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Truth Matters: A Call for the American Bar Association to Acknowledge Its Past and Make Reparations to African Descendants

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TRUTH MATTERS:
A CALL FOR THE AMERICAN BAR ASSOCIATION TO ACKNOWLEDGE ITS PAST AND MAKE REPARATIONS TO AFRICAN DESCENDANTS

*by Adjoa Artis Aiyetoro**

"Look truth straight in the eye and consider remembering as a moral obligation."[1]

INTRODUCTION

As the leading national bar association in the United States since its founding in 1878, the American Bar Association ("ABA") played a critically important role in the exclusion of African descendant attorneys[2] from the legal profession. Membership in the ABA opened and continues to open doors for lawyers climbing the ladder of success in the legal profession. The ABA's exclusionary policies and practices "enabled a few lawyers . . . to legislate for the entire profession and to speak for the bar on issues of professional and public consequence."[3]

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[1] AARON LAZARE, ON APOLOGY 253 (Oxford Univ. Press 2004).

[2] The term "African descendant" attorneys describes what some call "Black" attorneys and others call "African-American" attorneys. This term is being used for two primary reasons: (1) it bridges the gap between 1844 and 1868 when the Fourteenth Amendment was passed, making formerly enslaved African descendants and their progeny citizens of the United States; and (2) some African descendants do not embrace the African-American identity because of African enslavement and the exclusionary policies and practices within the colonies and the United States, some of which are discussed in this article.

[3] JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICAN (Oxford Univ. Press 1976).

The ABA's exclusionary policies and practices had a malignant effect on the United States since

> it depends so heavily upon the legal profession to implement the principle of equal justice under law and, simultaneously, to harmonize law with social change. A legacy of prejudice poses fundamental questions for those who take professional obligations seriously. Is an adversary system of justice 'just' when the adversary process is skewed by the social origins, ethnic identity, and financial resources of attorney[s] . . . ? Is there equal justice when the legal profession, the primary instrument of its attainment, is structured to reflect and reinforce social inequality?[4]

This article asks and answers the question of whether the exclusion of African descendant attorneys from membership in the ABA obligates the ABA to develop remedial programs that specifically address the consequences of excluding African descendant attorneys. In doing so, this article builds upon the work of scholars that have discussed and analyzed the history of the ABA's exclusionary policies and practices, and the consequences of such exclusion.[5] This article provides the historical background of the ABA's exclusionary policies and practices directed at African descendant attorneys. In addition, this article takes the investigation a step further by examining the ABA's hesitancy to take responsibility for seventy-eight years of exclusionary policies and practices, and the consequent missteps the ABA made in its twenty-five-year history of addressing concerns and problems of minorities in the legal profession.

This article begins with a discussion of the necessity for a voluntary private sector reparations model. Part I summarizes the history

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[4] *Id.* at 10.

[5] *See, e.g., id.* at 4; DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS (Foundation Press, 4th ed. 2004); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944 (Univ. of Penn. Press 1993). For analysis of some of the consequences, see, for example, Paula C. Johnson, *Honoring William H. Johnson, Class of 1903: The First African American Graduate of Syracuse University College of Law*, 55 SYRACUSE L. REV. 429 (2005); Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schools: Forward to the Past?*, 12 T. MARSHALL L. REV. 415 (1987); Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621 (1994); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005); David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993).

of the African descendant reparations movement, most notably the failed attempts to obtain reparations. Part I provides the historical imperative for the recommendation that the ABA embrace a voluntary reparations model. It connects the failures of the legislative and judicial branches to respond positively to demands for reparations and the ABA's failure to redress its stigmatizing conduct, which injured African descendants. Part II describes the white supremacist climate that existed prior to the ABA's formation, and provides the context in which Northerners and Southerners collaborated to create a racially exclusive national legal association.

This discussion leads to Part III, which portrays the ABA's exclusion of African descendant attorneys in the legal profession, and Part IV, which illustrates the effects of these exclusionary policies and practices on African descendant attorneys. Parts III and IV are a justification for the voluntary reparations model presented in Part V. The foundation of the voluntary reparations model is an acknowledgment of the conduct that injured African descendants; this acknowledgement is necessary to accomplish true racial healing. Part VI concludes by suggesting that the ABA assume a leadership role in racial justice work by leading through example. The ABA must recognize that providing anti-discrimination programming without a full acknowledgment of the ABA's role in creating the disparate representation of African descendant attorneys in the legal profession undermines the value of the anti-discrimination programming and its effectiveness in achieving racial reconciliation.

I. MAKING THE CASE FOR THE ESSENTIALITY OF A VOLUNTARY REPARATIONS MODEL

A. Historical Context for a Voluntary Reparations Model

The failure of both the legislative and judicial branches of the United States government to confront the atrocities of chattel slavery[6] and Jim Crow,[7] for which they bear significant responsibility, provides

[6] Chattel slavery is the term used to describe the institution of slavery in the United States. Africans and their descendants were treated as chattel, being bought, sold and worked as farmers did animals. *See* ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 20 (Univ. of Cal. Press 2004).

[7] Jim Crow refers to the period between the end of the Civil War and the beginning of the modern Civil Rights movement in the 1960s. During the Jim Crow era, segregation of the races was legal in many states, particularly in the South, and widespread discrimination limited opportunities for African descendants. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAV-

an opportunity for the ABA to provide redress for its discriminatory past. An almost 250-year history of chattel slavery and 100-year history of de jure[8] discrimination has continuing consequences on African descendants. Even though civil rights litigation and legislation ended de jure discrimination, discrimination against people of color continues in 2007.[9] Reparations, in addition to legislative and legal remedies, are needed to correct racial inequities. The reparations movement began in the 1890s,[10] and the continuing consequences of chattel slavery spur the modern day reparations movement.[11]

ERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 290, 539 (2004) ("Jim Crow" is segregation by law particularly in the South; The Civil Rights Act of 1964 was passed to support racial equality, ending Jim Crow); *see also* BROOKS, *supra* note 6, at ix (atrocities against African descendants continued for 100 years after slavery in the form of Jim Crow).

