Supreme Court decision declaring racially restrictive covenants enforceable by the courts, prosecuting after 1940 such District cases as *Arthur Bishop et al. v. Mabel Chamberlain et al., Sallie Broadway et al. v. Arthur Bishop et al., Arthur Bishop et al. v. Raphael G. Uriolo et al.* in the U.S. District Court and the U.S. Court of Appeals.

G. NCNEIL, *supra* note 14, at 177.

to anyone of a different race, color, creed or religion.[68] Here, Houston scored major victories in the United States Supreme Court. In *Shelley v. Kraemer*[69] and *Hurd v. Hodge*,[70] the Court was called on to decide if a private restrictive covenant, which prohibited a black citizen from purchasing property from a white citizen, violated the Constitution, and if the courts could be called upon to enforce these covenants.

In its analysis, the Supreme Court recognized first the value of the rights at stake:

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the [f]ourteenth [a]mendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that [a]mendment as an essential pre-condition to the realization of other basic civil rights and liberties which the [a]mendment was intended to guarantee.[71]

In *Shelley v. Kraemer*, the Court found that the state was not merely passively facilitating a private action, but was engaging in cognizable state action.[72] Such action could not be conducted by the state courts in contradiction of the rights guaranteed by the federal Constitution. Similarly, in *Hurd v. Hodge*, federal courts could not be called upon to enforce racially restrictive covenants.[73] Chief Justice Vinson,

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68. In his dissent in Spencer v. Kugler, 404 U.S. 1027, 1029-1030, fn. 1, (1972), Justice Douglas lays out the history of restrictive covenants:

> Historically, racial zoning ordinances imposed by local law were a formidable factor in creating and maintaining racially exclusive neighborhoods. Although such ordinances were held unconstitutional. As early as 1917, some communities continued to enforce them, even as late as the 1950's.
>
> Judicial enforcement by the State Courts of racially restrictive covenants has been another important factor. Although these covenants were private agreements to excluded members of designated minority groups, the fact that they were enforceable by the courts gave them maximum effectiveness. No until 1948 was the judicial enforcement of such covenants held unconstitutional, and not until 1953 was their enforcement by way of money damages held unlawful. Racially restrictive covenants no longer are judicially enforceable, but they still appear in deeds and the residential patterns they helped to create still persist. Various exercises of local government authority, such as decisions on building permits, the location of sewer and water facilities, building inspection standards, zoning and land use requirements, and the power of eminent domain have been used to exclude minority group of members from designated neighborhoods and even from entire communities . . . [T]he categorical distinction between de jure and de facto segregation is not as clear-cut as it would appear.

Id.

69. Shelly v. Kraemer, 334 U.S. 1 (1947).

70. Hurd v. Hodge, 334 U.S. 24 (1947).

71. *Shelly*, 334 U.S. at 10.

72. *Id.* at 19.

73. *Hurd*, 334 U.S. at 34-35. Chief Justice Vinson wrote:

writing for the Court, succinctly stated the holding:

> The task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly. Where, however, it is clear that the action of the State violates the terms of the fundamental charter, it is the obligation of this Court so to declare . . . .
>
> Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color.[74]

Chief Justice Vinson's holding is but a restatement of Smith's principle of pure legal existence. *Shelley* and *Hurd* therefore recognize the existence of basic constitutionally protected civil and political rights. Further, these cases uphold the proposition that as each individual seeks to procure the necessities for human survival, he does so with open access to the full range of the American community. Thus, a citizen's basic rights are protected, and he is included in the fabric of society.

B. *The Right to Secure Education*

Houston's struggles in the area of education reflect the twin themes of pure legal existence and inclusion in society's fundamental institution. While some specifics of the education struggle were discussed above, this section will focus on the importance of combatting racial discrimination in education.

Historically, states did not provide comprehensive education for their citizens. Once free, however, public compulsory education became a fundamental government service that states were obliged to provide to all citizens.[75] In discharging this obligation, states must

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> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy it is the obligation of courts to refrain from such exertions of judicial powers.

Id. at 34-35.

74. *Shelley*, 334 U.S. at 23.

75. For a general study of the development of public education prior to the [fourteenth] [a]mendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II; Cubberley, Public Education in the United States (1934 ed.), cc.

provide each child, regardless of race, with an educational bundle of equal quality. This was the major premise of Houston's strategy in education.

In confronting the issue of segregated education, Houston proceeded by asserting the individual right of each student to an education of a quality equal to the education received by each other student. His fight for equal opportunity in graduate education serves as an excellent example of his strategies and tactics.

Houston first challenged the laws of Maryland, which enforced segregated education at the University of Maryland School of Law, in the case of *Pearson v. Murray*.[76] At issue was whether the state could provide scholarships for black graduate students to study law only at out-of-state schools without violating the equal protection clause of the fourteenth amendment.[77] Donald Murray, except for his race, was

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II-XII. School practices current at the time of the adoption of the [f]ourteenth [a]mendment are described in Butts an Cremin, *supra*, at 269-275; Cubberley, *supra* at 288-339, 408-431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South e.g., the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408-423. In the country as a whole, but particulary in the South, the War virtually stopped all progress in public education. *Id.*, at 427-428. The low status of Negro education in all sections of the country, both before and immediately after the War, described in Beale, A History of Freedom of Teaching in American Schools (1941), 112-132, 175-195. Compulsory school attendance laws were not generally adopted until after ratification of the [f]ourteenth [a]mendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra* at 563-565.

Brown v. Bd. of Educ., 347 U.S. 483, 493 n.4 (1954).

The Supreme Court noted in *Brown*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown, 347 U.S. at 493 n.4.

76. Pearson v. Murry, 169 Ms. 478, 182 A. 590 (1936). *See also* G. MCNEIL, *supra* note 14, at 138-139.

77. *Pearson*, 169 Md. at 478, 182 A. at 590. The Maryland Court of Appeals gave a clear statement of the matter:

Separation of the races must nevertheless furnish equal treatment. The constitutional

otherwise qualified to be accepted at the University of Maryland.[78] The Maryland Court of Appeals noted the inadequacy of a remedy that provided for an out-of-state scholarship:

> Going to any law school in the nearest jurisdiction would, then, involve him in considerable expense even with the aid of one of the scholarships should he chance to receive one. And as the petitioner points out, he could not there have the advantages of study of the law of this state primarily, and of attendance on state courts, where he intends to practice.[79]

The Maryland Court of Appeals held that Murray had to be admitted to the University of Maryland Law School.[80] Although the court did not overturn the segregated educational system, it recognized that equality of educational opportunities had to be provided by the State of Maryland.[81]

The next "positionary tactic" Houston utilized was to challenge a state system which had the ability to offer in-state educational facilities in segregated schools for students of color.[82] This was accomplished in *Missouri ex rel Gaines v. Canada*.[83] Lloyd Gaines had sought admission to the University of Missouri School of Law.[84] Missouri provided out-of-state scholarships and had the ability to create a law program at Lincoln University (the school reserved for Missouri students of color). The real controversy focused on the subjective quality of the educational bundle each student received.[85] Houston stated the matter plainly:

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requirement cannot be dispensed with in order to maintain a school or schools for whites exclusively. That requirement comes first. **** And as no separate law school is provided by this state for colored students, the main question in the case is whether the separation can be maintained, and negroes excluded from the present school, by reason of equality of treatment furnished the latter in scholarships for studying outside the state were law schools are open to negroes.