[8] "Existing by right or according to law." BLACK'S LAW DICTIONARY 190 (2d Pocket ed. 2001).

[9] *See* Girardeau A. Spann, *Terror and Race*, 45 WASHBURN L.J. 89, 106-07 (2005); LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, A CRITICAL ASSESSMENT OF THE U.S. COMMITMENT TO CIVIL AND POLITICAL RIGHTS—TOWARD SECURING EQUALITY AND JUSTICE FOR ALL (July 2006).

[10] The post-Civil War reparations movement began with a back-to-Africa movement, in which a number of African descendants participated after enduring brutal treatment from whites during Reconstruction. This movement later transformed into a movement to obtain a pension from the federal government for "ex-slaves" or their descendants. The Ex-Slave Mutual Relief and Bounty and Pension Association was organized in the 1890s by Callie House and Isaiah Dickerson. MARY FRANCES BERRY, MY FACE IS BLACK IS TRUE 30-34, 50-51 (Knopf 2005). Even though the reparations movement did not gain full steam until the 1890s, David Walker first raised the demand for reparations in 1829 when he called on the government to "raise us from the condition of brutes to that of respectable men, and to make a national acknowledgement to us for the wrongs they have inflicted on us." DAVID WALKER'S APPEAL 90 (Black Classic Press 1993) (1830).

[11] There has been extensive scholarship on the modern-day demand for reparations. *See, e.g.*, RICHARD F. AMERICA, PAYING THE SOCIAL DEBT: WHAT WHITE AMERICA OWES BLACK AMERICA (Praeger Publishers 2001) (1993); WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks ed., 1999); BROOKS, *supra* note 6; RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES BLACKS (Plume 2001); SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS (Raymond A. Winbush ed., Amistad 1st ed. 2003); Adjoa A. Aiyetoro, *The Development of the Movement for Reparations for African Descendants*, 3 J.L. SOC'Y 133 (2002) [hereinafter Aiyetoro, *Development*]; Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457 (2003) [hereinafter Aiyetoro, *Formulating*]; Adjoa A. Aiyetoro, *The Reality of Obtaining Reparations: Present Day Harms as Vestiges of Enslavement*, *in* STATE OF THE RACE – CREATING OUR 21ST CENTURY: WHERE DO WE GO FROM HERE? 427 (Jemadari Kamara & Tony Menelik Van Der Meer eds., 2004) [hereinafter Aiyetoro, *Reality*]; Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003) [hereinafter Brophy, *Conceptual*]; Alfred L. Brophy, *The World of Reparations: Slavery Reparations in Historical Perspective*, 3 J.L. SOC'Y 105 (2002) [hereinafter Brophy, *World*]; Tuneen E. Chisholm, Comment, *Sweep Around Your*

Although the arguments for reparations[12] are well documented and hotly debated,[13] legislators[14] and judges have refused to provide a hearing on the substance of the reparation claims. Congress has simply refused to move H.R. 40,[15] the Reparations Study Bill introduced

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Own Front Door: Examining the Argument for Legislative African American Reparations, 147 U. PA. L. REV. 677 (1999); Adrienne Davis, *The Case for United States Reparations to African Descendants*, HUM. RTS. BRIEF, Winter 2000; F. Michael Higginbotham, *A Dream Revived: The Rise of the Black Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 447 (2003); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051 (2003); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1992); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. THIRD WORLD L.J. 429 (1998); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998); Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689 (2002).

[12] *See, e.g.*, AMERICA, *supra* note 11; Brooks ed., *supra* note 11; ROBINSON, *supra* note 11; Winbush ed., *supra* note 11; Aiyetoro, *Development*, *supra* note 11; Aiyetoro, *Formulating*, *supra* note 11; Aiyetoro, *Reality*, *supra* note 11; Brophy, *Conceptual*, *supra* note 11; Brophy, *World*, *supra* note 11; Chisholm, *supra* note 11; Davis, *supra* note 11; Higginbotham, *supra* note 11; Matsuda, *supra* note 11; Ogletree, *supra* note 11; Verdun, *supra* note 11; Westley, *supra* note 11; Yamamoto, *supra* note 11; Note, *supra* note 11. This article embraces an expansive conception of reparations based on the meaning of reparations as repair. Reparations as used in this article, therefore, include public education, targeted outreach programs to expand the inclusion of African descendants, policies and procedures that attest to the non-discriminatory commitment of an entity, and the creation of monitoring mechanisms to ensure that the policies and procedures are implemented consistently. This broader definition is one that has been embraced by N'COBRA, the leading grassroots reparations organization. Reparations and the National Coalition of Blacks for Reparations in America (N'COBRA) (2d ed., May 2004), www.nblsa.org/programs/reparations/2006-2007/resources/NCOBRAsInformationSheet.pdf; United Nations, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, S. Afr., *Report*, U.N. Doc. A/CONF.189/12 (2001) (identifying non-monetary forms of reparations including repatriation, returning stolen artifacts); the United States Civil Liberties Act of 1988, 50 U.S.C. § 1989 (1988) (Japanese American redress providing an apology, exoneration for political prisoners, compensation to the survivors, and funds for the development of educational programming to assist in goal of preventing conduct from reoccurring).

[13] Some of the opponents of reparations who have entered the debate include John McWhorter, *Against Reparations*, *in* Winbush ed., *supra* note 11, at 180; Robert A. Sedler, *Claims for Reparations Undermine the Struggle for Equality*, 3 J.L. SOC'Y 119 (2002); Robert W. Tracinski, *America's "Field of Blackbirds": How the Campaign for Reparations For Slavery Perpetuates Racism*, 3 J.L. Soc'y 145 (2002); Shelby Steele, . . . *Or a Childish Illusion of Justice?: Reparations Enshrine Victimhood, Dishonoring Our Ancestors*, *in* Winbush ed., *supra* note 11, at 197.