Id. at 485, 182 A. at 593.

78. *Id.* at 478, 182 A. at 590.

79. *Id.* at 486, 182 A. at 593.

80. *Id.* at 489, 182 A. at 594.

81. No separate school for colored students has been decided "upon and only an inadequate substitute has been provided. Compliance with the Constitution cannot be deferred at the will of the state. Whatever system it adopts for legal education now must furnish equality of treatment now." *Id.*

82. *See generally* Houston, *A Challenge to Negro College Youth*, 45 CRISIS 14-15 (Jan. 1938); G. MCNEIL, *supra* note 14, at 143-44, 149-51.

83. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

84. *Id.* at 342.

85. *See id.* at 346-48.

> But what do the white students get for their money? First and foremost, they preserve the rights and dignity of their citizenship. Second, they get the benefit of all the tax moneys which the state of Missouri year after year pours into the University of Missouri. Third, they have the advantage of any specialization which the University of Missouri gives to Missouri problems, and the advantage of associating with the future leaders of Missouri. In exchange for this the state banishes its Negro students with [a] hundred dollars or so for each as tuition in an out-of-state university where they enroll not by right, but by tolerance as strangers and outsiders.[86]

The Missouri Court of Appeals, unconvinced by such rational constitutional analysis, upheld the trial court's denial of a writ of mandamus compelling the University of Missouri to admit Gaines.[87] The United States Supreme Court found that Gaines had not been treated equally on a privilege given to white law students in Missouri. The Court found that Gaines' constitutional right to equal protection under the law had been violated.[88] Gaines was admitted to the law school at the University of Missouri.

Gaines and *Murray* laid the groundwork for two subsequent decisions: *Sweatt v. Painter*[89] and *McLaurin v. Oklahoma State Regents.*[90] In those cases, decided on the same day, the United States Supreme Court considered the subjective quality of educational opportunities. In *Sweatt*, the Court noted that even though the State of Texas had recently created a law school for black students, the newly created school did not compare to the vastly superior facilities, faculty and

86. Houston, *supra* note 81, at 14.

87. *Gaines, supra* note 82, at 339.

88. The court held:

> The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rest wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of duty of the State to supply the legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

Id. at 349-50.

89. Sweatt v. Painter, 339 U.S. 629 (1950).

90. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

opportunities available at the University of Texas.[91] The University of Texas was therefore compelled to offer admission to black students.[92]

The *McLaurin* case stands for the proposition that, once admitted, the black student could not be kept segregated from the rest of the student body. A black student must be allowed to interact freely with fellow students in the lively interchange of ideas.[93] Houston, unfortunately, did not live to see these landmark decisions handed down.[94] However, his vision laid the groundwork for these cases and established sufficient precedent to bring successfully *Brown v. Board of Education*.[95]

We must consider the struggle for equality in educational opportunities as a demand for inclusion in the larger American society. Certainly this demand entails the notion that the pursuit of education is more than a personal endeavor. New knowledge learned in late-night hours of study must be tested and refined in the bright light of day. It is only in the intellectual interchange with like-minded souls that true knowledge becomes rooted in, and made real to, the individual learner.[96]

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91. The Court found:

> [W]e cannot find substantial equality in the educational opportunities offered white and negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Sweatt, 339 U.S. at 633-34.

92. *Id.* at 633-34.

93. McLaurin, in pursuing a doctorate in education, was originally denied admission to the University of Oklahoma. *McLaurin*, 339 U.S. at 638. He successfully sought injunctive relief based on the *Gaines* cases and was admitted to the University of Oklahoma after the Oklahoma legislature amended its segregation statute. *Id.* at 638-40. However, the amended statute required him to receive his education segregated from the general student population. He was eventually "assigned to a seat in the classroom in a row specified for colored student; he [was] assigned to a table in the library on the main floor; and he [was] permitted to eat at the same time in the cafeteria as other students, although here again he was assigned to a special table." *Id.* at 640.

94. Houston died April 22, 1950. *Sweatt* and *McLaurin* were decided on June 5, 1950.

95. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

96. The Supreme Court in *McLaurin* saw the wisdom of requiring the University of Oklahoma to remove the barriers to Mr. McLaurin's full pursuit of knowledge:

> The result is that appellant is handicapped in his pursuit of effective graduate instruc-

Moreover, it is only when an individual can drink from the fountain of learning as deeply as his or her abilities and determination permit, that that individual can partake of the full blessings of life, liberty and the pursuit of happiness. Education, whether academic or technical, liberal arts or industrial arts, the tomes of ancient literature or of basic literacy, is the key to all that our society has to offer.[97] To fail in the fight for equality of education, would be to make the veil of which DuBois spoke a permanent wall with only small peepholes through which a significant part of society could glimpse, but never embrace, the richness and abundance that is America. The larger, societal implications of this travesty were recognized by Houston:

> Discrimination in education is symbolic of all the more drastic discriminations which Negroes suffer in American life. And these apparent senseless discriminations in education against Negroes have a very definite objective on the part of the ruling whites to curb the young [Blacks] and prepare them to accept an inferior position in American life without protest or struggle. In the United States the Negro is economically exploited, politically ignored and socially ostr[a]cized. His education reflects his condition; the discriminations practiced against him are no accident.[98]

C. *The Right to Secure Employment*

As he did in housing and education, Houston fought to secure the

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tion. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and in general, to learn his profession.

Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which product such inequalities cannot be sustained.

McLaurin, 339 U.S. at 641.

97. McNeil notes that as Special Counsel to the NAACP, Houston was dedicated to the elimination of discrimination in transportation and education, but perceived discrimination in education to be more critical. She states, quoting Houston:

> Although he had observed the evils resulting from discrimination in transportation and did not wish to minimize them, Houston had also seen the pressure of an economic depression lead to the sacrifice of black education in order to preserve white education. Houston insisted that black people could not let this continue. Since education is a preparation for the competition of life, he noted, 'a poor education handicaps black youth who with all elements of American people are in economic competition.'

G. MCNEIL, *supra* note 14, at 132 (quoting Houston).

98. *Id.* at 134.

pure legal existence of black workers and their inclusion into the larger realms of the economic marketplace. Although he was not an expert on labor law, Houston accepted the challenge to fight against racism in the workforce.[99] He focused particularly on employment in the railroad industry.[100]

His primary efforts in ending employment discrimination centered on assisting the Association of Colored Railway Trainmen and Locomotive Firemen in their efforts at organization and in their struggle to keep the white unions from bargaining away black jobs.[101] He also assisted the efforts of others, such as A. Philip Randolph and the Sleeping Car Porters Union, to protect the rights of black railroad workers.[102] Houston also worked with and served on the President's Fair Employment Practices Committee (FEPC) as an assistant special counsel and he also served as a member of the FEPC.[103]

The first step in the Houston strategy in the fight for the rights of

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99. *Id.* at 156.