[14] One notable exception: Rosewood Compensation Act, 1994 FLA. LAWS 94-359.

[15] *See* Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 109th Cong. (2005); Aiyetoro, *Reality*, *supra* note 11.

by Congressman John Conyers,[16] in every Congressional session since 1989.[17] Similarly, the courts have used procedural rules to avoid reaching a decision on the merits of reparation claims.[18] Devising ways to avoid reaching the merits of the demand for reparations, whether in the legislative or judicial branch, fails to comport with the image of a fair and just society. Indeed, the failure of the government to address the question substantively may be an effort to maintain a self-image of being a fair and just government despite its horrific history, including the atrocities committed on African descendants.[19] Although refusing to reach the merits of the claims, the judicial branch in a number of cases has suggested another branch should address the issue of reparations.[20]

The voluntary reparations model[21] is evolving naturally due to the stalled national legislative and litigation efforts.[22] The modern day

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[16] Congressman John Conyers became Chair of the House Judiciary Committee in January 2007. It is yet to be seen whether H.R. 40 will gather momentum in the House with his leadership.

[17] Although introduced each Congressional session since 1989, H.R. 40 has not moved out of the House Judiciary Committee. BROOKS, *supra* note 6, at 12.

[18] *See* Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131 (D. Okla. Mar. 19, 2004), *aff'd*, 382 F.3d 1206 (10th Cir. 2004), Cato v. United States, 70 F.3d 1103, 1105 (9th Cir. 1995); In re African-Am. Slave Descendants Litig., 304 F. Supp. 2d 1027, 1044 (D. Ill. 2004), *aff'd in part, rev'd in part*, 471 F.3d 754 (7th Cir. 2006), *petition for cert. filed*, No. 06-1533 (May 14, 2007) (multidistrict litigation brought by African descendants seeking reparations from eighteen corporations including FleetBoston Financial Corporation, Aetna Inc., New York Life Insurance Company, and JP Morgan Chase for acts committed by their predecessor companies during chattel slavery); Johnson v. McAdoo, 45 App. D.C. 440 (1916) (lawsuit initiated by Callie House, leader of the National Ex-Slave Mutual Relief, Bounty and Pension Association, to obtain cotton taxes collected between 1862 and 1868 as reparations to African descendants).

[19] *See* Discussion *infra* Part V.B.1.a (discussion of preserving self-image); BROOKS, *supra* note 6, (discussing the atrocities of slavery and Jim Crow committed by United States government that serve as the basis for atonement); AL BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921, RACE REPARATIONS, AND RECONCILIATION (Oxford Univ. Press 2002) (describing the destruction of the African descendant district, Greenwood, in Tulsa, Oklahoma by a white, deputized mob).

[20] *Cato*, 70 F.3d at 1105 (legislature is the "appropriate forum for plaintiff's grievances"); *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *36 (judge critical of Defendants' contentious attitude asserts that the State and City have a moral responsibility for the destruction of Greenwood).

[21] *See supra* Part V.

[22] There have been a few private entities in the past ten years to apologize for their role in chattel slavery and Jim Crow, including the Southern Baptists (1995) and the Episcopal Church (2006). In response to revelations made possible by the Chicago City Council's 2002 Slavery Era Disclosure Ordinance requiring companies doing business in Chicago to disclose connections to the enslavement of African peoples, J.P. Morgan acknowledged its ties to the enslavement of African peoples, and set up a $5 million scholarship fund in Louisiana for African descendants.

reparations movement began in the mid 1980s with a focus on legislative initiatives, primarily H.R. 40.[23] Building on past actions, the reparations movement expanded its strategies to include litigation in the 1990s.[24] During this time, law review articles analyzed strategies for overcoming procedural hurdles on which the courts were relying to dismiss reparations cases.[25] Judicial and legislative inaction provide strong support for the expanding effort to obtain voluntary reparations from the private sector, particularly the ABA.[26]

II. THE FOUNDATION OF THE ABA – WHITE SUPREMACY

An examination of the ABA's founding and its first seventy-eight years provides support for the conclusion that the ABA is an ideal organization to fill the void created by legislative and judicial inaction. The programs developed by the ABA to minimize racial disparities in the legal profession, to an unschooled eye, seem benevolent rather than compensatory.[27] The historical accounts of the legal profession's

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Wachovia announced its ties and the creation of a project to provide financial supports to the African descendant community. In 2003, Brown University's president, Barbara Simmons, formed the Brown University Steering Committee on Slavery and Justice to "understand the University's own historical ties to slavery." Alison Nguyen, *Report on Brown U.'s Ties to Slavery Expected This Fall*, N.Y. TIMES, July 17, 2006 (U-Wire). The Steering Committed issued its report in October 2006. Slavery and Justice: Report of the Brown Universtity Steering Committee on Slavery and Justice, www.brown.edu/Research/Slavery_Justice/report/index.html (last visited Aug. 2, 2007). The University responded to the report in February 2007. Response of Brown University to the Report of the Steering Committee on Slavery and Justice (Feb. 2007), http://brown.edu/Research/Slavery_Justice/documents/SJ_response_to_the_report.pdf.

[23] The formation of N'COBRA signaled the beginning of the modern day reparations movement, by calling together more than twenty-five organizations and individuals in 1987 to develop "a definitive campaign for reparations." Adjoa A. Aiyetoro, *The National Coalition of Blacks for Reparations in America (N'COBRA): Its Creation and Contribution to the Reparations Movement, in* SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS 211 (Raymond A. Winbush ed., Amistad 2003). The organization immediately began working with members of the Congressional Black Caucus, and its Detroit members, led by Ray ("Reparations Ray") Jenkins, were successful in convincing Congressman John Conyers to introduce H.R. 40 in 1989. *Id.* at 215, 217.

[24] Aiyetoro, *Formulating*, *supra* note 11, at 464. *See also* Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 84 (2005) (the judiciary can solve problems not resolved by the legislature).

[25] *See, e.g.*, Aiyetoro, *Formulating*, *supra* note 11.

[26] Malveaux, *supra* note 24 (provides an excellent analysis of the district court's failed analysis of the equitable remedies available to toll the statutes of limitations in *Alexander v. State*, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131 (D. Okla. Mar. 19, 2004)).

[27] For example, the ABA hosts conferences to address ways of promoting involvement of minority lawyers in corporations, government, law firms, law schools, bar associations, and the Minority Counsel Demonstration Program (encouraging corporations to do business with minor-

development generally, and the ABA specifically, rarely address the legal profession's exclusionary policies and practices and their far-reaching effect on African descendant attorneys.[28] Indeed, if one looks at the statement of principle the ABA adopted in 1963, one might erroneously conclude that the ABA was an innocent bystander in the United States' racial apartheid that existed until the mid-Twentieth Century Civil Rights Movement:

> The American Bar Association *has long welcomed* and continues to welcome into membership all duly admitted members of the bars of the several states, of good moral character, regardless of race or creed. The Association believes that this policy is required by the nature of the legal profession as a common calling and by the special dignity and responsibility shared alike by all members of the bar as officers of the court. The American Bar Association further believes that all lawyers have equal obligations to carry out the responsibilities of the profession and have equal rights and privileges of the profession. Among the obligations and privileges of an attorney-at-law are membership and active participation in bar organizations within their states, which officially establish standards for the profession and represent the profession before the courts, the legislature and the public.[29]

Yet that same year, Secretary of Labor W. Willard Wirtz, in an address to the Association of American Law Schools Convention,

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ity firms). 113 ABA Rep. 214-15 (1988). *See also* ABA Council on Racial and Ethnic Justice, www.abanet.org/randejustice (last visited Aug. 29, 2007).

[28] *E.g.*, CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 562 (William S. Hein & Co. 1980) (1911); EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK (1953) (no mention of African descendants and the ABA); John A. Matzko, "*The Best Men of the Bar:" The Founding of the American Bar Association*, *in* THE NEW HIGH PRIESTS (Gerard W. Gawalt ed., 1984) (no mention of the ABA's exclusion of African descendants); JAMES GRAFTON ROGERS, *The American Bar Association in Retrospect* 179, *in* LAW: A CENTURY OF PROGRESS 1835-1935 VOLUME I-HISTORY, ADMINISTRATION, AND PROCEDURE (1937) (ABA's "accidental election" of three African descendant lawyers "threatened to split the Association." Rogers suggests it cost Wickersham the presidency of the ABA); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 497, 541 (stating that bar associations were for a select group of lawyers and that the ABA admitted three Black lawyers by "mistake" in 1912) (3d ed. 2005); *see also* SMITH, *supra* note 5, at 541-46 (providing a more complete discussion of racial discrimination in the legal profession); AUERBACH, *supra* note 3, at 216 (providing a more complete discussion of racial discrimination in the legal profession).

[29] Negro Members and Their Participation in the American Bar Association, November 1968, Office of the Secretary, Division of Executive Services (hereinafter "1968 Report of Secretary") at Exhibit A at 6 (emphasis added); 88 ABA Rep 617 (1963).

stated that the legal profession was "the worse [sic] segregated group of the whole economy or society."[30] An examination of the ABA's founding and its first seventy-eight years may enlighten those who presume the ABA's innocence in the creation and maintenance of a racially disparate profession.

A. The ABA Was Organized on the Shoulders of a White Supremacist Legal Profession

The legal profession's historical development and view of African descendants in the United States laid the foundation for the ABA's exclusionary policies and practices. The legal profession in the United States developed in conjunction with European migration, as Anglo-Saxon settlers brought the practice of law to the North Amercian continent.[31] The attorneys and judges in the legal profession, from its earliest beginnings in the Seventeenth Century, were Anglo-Saxon males; generally, these men did not receive any legal training, although some English barristers migrated to the colonies and served as barristers in, or chief justices of, the colonial courts.[32] Examining both the negative perception of African descendants and lawyers through the early Nineteenth Century sets the framework for the ABA's exclusionary policies and practices.

The majority of the Africans introduced to the colonies between 1619 and approximately 1638 were indentured servants.[33] However, beginning in the 1630s and extending through the 1660s, the status of these indentured servants changed to slave as colonies formalized slavery by law.[34] The enslavement of Africans and African descendants deprived their race of their professional classes, including their legal advocates.[35]

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[30] Henry W. McGee, Jr., *Black Lawyers and the Struggle for Racial Justice in the American Social Order*, *in* RACE, LAW, AND AMERICAN HISTORY 1700-1900 212 (Paul Finkelman ed., 1992).

[31] *See* WARREN, *supra* note 28, at 3-4.

[32] *Id.* at 3, 17; SMITH, *supra* note 5, at 6-9 (grade school education was all many lawyers had after the Civil War).

[33] FRANKLIN & MOSS, *supra* note 7, at 53-63.

[34] *Id.*; *see also* A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR 19 (1978). As Franklin and Moss point out, there is evidence that Africans came to the New World prior to Columbus and engaged in trading with its inhabitants. Africans also came with the Europeans as explorers, servants and slaves. FRANKLIN & MOSS, *supra* note 7, at 30.