100. *See generally id.* at 156-75.

101. McNeil describes the obstacles the railroad workers were up against:

> The railroad labor world, which included black workers, had boasted racist practices and policies since the nineteenth century. Four brotherhoods had always restricted their memberships to whites—the Brotherhood of Locomotive Engineers, the Order of Railway Conductors, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen founded in 1863, 1868, 1873, and 1883 respectively—dominated railroad labor. Unable to bar blacks entirely from the crafts, however, they traditionally wielded their power—substantiated by their numbers—to eliminate blacks from the operating department of the industry and to better the working conditions, wages, and positions of their members.

Id. at 158. For a discussion of the history of the struggle for black employment rights in the railroad industry, *see generally* Houston, *Foul Employment Practice on the Rails*, Crisis, October, 1949, at 269 [hereinafter Houston, *Foul Employment Practice*].

102. G. MCNEIL, *supra* note 14, at 162-63.

103. *Id.* at 165-67. McNeil describes the functions of the President's Fair Employment Practices Committee as follows:

> The committee handled complaints of three classifications from across the nation: those against federal government agencies, those against employers and unions with companies and corporations having federal government contracts, and those against employers and the union connected with war industries. To do its work, the FEPC depended not only on the extensive headquarters' staff of lawyers, examiners, field investigators, and information officers, but also in large measure on the regional offices.

Id. at 166-67. Houston's work for the FEPC often took significant amounts of time and required extensive travel across the country to hear employment discrimination complaints. *Id.* at 171. In 1945 Houston was instrumental in challenging Washington, D.C.'s Capital Transit Company which refused to hire and promote "to positions as bus operators, checkers, motormen, or streetcar conductors. . . ." *Id.* at 172. After extensive hearings the FEPC issued a directive to Capital Transit ordering it to end its racially discriminatory employment practices. *Id.* President Harry Truman countermanded the FEPC's directive on the grounds that such action was beyond the scope of the FEPC's authority. *Id.* at 174. Houston resigned from the FEPC in protest. *Id.* at 173-75.

railroad workers was to use the federal Railroad Labor Act as the basis for asserting that any representative bargaining agent of a work unit, who was authorized to collectively bargain for all members of that work unit, must fairly and nondiscriminatorily represent all employees in that work unit.[104] This effort asserted the individual rights of Blacks already employed.

Houston next attacked employment practices which impeded the initial hiring of black workers.[105] His efforts bore fruit in the landmark decisions in *Steele v. Louisville & Nashville Railroad Co.*[106] and in its companion case, decided the same day, *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*.[107] In both cases, black locomotive firemen challenged the efficacy of the all-white Brotherhood of Locomotive Firemen and Enginemen to bargain away black firemen's jobs.[108] At issue was

> whether the Railway Labor Act [citations omitted] imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation.[109]

In examining the purpose of the Railway Labor Act, the Court determined that in representing a craft of employees, the Brotherhood, like any other union, must "represent all of its members, regardless of

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104. *Id.* at 170-71.

105. *Id.*

106. Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

107. Tunstall v. Bhd. of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944). The *Tunstall* case was brought originally in the federal district court, while the *Steele* case was initiated in the state courts of Alabama.

108. *See Steele*, 323 U.S. at 192. The Supreme Court noted the invidiousness of the discrimination:

> On March 28, 1940, the Brotherhood, purporting to act as representative of the entire craft of firemen or giving them the opportunity to be heard, served notice on respondent Railroad and on twenty other railroads operating principally in the southeastern part of the United States. The notice announced the Brotherhood's desire to amend the existing collective bargaining agreement in such a manner as ultimately to exclude all Negro firemen from the service. By established practice on the several railroads so notified only white firemen can be promoted to serve as engineers, and the notice proposed that only promotable, i.e., white, men should be employed as firemen or assigned to new runs or jobs or permanent vacancies in established runs or jobs.

Id. at 195. In pursuit of this policy black firemen were reassigned to less remunerative and more dangerous jobs and white firemen with less seniority replaced them. *Id.* at 195.

109. *Id.* at 192.

their union affiliations or want of them."[110] The Brotherhood was, by statute, empowered to act for all firemen and subsequently had the power to determine the employment rights of the represented craft.[111] Correspondingly, the Brotherhood had "the duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them."[112] This duty placed on the Brotherhood, as the representative agent established for the Black firemen, a federal right to be fairly represented and saw that right as one that could be enforced in a court of law.[113]

The Court grounded its decision on a strict, statutory interpretation of federal law and recognized a protectable federal right available to all railway workers represented by a union, regardless of the workers' race, color or creed. Justice Murphy recognized the broader significance of the issue presented to the Court. In a concurring opinion he vigorously stated:

> The utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation. To decide the case and to analyze the statute solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees, is to make the judicial function something less than it should be.[114]

Justice Murphy went on to acknowledge that, more fundamentally, the Railway Labor Act permitted the authorization of a bargaining representative which by its charter and by-laws specifically

110. *Id.* at 200.

111. *Id.* at 202-03.

112. *Id.* at 203. The Court was very specific in defining the nature of the duty to represent all members of the craft fairly:

> So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent nonunion or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action.

Id. at 204.

113. *See id.* at 204-07; *see also Tunstall*, 323 U.S. at 210.

114. *Steele*, 323 U.S. at 208.

excluded black firemen from membership.[115] For Justice Murphy, this exclusion cut to the heart of constitutional jurisprudence and the duty of the Supreme Court. He proclaimed, "[a] sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation."[116]

The issue was not just a matter of judicial determination of a federally created right. The issue was the nature and quality of our constitutional democracy as reflected in the heart of our workforce. Who was to be included and guaranteed protection in our democratic society where the right to earn a livelihood is essential to freedom? Houston fully understood this aspect of the struggle. He insisted that securing employment rights for railway workers was "basic to the whole concept of economic democracy."[117] There could be no justification for the major Brotherhoods' exclusion of black and other Americans based on their national origin, culture or religion. All Americans patronized the railways and paid taxes to support them.[118]

Furthermore, the federal government, as the duly constituted representative of all the people, should not countenance the exclusion of

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115. Justice Murphy concluded:

> The cloak of racism surrounding the actions of the Brotherhood in refusing membership to Negroes and in entering into and enforcing agreements discriminating against them, all under the guise of Congressional authority, still remains. No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States. Nothing can destroy the fact that the accident of birth has been used as the basis to abuse the individual rights by an organization purporting to act in conformity with its Congressional mandate. Any attempt to interpret the Act must take that fact into account and must realize that the constitutionality of the statute in this respect depends upon the answer given.

Id. at 209.