[35] "It is difficult to conceive of any people as having no professional classes. Even in the most primitive stages we find these well defined. All natives have their artists, their teachers, their advocates, their medicine men, and their clergy . . . . That the Negro must have had a well

From the founding of the first colony until well into the Nineteenth Century, African descendants were excluded from the practice of law through their involuntary servitude and enslavement.[36] The "free" African descendant, particularly after the Revolutionary War, was treated only slightly better than the enslaved African and African descendant.[37] For example, some slave states required the "free" African descendant to leave the state.[38]

During the same period, spanning from the colonial era through the early Nineteenth Century, the colonists viewed the law and lawyers with distrust and contempt for two predominant reasons. First, many colonists experienced the legal profession and common law in England as oppressive and, therefore, had a negative view of those who attempted to practice law in the colonies.[39] This view reemerged after the War of Independence in the early Nineteenth Century; Americans once again saw lawyers as protecting the propertied elite.[40] Second, the lack of legal resources, including books and those trained in the law, as well as the jealous way that planters, landowners, and merchants guarded their positions of power, made the legal profession in the colonies one of comparably low status.[41] The ABA's exclusionary policies and practices, therefore, are rooted in both the European-American view that Africans and African descendants were "une-

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developed professional service is evident from what we know of the tribal life in Africa prior to his transplantation to America." CARTER GODWIN WOODSON, THE NEGRO PROFESSIONAL MAN AND THE COMMUNITY 1 (1934); *see also* FRANKLIN & MOSS, *supra* note 7, at 29 ("Whether the [African] states were great empires or modest political entities, they were well organized with limited monarchies and a myriad of public officials. Well-defined concepts of law and order prevailed, and even if there was considerable rivalry and strife among states, there was a remarkable degree of order within the several governments.").

36 HIGGINBOTHAM, *supra* note 34, at 6; RHODE & LUBAN, *supra* note 5, at 3 (exclusion began in English model). In 1844 Macon Allen became the first Black man admitted to the bar. GERALDINE R. SEGAL, BLACKS IN THE LAW 208 (1983); SMITH, *supra* note 5, at 33; RHODE & LUBAN, *supra* note 5, at 62.

37 FRANKLIN & MOSS, *supra* note 7, at 139-42; FRIEDMAN, *supra* note 28, at 49, 157, 160.

38 FRANKLIN & MOSS, *supra* note 7, at 139; FRIEDMAN, *supra* note 28, at 156.

39 WARREN, *supra* note 28, at 5-7.

40 *Id.* at 214-19 (problems associated with debt collection, including jailing for debt, attributed to lawyers and attempts were made into the early nineteenth century to either abolish the bar or regulate lawyer fees); Matzko, *supra* note 28, at 76.

41 WARREN, *supra* note 28, at 7-8. Most of the law books that did exist were manuals for justices of the peace and sheriffs. *Id.* at 157. The few bound collections of state statutes and law reports in the colonies were in the richer lawyers' offices. *Id.* at 161. After the American Revolution, the Tory lawyers took any law books and reports in their possession with them when they fled. *Id.* at 163.

qual" to the Anglo-Saxon[42] and the need to bolster the low esteem of the legal profession in the Seventeenth and Eighteenth centuries and into the early Nineteenth century.[43]

In an attempt to gain respect, prestige, and social standing, attorneys in the colonies began developing state bar associations in the mid-Eighteenth Century.[44] In many instances, these associations took the place of the local legislative bodies in creating rules for the practice of law.[45] According to Charles Warren, a legal historian, these local bar associations were "designed to dignify the profession."[46] The associations and the rules developed were designed to exclude those who did not meet certain qualifications, purportedly ridding the legal profession of "pettifoggers" and "sharpers,"[47] as well as the "ill-bred."[48] Most state bar associations excluded the few African descendant attorneys who had managed to overcome the obstacles to admission to the practice of law.[49]

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[42] *See, e.g.*, HIGGINBOTHAM, *supra* note 34, at 19 ("since the fifteenth century, Englishmen had regarded blackness as 'the handmaid and symbol of baseness and evil, a sign of danger and repulsion.'[citations omitted]; 'colonists' predilection for seeing Africans as less than human . . .'").

[43] WARREN, *supra* note 28, at 5-10, 12, 214-19, 221.

[44] *Id.* at 17-18.

[45] *Id.* at 83-84 (Massachusetts bar association formed and developed qualifications for admission to Bar).

[46] *Id.* at 17-18; *but see* FRIEDMAN, *supra* note 28, at 495 (lawyers formed mainly social associations until the last third of the nineteenth century).

[47] WARREN, *supra* note 28, at 17-18, 200-02. A pettifogger is a "lawyer whose methods are petty, underhanded, or disreputable; one given to quibbling over insignificant details . . . ." Webster's Third New International Dictionary 1691 (1966). A sharper is an unduly sharp or canny person, such as a cheater. *Id.* at 2088.

[48] WARREN, *supra* note 28, at 204 (quoting a letter from John Adams to his nephew William Cranch: "What? is it unlawful for the gentlemen of the profession to spend an evening together once a week? to converse upon law and upon their practice; to bear complaints of unkind, unfair and ungentlemanlike practice; to compare difference; to agree that they will not introduce ignorant, illiterate, or ill bred, or unprincipled students or candidates . . . .").

[49] Ernest Gelhorn, *The Law Schools and the Negro*, *in* RACE, LAW, AND AMERICAN HISTORY 1700-1990 108 (Paul Finkelman ed., 1992). *See also* WOODSON, *supra* note 35, at 199, 205, 208 (In 1930, African descendants were not allowed to be members of a number of bar associations including Baltimore, Washington, D.C., Chicago, and Los Angeles). Indeed, even in the 1960s, African descendants were excluded from a number of Southern bar associations, for example, North Carolina. Gelhorn, *supra* at 114.