116. *Id.*

117. *See* Houston, *supra* note 101, at 285. Houston recognized the same issues in other struggles for labor rights:

> Every principle which they establish for railroads can be applied to every other public utility: gas, electricity, telephone and telegraph, bus lines and air lines, every industry affected with a public interest. As the Negro Railway labor Executives Association announced: 'Other fathers and grandfathers pioneered the railway industry, and we intend to hold this employment and broaden its base until every vestige of segregation and discrimination, and every limitation on a man's right to hold a job on the railroad based on race, creed, color, or national origin, is wiped out. When we do this we shall have gained a victory for the white railroad workers by freeing them from their prejudice and their fears; because they are imprisoned just as much as we are.'

Id.

118. *Id.* at 270. Houston observed that the "Big-four Brotherhoods have the railroad train and engine service tied up tight for a white monopoly, for a 'Nordic closed shop.' " *Id.*

some Americans from America's bounty because of their race, color or creed. The government's complicity in the subjugation of black workers was demonstrated by Houston and John P. Davis in their study of the Tennessee Valley Authority and other New Deal programs created to put Americans back to work during the Great Depression.[119] The New Deal was about social and economic recovery, and Houston and Davis stated what ought to be obvious if a return to prosperity was the goal:

> [F]undamentally no recovery program in the South can succeed without admitting the Negro to his full and equal share. If it is a question of increasing buying power, the South cannot raise itself very high as long as it keeps twenty-five per cent of its population on starvation wages. If it is a question of social rehabilitation and the standards of living, the South cannot be secure as long as one-fourth of its population is held in ignorance, squalor and disease. The South cannot keep its prejudice and have its prosperity too.[120]

The message is clear: unless all are included in plans and programs for the economic advancement of the nation, none will be able to prosper fully due to the social and economic drain caused by those who are purposely excluded.

V. HOUSTONIAN SCHOLARSHIP: A PROPOSED AGENDA

Through our scholarship we have before us the high opportunity to advance creatively the pursuit of social justice as envisioned by our foreparents.[121] Consider how powerful a framework of scholarship

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119. *See* Houston and Davis, *TVA: Lily-White Reconstruction*, The Crisis, October 1934, at 290. This article documents the federal government's efforts to develop hydro-electric power along the Tennessee River. The authors highlight how blacks were at best tolerated in this multi-million dollar project and at worst completely excluded from its benefits. The authors, in considering the need for organized struggle against governmental discrimination, concluded:

> For if the Negro population is to benefit by the cheap electricity produced and distributed by the T.V.A., it means that the fight must go on to increase its purchasing power. The fight must go on to get the Negro industrial worker increased recognition and income under the NRA [National Recovery Administration], and the Negro sharecropper and farmer a larger share of his produce under the AAA [Agricultural Adjustment Administration]. The stark truth is that the entire 'New Deal' administration must be made to realize that the economic wage slavery and social suppression cursing the South today, are absolutely incompatible with a real return to prosperity.

Id. at 311.

120. *Id.*

121. In his memoriam to Professor Frank D. Reeves, Dean Smith challenged us to follow the lead of the great law teachers who worked for social justice:

> Professor Reeves, like Houston, as a law teacher and litigator, frequently emphasized to

grounded upon the Houstonian principles of pure legal existence coupled with thoughtfully conceived plans of action.

Our task now is to propose a research agenda for the scholar-activist in the Houstonian mold.[122] Rather than attempting to be definitive, this is "an effort to think about what we should be thinking about," as Professor Deborah Rhode suggests in her reflections on a research agenda for gender and jurisprudence.[123] Utilizing the primary issues with which Houston wrestled as a preliminary guide, we can now propose agenda items in housing, education and employment.

A. *An Agenda for Housing*

From the shoulders of Houston we stand firmly on the precedents of *Shelley v. Kramer*[124] and *Hurd v. Hodge*.[125] We are buttressed by the Fair Housing Act of 1968[126] and the decisions of *Jones v. Alfred H. Mayer Co.*,[127] *Trafficante v. Metropolitan Housing Development Corp.*,[128] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[129] Yet, as recent as January 1988, the Housing Subcommittee of the House Banking, Finance and Urban Committee considered extensive testimony on discrimination and segregation patterns in residential housing.[130]

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students the need for civil rights litigators and for civil rights planners and scholars, to mutually assist each other in order to present and to channel the message to both the national and local governments, that the bell tolled for the application of the principles of formal justice for black citizens in America.

Professor Reeves shared with his students, and with the collective bar, a simple philosophy, that the law is the appropriate means to gain access to benchmarks beyond the barriers of racism and that the Howard University School of Law should continue to serve as the clearing house for legal planning of issues involving the to rights of blacks and other minorities in this country. There is encouraging evidence that legal scholars are about the work long awaited by law teachers, such as Professor Reeves, that is, an analytical expression of the state of the law and the state of blacks under the law.

Smith, *supra* note 12.

122. *See* Brooks, *supra* note 11.

123. Rhode, *Gender and Jurisprudence: An Agenda for Research*, 56 CINCINNATI L. REV. 521 (1987).

124. Shelley v. Kraemer, 334 U.S. 1 (1947).

125. Hurd v. Hodge, 334 U.S. 24 (1947).

126. 42 U.S.C. § 3601 (1968).

127. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1967).

128. Trafficante v. Metro. Hous. Dev. Corp., 409 U.S. 205 (1972).

129. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

130. In January, 1988, the Housing Subcommittee of the House of Representatives' Banking, Finance and Urban Affairs Committee held a hearing to study the enforcement of fair housing laws. *See also* Marino, *Blacks still Encounter Segregation: Professor Says Economic Status Doesn't Explain Housing Patterns*, Wash. Post, Jan. 30, 1988, at F1. The House Subcommittee

The accelerating cost of housing in most areas compounds the problem. A recent report by the Louis & Nettleton Company in its newsletter, U.S. Housing Market, noted that the cost of housing continues to skyrocket and monthly mortgage payments gobble up increasingly larger percentages of take-home pay.[131] Affordable, decent housing is becoming more difficult to obtain, especially for minorities and women whose income continues to lag behind the national average of white males.[132] Further exacerbating the income gap problem is the unconscionably higher unemployment rates for minorities.[133]

Housing that might be available and affordable is increasingly being lost to "gentrification," a phenomenon by which upwardly mobile, middle-class individuals or real estate agents purchase housing in depressed, run-down or low-income neighborhoods with the intent of totally remodelling the premises.[134] The gentrification process has occurred in many central cities, often spurred on by the banking and real estate industries.[135] While this process may revitalize inner-city

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considered a report by Professor Douglas S. Massey, Director of the University of Chicago's Population Research Center. *Id.* Professor Massey concluded that "white Americans' prejudice against blacks 'is at the root' of continued housing segregation." *Id.*

131. Foote, Jr., *House Payments Rise Above $1,000: Average Monthly Mortgage Bill Jumps 8 Percent*, Wash. Post, Jan. 30, 1988, at E1, col. 2.

132. In 1986, 31.1 percent of blacks and 27.3 [percent] of Hispanics had incomes below the poverty level—nearly three times the rate for whites. [Statistical Abstract of the U.S. 1988, Table 715, p. 435.] Median black family income was only 57 percent that of whites, $17,604 as opposed to $30,809. Median Hispanic family income was $19,995. [Statistical Abstract of the U.S. 1988, Table 700, p. 427.]

One Third of a Nation, A Report by the Commission on Minority Participation in Education and American Life 4 (1988).

133. Black unemployment reached record levels for the post WW II period during the recent recession. Thus, this latest recession continues the trend of each recession having a more devastating effect on the black population. Moreover, black unemployment rates were already high at the onset of the recession at 12.3% in 1979. The recession pushed the average black unemployment to 19.5% in 1983 even though the recovery phase had already begun. Since 1975, the annual average black unemployment rate has been 15.2%. There has been no year during this period in which black unemployment was less than 12%. Since 1981 the black unemployment rates have averaged 17% and there hasn't been a single year in the last five when black unemployment was less than 15%. Even for the first three quarters of 1985, the third year of the recovery, black unemployment averaged 15.1%.

National Urban League, State of Black America 14 (1987).

134. *See generally* Lawrence, *Gentrification, Is It a New Form of Oppression on a New Opportunity*, The Crisis, Nov., 1985, at 426.

135. Redlining consists of the denial of home loans for or insurance coverage on dwellings based on the characteristics of the neighborhood surrounding the dwelling. Lending institutions or insurance underwriters draw a "red line" on a map around certain neighborhoods and refuse to consider applications for loans or insurance for dwellings within the "red line." Redlining has been held to be a discriminatory violation of 804 and 805 of the Fair Housing Act (42 U.S.C.

neighborhoods, increased housing prices (which are driven up through demand for housing in now fashionable neighborhoods) and higher real estate taxes displace residents in these and surrounding neighborhoods.[136]

Where will people go to find safe, decent and affordable housing within a reasonable distance from their place of employment without confronting discriminatory barriers? When persons are excluded from the community because they cannot find housing, how and where can they exercise the rights which define their pure legal existence? Will more people experience the wretched plight of the homeless and be further excluded from our democratic republic?

Our task is to design an agenda for action to improve and increase housing opportunities for those who are being edged towards the fringes of our society. We know much about housing discrimination, unaffordability and unavailability; but more data and analyses are needed to understand the relationship between the complex factors that keep a significant segment of our citizenry in poor housing or in no housing at all. Only then will we be able to craft creative methods of utilizing the legal system to promote the pure legal existence of all Americans.

Many housing issues and problems cry for the attention of our best minds. First, the implication of Professor Massey's research on housing discrimination is that the current laws and constitutional guarantees on fair housing are not being vigorously enforced and/or need to be strengthened.[137] Why is that the case? Has the Reagan Administration forsaken the constitutional rights of the poor in this area? What is the litigation trend in pursuing federal fair housing cases? Are the courts reading fair housing laws more restrictively and conservatively? Are discriminatory practices like steering and blockbusting by realtors continuing unabated? Is the banking industry developing more sophisticated methods of red-lining and disinvestment in minority communities? Do local zoning laws affect housing

3604, 3605). Springfield v. McCarren, 549 F. Supp. 1134 (1982). *See* Comment, *Legislating Against Mortgage Redlining: The Need for a Firmer Commitment*, 12 RUTGERS L.J. 151 (1980); Duncan, Hood & Nect, *Redlining Practices, Racial Desegregation, and Urban Decay: Neighborhood Housing Services as a Viable Alternative*, 7 URB. LAW. 510 (1975).

136. *See* Lawrence, *supra* note 133.

137. *See supra* note 129.

availability?[138] Certainly there are many other causes of housing discrimination, unavailability and unaffordability that can be explored by our best minds.

Second, closely connected to the use of courts in pursuing housing rights is the exercise of political participation in the governing process. We all have the privilege of voting, running for office, and expecting accountability from public officials charged with the care of the community. We must "mobilize the masses" and be vigilant in seeing that all housing laws are vigorously enforced. We must devote attention to those exercises of governmental power which destroy housing stock or foster gentrification. Such exercises of power are of special concern when governing bodies pursue economic development without first considering the needs of all citizens. Law professors can provide guidance to the mobilization of the masses by providing vigorous public policy analysis.

Third, we should pursue creative ways to promote home ownership. Lending institutions should be challenged under the Community Reinvestment Act to invest in local minority and low-income communities.[139] Existing local housing authorities must be reviewed to ensure that all available state and federal mortgage and rental assistance programs are fully utilized. If localities do not have a housing authority, we should vigorously prompt them to establish an agency through which home ownership can become a reality. Similarly, law professors can construct appropriate organization models of non-profit organizations which can assist in providing low and moderate-income housing.[140] Further, in some areas, urban homesteading has proven to be a successful mechanism for encouraging home ownership.[141] How can

138. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

139. *See* Community Reinvestment Act of 1977, 12 U.S.C. 2901-2905 (—) (Title VII of the Housing and Community Development Act). *See* Head, *Representation of Clients under the Community Reinvestment Act*, 21 CLEARINGHOUSE REV. 1004 (1988).

140. *See, Yale Law Students Aid the Homeless by Preserving Low Income Housing*, N.Y. Times, Jan. 1, 1988, at 38.

141. 12 U.S.C. 1706e( ) allows the Secretary of Housing and Urban Development to:

> transfer without payment to a unit of general local government or a State, or a qualified community organization or public agency designated by a unit of general local government or a State, any real property—
>
> (1) which is improved by a one-to-four family residence;
> (2) to which the Secretary holds title;
> (3) which is not occupied by a person legally entitled to reside there;
> (4) which is requested by such unit, [s]tate, or agency for use in an urban homestead program; and

laws be revised to aid in these endeavors? What tax laws support creative approaches to low-income housing production? Law reform scholarship in the tax area is extremely important.[142]

Related issues demand even further study. What impact does public transportation, or the lack of it, have on housing availability? Should states require, as New Jersey does, that each municipal subdivision commit to providing a certain percentage of low and moderate-income housing?[143] Finally, what would be learned by studying

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(5) which the Secretary determines is suitable for use in an urban homestead program which meets the requirements of subsection (b) of this section.

Id.

The individual or family to whom the property is conveyed must agree to:

(A) occupy such property as a principal residence for a period of not less than 5 years, except under such emergency standards as may be prescribed by the Secretary;

(B) repair all defects in the property that pose a substantial danger to health and safety within 1 year of the date of conveyance; and

(C) make such repairs and improvements to the property as may be necessary to meet applicable local standards for decent, safe, and sanitary housing within 3 years after the date of initial conveyance, and

(D) Permit reasonable periodic inspections at reasonable times by employees of the unit of general local government or State or the qualified community organization or public agency designated by the unit of general local government or [s]tate for the purpose of determining compliance with the agreement.

Id.

Upon compliance with the above requirements the homesteader is granted fee simple title to the property without consideration. Furthermore 42 U.S.C. 1452b(—) provides for the granting of low interest loans for the rehabilitation of these urban homestead properties.

142. *See* 6 U.S.C. 42 (1986) (Low-income housing credit) and 26 U.S.C. 142(d) (1986) (Exempt facility bonds for qualified residential rental projects). For a general explanation of these provisions see Prentice Hall Federal Taxes, Bulletin 20 Extra (May 11, 1987), Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986*, "Blue Book," prepared by the Staff of the Joint Committee on Taxation.