Bar associations were created as early as 1745,[50] and they deeply influenced the creation of requirements for practicing law.[51] Many of the complaints regarding lawyers concerned their competency, including lack of knowledge of legal principles and the "common customs" of the colonies.[52] In light of these grievances, it seemed reasonable to develop standards to ensure that those practicing law possessed a basic knowledge of the law and legal procedure.[53]

The rules adopted to ensure some minimal level of competency usually entailed a period of apprenticeship between a Bar member and an aspiring attorney.[54] However, these seemingly neutral apprenticeship requirements had the practical effect of ensuring that few, if any, African descendants were admitted to practice law.[55] Until after the Civil War, the only African descendants qualified to practice law were "free" men, and, according to the 1790 Census, approximately ninety-percent of African descendants were enslaved.[56] Not surprisingly, there is no record of any African descendant being admitted to any state Bar until well after the American Revolution.[57] However,

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50 Albert P. Blaustein, *New York Bar Associations Prior to 1870*, 12 THE AM. J. OF LEGAL HIST. 1, 53 (1968). Blaustein found that the New York Bar Association was "probably formed in 1744, 1745, or 1747." *Id.*

51 WARREN, *supra* note 28, at 200-04.

52 *Id.* at 6. Many of the colonies refused to allow the use of English precedents and the lawyers and courts had to create the law that applied to the situation. *Id.* at 11, 16. However, there is some complaint that even after state admission requirements were implemented the quality of the profession was unacceptable due to the different standards, some of which were considered "ridiculously easy and inadequate." Editorials, 1 YALE L.J. 163 (1891-92). *See also* F. S. Smith, *Admission to the Bar*, 16 YALE L.J. 514, 518 (1906-07).

53 *See generally*, RHODE & LUBAN, *supra* note 5, at 34 (the term profession is both elastic and elusive, yet the most common definition is that members of a profession share a body of common knowledge).

54 WARREN, *supra* note 28, at 84-85, 193 (costs); FRIEDMAN, *supra* note 28, at 56. In 1890, 23 of 39 states and territories required some formal period of study or apprenticeship. *Id.* at 500; SMITH, *supra* note 5, at 33-34 (apprenticeships and fees).

55 WOODSON, *supra* note 35, at 191 (until approximately the late 1920s, no African descendant lawyer was admitted to the bar in Delaware because no white lawyers would allow an African descendant lawyer the opportunity to be an apprentice for one year); *Introduction*, *in* RACE, LAW, AND AMERICAN HISTORY 1700-1990 vii (Paul Finkelman ed., 1992) (under the apprenticeship method of becoming a licensed attorney, it was difficult for African descendant lawyers to become barred because of the dearth of African descendant lawyers and the difficulty of finding a white lawyer willing to allow the apprenticeship).

56 FRANKLIN & MOSS, *supra* note 7, at 98, Table 2 (of the 757,181 African descendants in the 1790 Census, 59,557 were "free").

57 Macon Allen and Robert Morris are recorded as the first African descendant attorneys admitted to the Bar of any state. SEGAL, *supra* note 36, at 208 (controversy over whether Allen or Morris was the first African descendant admitted to the Bar of any state); SMITH, *supra* note

due to the restrictions on admission to the legal profession, the prestige and power of lawyers rose significantly immediately prior to and after the American Revolution, and served to overcome much of the dislike that had plagued the legal profession from the founding of the first colonies.[58]

The strength and influence of the South and its political lawyers, during the Constitutional Convention, and the so-called compromises that they crafted regarding slavery were the womb from which the ABA was born.[59] The South's economic strength and its strong resistance to the abolition of slavery after the War of Independence made it a foregone conclusion that slavery would be an important consideration at the Constitutional Convention.[60] The South's strong opposition led to compromises that included the Three-Fifths Clause,[61] the legal continuation of the importation of Africans for purposes of enslavement until 1808,[62] and the Fugitive Slave Clause.[63] There was virtually no opposition to the passage of the Fugitive Slave Clause.[64]

> Quakers and other [abolitionist] groups could view the new document as devoid of guarantees of human liberties, and zealous reformers could regard the Constitution as a victory for reaction; but their objections were silenced by the effective organization for ratification that was in operation even before the convention had adjourned. The drafters of the Constitution were dedicated to the proposition that

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5, at 8 (Allen was the first African descendant admitted to practice law); Finkelman ed., *supra* note 30, at vii (Morris was the first African descendant admitted to practice law); Walter J. Leonard, *The Development of the Black Bar*, *in* RACE, LAW, AND AMERICAN HISTORY 1700-1900 198 (Paul Finkelman ed., 1992) (no one sure who was the first African descendant lawyer in the United States).

58 WARREN, *supra* note 28, at 211 ("Antipathies changed towards attorneys because character and talents changed."). The rise in prestige and power and the decline of the disdain of the legal profession is also due to the fact that many prominent lawyers were political leaders during the American Revolution and in the newly formed federal government. Of the fifty-six signers of the Declaration of Independence, twenty-five were lawyers. *Id.* at 211, 214 (the attorneys of stature that remained in North America after the American Revolution were in politics, the military, or judges).

59 Northerners and Southerners maintained views of white supremacy and African inferiority as seen in the history of the exclusion of African descendants, discussed *infra* Part IV.

60 FRANKLIN & MOSS, *supra* note 7, at 93.

61 U.S. CONST. art. I, § 2 (enslaved Africans would be counted as three-fifths of a person).

62 *Id.* at art. I, § 9.

63 *Id.* at art. IV, § 2; *see also* FRIEDMAN, *supra* note 28, at 155.

64 FRANKLIN & MOSS, *supra* note 7, at 95. Franklin and Moss suggest that the ease of passage may have been because the discussion was an "anticlimax to the great debates." *Id.*

> "government should rest upon the dominion of property." For Southerners this proposition meant slaves just as surely as it meant commerce and industry for Northerners. In the protection of this property the Constitution had given recognition to the institution of human slavery, and it was to take seventy-five years to undo that which was accomplished in Philadelphia in 1787.[65]

Northerners engaged in the trade of Africans arriving from Africa, flaunting the 1807 federal legislation prohibiting the importation of Africans for purposes of enslavement that became effective in 1808, pursuant to the Constitutional provision prohibiting such laws until 1808.[66] Northerners also participated in the trade of African descendants born in the United States.[67] The center of the United States federal government, Washington, D.C., was considered a major slave market, commonly known as "the very seat and center of the slave trade."[68] Thus, Southerners and Northerners became rich, influential, and powerful on the backs of enslaved Africans and African descendants. Although there were a few white[69] lawyers who were outspoken in opposition to slavery,[70] the "justice system" and the public ignored for the most part the flagrant violations of the Constitutional prohibition against the importation of enslaved Africans that took place until shortly before the Civil War.[71]

After the Civil War, the legal profession faced new issues with the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, and "the economic, social, and political problems" that flowed from these amendments.[72] The formation of a national bar association was important to the maintenance and expansion of the prominence of

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65 *Id.*

66 *Id.* at 136-37; An Act to Prohibit the Importation of Slaves, 2 Stat. 426 (1807); U.S. CONST. art. I § 9.