143. In 1975 the New Jersey Supreme Court considered the question:

> [W]hether a developing municipality, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its confines because of the limited extent of their income and resources.

So. Burlington City NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, 724 (1975) (This case is known as *Mt. Laurel I*). Plaintiffs brought the suit on behalf of the poor minorities, although the New Jersey Supreme Court considered the issue in the larger context of all low and moderate income persons who could not afford housing in suburban townships like Mt. Laurel. *Id.* at 717. The Court held:

> that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefore.

Id. at 724.

The New Jersey Supreme Court revisited the same issue with the same parties in So. Bur-

the correlation between income levels, discrimination in employment, discrimination in housing, access to quality education based on residence, and other social issues which may retard the pursuit of a dignified existence? Rigorous scholarship devoted to the multi-dimensional aspects of these issues can reveal the true nature of the housing problem and yield possible solutions.

B. *An Agenda for Education*

From the shoulders of Houston we stand firmly on the precedents of *Pearson v. Murray*,[144] *Missouri ex rel Gaines v. Canada*,[145] *Sweatt v. painter*,[146] *McLaurin v. Oklahoma State Regents*,[147] and *Brown v.*

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lington County NAACP v. Mt. Laurel Township, 92 N.J. 158, 456 A.2d 390 (1983) (This case is known as *Mt. laurel II*). After ten years Mount Laurel Township continued to have exclusionary zoning and had made no progress in making low and moderate income housing available. *Id.* at 410. After vigorously reaffirming the doctrine announced in *Mt. Laurel I*, the New Jersey Supreme Court held:

> We have reexamined the *Mount Laurel* doctrine and have found it correct. We have reaffirmed the judiciary's commitment to the enforcement of the constitutional right and its resulting remedy. We have found it necessary to rectify the ineffective administration of this doctrine in our courts. We have simplified the scope of litigation; the *Mount Laurel* obligation is to provide a realistic opportunity for housing, not litigation. We have substituted as a remedy the plans for growth in the State Development Guide Plan for the concept of developing municipalities directed lower courts to dispose of the *Mount Laurel* litigation on a one-stop basis, and provided for the assignment of three judges to manage the cases statewide on a uniform basis. We have required municipalities to take affirmative action to comply with Mount Laurel and refocused the litigation on the question of whether low and moderate income housing will be built.
>
> As we said at the outset, while we have always preferred legislative to judicial action in this field, we shall continue—until the legislature acts to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine. That is our duty. We may not build hoses, but we do enforce the Constitution.
>
> The provision of decent housing for the poor is not a function of this court. Our only role is to see to it that zoning does not prevent it, but rather provides a realistic opportunity for its construction as required by New Jersey's Constitution. The actual construction of that housing will continue to depend, in a much larger degree, on the economy, on private enterprise, and on the actions of the other branches of government at the national, state and local level. We intend here only to make sure that if the poor remain locked into urban slums, it will not be because we failed to enforce the Constitution.

Id. at 490.

Subsequently, the New Jersey State Legislature enacted the Fair Housing Act. N.J. STAT. ANN. 52:270-302-344 (1986). The Act codified the judicial doctrine announced in *Mt. Laurel I and II*. *See* N.J. STAT. ANN. 52:270-302, 303. The Fair Housing Act authorizes an administrative planning mechanism by which low and moderate income housing can be provided in municipalities. For a discussion of the New Jersey Fair Housing Act, see Comment, *The Fair Housing Act: Meeting the Mt. Laurel Obligation with a Statewide Plan*, 9 SETON HALL LEGIS. J. 585 (1986).

144. Pearson v. Murry, —, 192 A. 590 (1936); *see also* G. MCNEIL, *supra* note 14, at —.

145. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

146. Sweatt v. Painter, 339 U.S. 629 (1950).

Board of Education.[148] The Constitution guarantees that all of America's children will have an equal opportunity to obtain a quality education. Local school systems may no longer purposely segregate students according to race. Yet, one hauntingly wonders what education integration has wrought.

Has the promise of *Brown* been wholly achieved throughout this democratic land? Where de jure discrimination has been judicially excised, has the promise of an improved educational experience been fulfilled? Is there a correlation between the increasing drop-out rate for black students and the decreasing enrollment in post-secondary schools? Recent cases suggest that present day de facto segregation (caused in large part by housing segregation) may not be amenable to legislative or judicial correction.[149] If so, will further desegregation litigation be fruitless?

As stated earlier, education is the key that unlocks limitless opportunities to maximize the potential of each individual.[150] Only with education will individual citizens, regardless of race, religion, gender or ethnicity, be productive, contributing participants in this great social experiment we call America. Our task is to design an agenda for action which focuses on the clarion call of Mary Hatwood Futrell, President of the National Education Association, to "unleash the full potential of every student."[151]

First, it is imperative that the present state of education equality law be fully assessed. What is the present state of the law under the fourteenth amendment and the Civil Rights Act? On what basis and with what level of proof can a successful desegregation suit be brought? Under what circumstances will school systems under school desegregation orders be released from further federal judicial supervi-

147. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

148. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

149. For a discussion of recent cases considering the impact of discriminatory housing patterns on school segregation *see* Hankins, *The Constitutional Implications of Residential Segregation and School Segregation—To Boldly Go Where Few Courts Have Gone*, 30 How. L.J. 481 (1987), and Rudley, *School Desegregation: Whose Responsibility?*, 12 THURGOOD MARSHALL L.J. 109 (1986).

150. *See* discussion *supra* accompanying notes 95-96.

151. Futrell, *The Alternative to Tracking* (National Education Association advertisement), Wash. Post, Jan. 17, 1988, at C3.

sion?[152] How can we better monitor school systems to ensure compliance with requisite constitutional standards on equality of educational opportunity?

Clearly, understanding where we are and how we arrived here is essential to planning where it is that we must direct our efforts. For civil rights organizations, this assessment is crucial in planning future activities and allocating limited resources. For the legal educator planning improved civil rights law curricula, this assessment is of particular importance. Some law students under our instruction will represent parties in educational civil rights suits or serve as legal advisors to school systems which seek to comply with civil rights laws or judicial decrees.

Second, in reviewing the impact of school integration, it is imperative that we consider the status of minority teachers. Longitudinal studies have demonstrated that after integration, the number of black teachers in previously segregated school systems has drastically declined.[153] Given the recent lack of enthusiasm for affirmative action, we must assess this decline. Is there discrimination in the hiring process? Are fewer minorities entering the teaching field? How many minorities hold administrative positions and participate in promulgating hiring policies? What relationship, if any, does the racial composition of the school board have to the percentage of minority teachers employed? Should we judicially challenge school systems that lack ethnic and racial diversity from the school board to the maintenance staff?