67 FRANKLIN & MOSS, supra note 7, at 133-37.

68 *Id.* at 130.

69 "White" is used instead of Anglo-Saxon for two reasons: (1) Anglo-Saxon is the appropriate designation for the founding meeting and the earliest years since the founders were all Anglo-Saxon. (2) White is a term that most of the scholarship uses in discussing discrimination against African descendants and is inclusive of Anglo-Saxons.

70 FRANKLIN & MOSS, *supra* note 7, at 92 (stating that Zepheniah Swift, Noah Webster, and Theodore Dwight were considered "outstanding spokesmen for the legal profession" in opposition to slavery after the War of Independence).

71 *Id.* at 136–37.

72 WARREN, *supra* note 28, at 442.

lawyers and the "dignity of the bar."[73] The ABA's formation as an exclusively white male legal organization ensured that the collusion between the white male Southerners and Northerners in the exploitation of Africans and African descendants would continue in the legal profession.

B. The ABA Maintained the "Dignity of the Profession" in Its Early Years Through Exclusion

1. Reconstruction

During Reconstruction, African descendants experienced a twelve-year period of some social, economic, and professional growth.[74] African descendants were elected to the local, state, and federal legislatures and held judgeships.[75] The number of African descendants who became practicing attorneys increased significantly during Reconstruction.[76] The Freedmen's Bureau established "freedmen's courts" and boards of arbitration when the Freedmen's Bureau felt the local courts would not fairly adjudicate a matter involving an African descendant.[77] However, in another act of solidarity between Southern and Northern Anglo-Saxons, Reconstruction ended in 1877,[78] when Reconstruction failed to bring peace and order to the

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[73] *Id.* at 18 (local bar associations designed to "dignify the profession").

[74] Although President Lincoln began implementing a plan for Reconstruction immediately after the Civil War and President Johnson continued to implement the plan after Lincoln's death, there was significant discord between Congress and the President. Northern advocates for African descendants were of the opinion that the President's plan sanctioned white home rule in the South, which was practically indistinguishable from the white home rule prior to the Civil War. It was not until 1867 that Congress passed the Reconstruction Act, which enfranchised all males in the District of Columbia, denied readmission to any state that did not ratify the Fourteenth Amendment, required each state that had seceded to draft a new constitution guaranteeing universal male suffrage that was acceptable to the Congress of the United States, and stabilized the Freedman's Bureau. FRANKLIN & MOSS, *supra* note 7, at 251–53. Despite these efforts, most former enslaved Africans did not obtain economic security during Reconstruction. *Id.* at 264, 271.

[75] Leonard, *supra* note 57, at 190-91. Macon Allen, reputed by some to be the first African descendant attorney in the United States and admitted to the practice of law in Maine and Massachusetts, returned to South Carolina during Reconstruction where he was admitted to the bar and was elected to the bench in Charleston. *Id.* at 190. FRANKLIN & MOSS, *supra* note 7, at 269 (stating that African descendants were prosecuting attorneys).

[76] Leonard, *supra* note 57, at 190–92.

[77] FRANKLIN & MOSS, *supra* note 7, at 256.

[78] Reconstruction ended by virtue of a series of compromises between the Democrats and Republicans. The final compromise that ended Reconstruction came in 1877, to secure the presidency of the Republican candidate Rutherford B. Hayes since neither presidential candidate (Hayes or Samuel J. Tilden) received the majority of electoral votes. THE GREENWOOD ENCY-

South and threatened the Northern industrialists' prosperity.[79] The largely political advances experienced by African descendants were rescinded over a number of years after Reconstruction.[80] Southern Anglo-Saxons returned to an elevated level of political, social, and economic power, firmly reestablishing white supremacy in the United States.[81]

2. *The Post-Reconstruction Organization of the ABA*

The end of Reconstruction and the reduction of African descendants' rights ushered in a new era of oppression, coinciding with founding of the ABA. In 1878, Simeon Baldwin and the Connecticut Bar Association called on a select group of Anglo-Saxon lawyers to meet in Saratoga, New York, with the purpose of founding the ABA.[82] During this time period, the legal profession's prestige was waning, and hostility towards lawyers was on the rise. This contributed to the effort to regulate the legal profession through development of rules by professional organizations.[83] Although the legal profession was composed of primarily Anglo-Saxon men, African descendant attorneys of some note were practicing in 1878.[84] However, the organizers of the first meeting did not invite any African descendant attorneys to the first meeting.[85] "The legal profession all too accurately mirrored American society. Every essential feature of professional organization and structure reflected prevailing national values: stratification along ethnic lines . . . ."[86]

CLOPEDIA OF AFRICAN AMERICAN CIVIL RIGHTS: FROM EMANCIPATION TO THE TWENTY-FIRST CENTURY, VOLUME I, A-R 121-22 (Charles D. Lowery & John F. Marszalek eds., Greenwood Press 2003). The Republicans "promised to remove the remaining federal troops in the South, to be fair to Southerners in the distribution of federal patronage, and to vote funds for a number of southern internal improvements." KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION: 1865-1877 210 (Vintage Books 1967).