Another facet of this problem is the trend toward recertification of teachers. Professor Beverly Charles, in her recent work, suggests that competency testing in Texas has had a negative impact on minority teachers.[154] Are there other official or unofficial methods of testing teacher competency that work to the detriment of minority teachers? What evaluative techniques are utilized in making retention, promotion and salary increase decisions? Does a lack of commitment to staff

152. *See* Riddick by Riddick v. School Bd. of City of Norfolk, 784 F.2d 521 (4th Cir. 1986), *cert. denied*, 476 U.S. 1180 (1986).

153. Smith and Smith, *For Black Educators: Integration Brings the Axe.*

154. Charles, *First They Come for the Teachers . . .: Competency Testing and the Decertification of Texas Teachers Issued Certificates Valid for Life*, 12 THURGOOD MARSHALL L.J. 1 (1986). *But see* Rebell, *Disparate Impact of Teacher Competency Testing on Minorities: Don't Blame the Test Takers or the Tests*, 4 YALE L. & POL'Y REV. 375 (1986).

and administrative diversity translate into lower merit evaluation for minority teachers? These issues cut to the heart of maintaining minority teachers' pure legal existence and their inclusion in the great task of providing quality education for all children.

Finally, and perhaps most importantly, we must consider the impact integration has had on minority children. How has the quality of the educational experience improved for minority students? An answer to this question certainly requires an evaluation of current empirical data and may require the development of innovative measuring instruments. We do know that integration has caused white flight to the suburbs and tend to private schools, draining resources away from public schools. The broader implication of this loss of revenue may well require a review of state and local education spending patterns. Are there disparities in resource allocations between school districts and do these disparities correlate to racial profiles? Have so-called "magnet schools" improved educational opportunities or merely allowed marginal schools with meager resources and poor programing to exist?[155] Some of these problems may require legislative or political solutions.

More troublesome still is the problem of evaluating how individual students are being treated in the classroom. Recent studies suggest that most schools utilize a class placement method called "tracking," where students are grouped according to perceived ability levels as reflected by standardized achievement tests.[156] Tracking and the testing methods employed have a disproportionately negative impact on minority children. A significant portion of these children are assigned to the lowest achievement group or categorized as possessing learning disabilities. Teachers have minimal expectations for these children and resources for helping these children fulfill their potential are disproportionately fewer. These children tend to feel excluded from the general student population and to show a lower self-esteem.

Since there is a right to equal opportunity for quality education, we should study ways to ensure the attainment of that right.[157] This

155. *See* Price and Stern, *Magnet Schools as a Strategy for Integration and School Reform* 5 YALE L. & POL'Y REV. 291 (1977). *But see* Metz, *In Education, Magnets Attract Controversy*, 6 NEA TODAY 54 (Jan. 1988).

156. *See* Oakes, *Tracking: Can Schools Take a Different Route?*, 6 NEA TODAY 41 (Jan. 1988).

157. For a provocative discussion on how to achieve quality education for minority children

study will necessitate not only scholarly analysis of educational discrimination on the macro-level of the school system, but also on the micro-level of the individual student whose pure legal existence must be preserved and who must have the opportunity to participate effectively and to maximize his or her potential in the larger community.

C. *An Agenda for Employment*

From the shoulders of Houston, we have *Steele*[158] and *Tunstall*[159] which establish the equal right to participate in employment opportunities. Building upon these precedents, we know that employers and unions must not exclude on the basis of race, sex, religion or disability. To the contrary, each has an affirmative duty to include workers who historically have been denied access to employment opportunities.[160]

Despite these gains, Blacks still lag woefully behind in employment opportunities.[161] The unemployment rate is still significantly higher among Blacks than whites, and is especially higher among black youth.[162] Employment opportunities as reflected by wages continue to demonstrate that Blacks with qualifications similar to those of whites receive significantly lower annual earnings.[163] While entry-

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see Bell, Jr., *The Legacy of W.E. B. DuBois: A Rational Model for Achieving Public Schools Equity for America's Black Children*, 11 CREIGHTON L. REV. 409 (1977). *See also* V. Wilson-Wesley, *Making America's Classrooms Work*, BLACK ENTERPRISE Sept. 1984, at 34.

158. Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

159. Tunstall v. Bhd. of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944).

160. *See generally* United States v. Paradise, 480 U.S. 149 (1987); Johnson v. Transportation Agency, Santa Clara County, California, — U.S. —, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987); Fullilove v. Klutznick, 448 U.S. 448 (1980).

For an excellent discussion of affirmative action in employment see Edwards, *The Future of Affirmative Action in Employment*, 44 WASH. & LEE L. REV. 763 (1987).

161. *See* Edwards, *supra* note 159, at 767.

162. The unemployment rate for whites averaged only 6.7% over the last 11 years versus the 15.2% rate for blacks. In the last five years when black unemployment averaged 17%, white unemployment averaged 7.3%. The increase in disparities affected all demographic groups. Over the last five years adult black male unemployment rates averaged 8.9 percentage points more than whites, black women averaged 8.1 percentage points more unemployment, and black teenager unemployment rates were 26.4 percentage points higher than white teenage unemployment rates.

See National Urban League, *supra* note 132, at 15.

163. Racial inequality persisted throughout the income distribution in 1984. Both the black poor and the black wealthy have lower incomes than whites at similar positions in income distribution. However, racial inequality is greatest among the lower income groups.

— Swinton, Economic Status of Blacks, 1985.

level and low skilled jobs seem to be available in abundance for minorities, employment positions in middle and upper management and in the professions continue to be difficult for Blacks to secure in more than marginal numbers.[164] Similarly discouraging figures show that fewer Blacks own businesses or are self-employed, a factor particularly noticeable in the attainment of government contracts for goods and services.[165] Underinclusion of black-owned businesses in government contracts and of black workers in the performance of these contracts tends to negate the pure legal existence of a large class of Americans.

Accordingly, there is much work to be done in this area. The minority law professor is well-equipped to provide the systematic analysis of employment discrimination.[166] Certainly, the effectiveness of existing legal protection and the possible erosion of that protection must be carefully observed and noted. New legal strategies that preserve the ground already attained and that advance the pure legal existence of historically excluded Americans beyond that ground should be arduously pursued.

Further, empirical research is needed to determine the very nature of present employment discrimination. When and how are individuals being discriminated against in the attainment of employment? Is there "token" hiring of minorities, and if so, how do we push beyond the glass barriers which limit employment advances and move to fuller, more meaningful opportunities? What is the relationship between inadequate educational opportunities and broad based employment opportunities? How do advancing technologies and job obsolescence impact upon minority job opportunities?

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164. According to the U.S. Bureau of the Census 37% of black families had annual incomes of under $10,000 in 1983 while only 13% of white families had annual incomes of under $10,000. In 1983 black families comprised 36% of those with annual incomes between $10,000 and $24,999 while white families made up 35% of this category. Furthermore, only 14% of black families had incomes over $25,000 while 64% of white families had an income of over $25,000. Only 4% of black families were reported as having income over $50,000 while 14% of white families were reported as having incomes over $50,000. Bureau of the Census, Money Income of Households, Families, and Persons in the United States: 1983, Consumer Income: Current Population Reports, Series P-60, No. 146 (1985).

165. Only 5. 2% of employed blacks are in executive, administrative or managerial positions. Only 3.0% are lawyers or judges, 4. 0% are college or university teachers, 3.3% are physicians or dentists (only 6.7% are engaged in a professional specialty) and 4.0% are supervisors or proprietors of sales outlets. 23.8% of the employed blacks work in cleaning and building service occupations as maids or janitors. Bureau of the Census, Statistical Abstract of the United States 1988, Table 627 (108th ed. 1988).

166. Judge Edwards' article is an excellent example. *See* Edwards, *supra* note 159.

These and similar questions suggest the need for a more comprehensive approach in considering equal employment opportunity. To secure legal rights buttressed by the equal protection clause of the Constitution is only the beginning of the establishment of pure legal existence and inclusion into the richness and abundance that is America. Minorities cannot obtain this until the concept of justice is meaningfully enlarged to include an economic component. As Houston noted, employment rights are "basic to the whole concept of economic democracy."[167] Employment is but a part of the larger realm of economic opportunity. The ability to participate fully in the economic life of the community marks the wholeness of one's pure legal existence.[168] To be wholly included in the rich economic life of the larger community is a reaffirmance of how our democratic society values the worth of individuals. The national Conference of Catholic Bishops, in their pastoral letter on economic justice, fully understood that justice, as conceived in American constitutional jurisprudence, included economic rights.[169] In articulating a Christian vision of economic life, the Catholic Bishops declared the following:

> The basis for all that the church believes about the moral dimensions of economic life is its vision of the transcendent worth—the sacredness—of human beings. The dignity of the human person, realized in community with others, is the criterion against which all aspects of economic life must be measured. All human beings, therefore, are ends to be served by the institutions that make up the economy, not means to be exploited for more narrowly defined goals. Human personhood must be respected with a reverence that is religious. When we deal with each other, we should do so with the sense of awe that arises in the presence of something holy and sacred. For that is what human beings are: we are created in the image of God (Gn. 1:27). Similarly, all economic institutions must support the bonds of community and solidarity that are essential to the dignity of persons. Wherever our economic arrangements fail to conform to the demands of human dignity lived in community, they must be questioned and transformed.[170]

We, as legal scholars, have the high duty to define more fully and

167. *See supra* note 117.

168. *See supra* note 115 (Justice Murphy's comments in text accompanying note).

169. National Conference of Catholic Bishops, Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy (1986).

170. *Id.* at 15 (emphasis in original).

advocate for economic justice. We can accomplish this on at least two levels. First, we must provide empirical research into the problem in order to articulate a comprehensive definition of economic justice. In our attempt to understand economic justice we must know the magnitude of the problem. This understanding will require a quantitative analysis of hiring statistics, employment practices and the economic impact of differing employment patterns. Recently litigated cases should be examined to evaluate judicial trends in employment discrimination and affirmative action law.[171] Of particular importance is that we must be able to gauge the levels of proof and evidence needed to bring successfully an employment action.

On a deeper level, we need to know where the successes are. What actions and programs have been effective in creating employment opportunity? Can these approaches be duplicated? If not, are there economic niches that can be exploited by minorities to create fuller opportunities for economic advancement?

As teachers of future lawyers, we have the opportunity to train and inspire a cadre of skilled men and women dedicated to actualizing the dream of economic justice for all. In the great tradition of Charles Houston we can lay the educational groundwork upon which the future can be built. Indeed, the rich reward of our profession is as Christa McAuliffe, the late Challenger astronaut put it, to "touch the future" through the students who pass our way.[172]

First, we must teach our students the skills of lawyering and ensure that the how-to-skills of civil rights litigation and advocacy are mastered. Equally important, our students must master the rigors of tax, corporate and commercial law. Additionally, as minorities continually experience the loss of land and accumulated family resources, we need to prepare students to be expert financial and estate planners. To ensure that latent potential is not crushed in the crucible of poverty related crimes, we also need skilled criminal attorneys who can ensure justice in criminal courts. In short, the lawyers that we train ought to be, as Judge Robinson noted, "superlative" in whatever they do.[173]

Second, as we design and implement the curricula for our individual courses, we should endeavor to develop teaching methodologies

171. *See* Edwards, *supra* note 160; *see also*, Days, III, *Fullilove*, 96 YALE L.J. 453 (1987).

172. *See supra* note 30.

173. *See* Robinson, *supra* note 16.

and materials that emphasize social justice. We should be able to demonstrate systematic processes that promote economic development in minority and disadvantaged communities. For instance, in the area of corporate law planning for family-owned businesses, we can examine how capital can be raised without compromising the equity interest of the family. In this regard, an attorney needs to know the process for obtaining public or private venture capital and how to interface with lending institutions so as to minimize the amount of personal property that might be collateralized. Our focus must be to enable our students to understand the unique legal problems facing the minority business community and how they, as lawyers, can craft appropriate, innovative solutions.

Similarly, constitutional law courses should consider various aspects of economic justice. For instance, it is constitutionally permissible to boycott businesses which have a regressive hiring record for minorities.[174] The enormous purchasing power of the minority community cannot be ignored. On another front, the study of the fifteenth, nineteenth and twenty-sixth amendments to the United States Constitution could include an analysis of how the right to vote, which represents more than simply selecting candidates for office, can be utilized to advance economic justice. Through the vote, we impact political process and policy. Our voting strength should guarantee our fair share of political patronage jobs and opportunities. For lawyers, the protection of voting strength means gaining access to municipal representation and judgeships, to government contract and bond work. Our approach can take constitutional theory and apply it to the realities of the political marketplace, demonstrating what is at stake when we discuss the political franchise.

CONCLUSION

For this Afro-American professor who struggles to make his existence relevant and meaningful in this strange academic paradise, the legacy of Charles Hamilton Houston is inspirational, indeed. From Houston's broad shoulders, which bore the burden of the battle for dignity and justice, I see the promised land of a just society stretching our clearly before us. If we hew towards the role of social engineer

174. *See* NAACP v. Claiborne Hardware, 458 U.S. 886 (1981), *reh. denied*, 459 U.S. 898 (1982).

as lived by Houston, all we have to do is inhabit that promised land. That land, our land has already been paid for.

Our task is two-fold: one, to make the Houstonian vision a reality for all Americans, and, two, to maintain and preserve that just society for which Houston lived, worked, and died. To accomplish this task, we scholar/activists must be as passionate and as determined as Dean Houston was. We must have a passion for justice in the fullest sense. We must have a passion for disciplined study and professional excellence. We must have a passion for personal integrity and the highest of ethical standards. We must have a will to sacrifice our very beings, if necessary, to make the Houstonian vision of pure legal existence and our inclusion in a just democratic society a living reality.

> You must not only be but superior, and just as superior in all respects as time, energy, money and ability permit. I wouldn't be stymied by difficulties—The most important thing now, as fast as conditions are changing, is that no Negro tolerate any ceiling on his ambitions or imagination. Good luck and don't have any doubts; you haven't time for such foolishness.[175]

175. Robinson, *supra* note 16, at 5.