79 FRANKLIN & MOSS, *supra* note 7, at 280.

80 *Id.* at 281–86.

81 *Id.* at 271, 286–91.

82 SUNDERLAND, *supra* note 28, at 3–4; SMITH, *supra* note 5, at 541.

83 WARREN, *supra* note 28, at 510–14 (stating that the unpopularity of lawyers contributed to effort to regulate lawyers through development of codes); FRIEDMAN, *supra* note 28, at 496 (stating that there was a crisis in the legal profession in post-Civil War discussing New York attorneys and "stench of corruption").

84 *See infra* Part III.C.

85 SMITH, *supra* note 5, at 541.

86 AUERBACH, *supra* note 3, at 163.

The Connecticut Bar Association's organizing committee reached out to "a small number of leading lawyers in different parts of the country" to sign a letter requesting the Saratoga organizational meeting.[87] The twenty men asked to sign the letter for the organizing meeting were similar in background and viewpoint: political moderates, defenders of the Fugitive Slave Laws, opposed to Radical Reconstructionists, and, in contrast to the majority of lawyers at that time, most had attended college.[88] The organizational letter stated the national association's purpose was "comparison of views and social intercourse."[89] The ABA's purpose mimicked in many ways the purpose of the state bar associations: to provide a vehicle for enhancing the status of the profession.[90] "Not only was the new Association expected to provide opportunities for social intercourse among the lawyers of the nation, but it was to be a means for improving American jurisprudence, elevating the standards of the profession, and providing the public with a more efficient administration of justice."[91] Indeed, the class and racial identification of those who gathered at Saratoga determined the organization's focus.[92] The attorneys who were invited and attended the first meeting represented the elite of the profession: men of wealth who were allied with corporate capitalism.[93] These attorneys represented the interests of the financial and political leadership of the country, and their collaboration in forming the ABA mirrored the collaboration of the South and North in ending Reconstruction, for example:

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87 SUNDERLAND, *supra* note 28, at 3; Matzko, *supra* note 28, at 85.

88 Matzko, *supra* note 28, at 85–86 (stating that fourteen of the twenty men had attended college).

89 *Id.* at 88–89.

90 *Id.* at 88.

91 *Id.* at 11; *see also* AUERBACH, *supra* note 3, at 63.

92 AUERBACH, *supra* note 3, at 63 (stating that (1) Simeon Baldwin, the moving spirit behind the association, labored to confine the membership "to leading men or those of high promise;" (2) local associations often were similarly exclusive; (3) the Chicago Bar Association, founded (in the words of one of its presidents) to bring "the better and the best elements of the profession together," charged high admission fees and annual dues to achieve its purpose; and (4) the strongest pillars of the Association of the Bar of the City of New York were Yale, Harvard, and Protestantism). In doing this, it further entrenched white supremacy as the policy and practice of the legal system by its own exclusion of African descendants and its support of state associations that engaged in this practice of exclusion. *Id.*

93 *Id.* at 75, 78, 81 (stating that (1) the ABA president indicated founders linked to big business, (2) that elite lawyers had "gained much wealth by alliance with corporate capitalism," and (3) that the elite of the bar had to organize a successful national association).

- Simeon Baldwin was a member of a prominent New England family that included a signer of the Declaration of Independence, a founder of an antislavery society and a co-counsel with John Quincy Adams in the *Amistad* case.[94]
- Francis Rawle, a Harvard graduate and member of a famous Philadelphia family of lawyers, was the secretary at the first meeting and ABA treasurer for twenty-four years.[95]
- John Hazlehurst Boneval Latrobe of Baltimore, Maryland, the ABA's preliminary chairman[96] from 1828 until his death in 1891, represented the Baltimore & Ohio Railroads. He was an active supporter of the African descendant colonization of Liberia.[97]
- Carleton Hunt of Louisiana was a leader in the organizing body for the ABA,[98] and for a number of years was chairman of the ABA Committee on Legal Education and Admissions to the Bar.[99] He served as a First Lieutenant in the Louisiana Artillery Regiment, Confederate Army.[100]

The organization of the ABA was a conscious collaboration between Southern and Northern whites seeking "to purge the political system of its corruption . . . but they had no desire to make sweeping changes in society."[101] This collaboration is reminiscent of the Constitutional Convention's compromises on slavery and the collusion between prominent Anglo-Saxon men from the North and the South in the continuation of the African slave trade after the passage of the Constitution. There were 289 lawyers at the ABA's founding meeting, representing twenty-nine states and the District of Columbia.[102] Louisiana, with thirty-three attorneys, and New York, with thirty-two attorneys, had the largest number of delegates.[103] The South had one

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94 *Id.* at 81.

95 *Id.* at 87.

96 *Id.*

97 Maryland Art Source, John H. B. Latrobe, www.marylandartsource.org/artists/detail_00 0000054.html (last visited Aug. 2, 2007).

98 Biographical Directory of the United States Congress 1774 - Present, bioguide.congress.gov/scripts/biodisplay.pl?index=H000969 (last visited Aug. 2, 2007).

99 *See* ABA Rep. (1879-1885).

100 Matzko, *supra* note 28, at 86.

101 *Id.* at 82.

102 SUNDERLAND, *supra* note 28, at 9.

103 *Id.*

hundred delegates,[104] as compared with sixty-nine from the Midwest,[105] and one hundred twenty-six from the Northeast.[106] Nineteen states had no delegates at the ABA's founding meeting.[107] The strength and political perspectives of the Southern representation, combined with the Northern concern with healing the divide between North and South, ensured that African descendants would not be included.[108]

The first ABA constitution, although not explicitly prohibiting African descendant members, provided virtual assurance that no African descendants would become members.[109] Although there was no mention of racial or ethnic identity, the requirements for membership virtually guaranteed that the state bar association only nominated and selected "leading males" of the profession (i.e., Anglo-Saxons) for membership since many of the state bar associations sought to include only the "leading men" of the profession.[110] Many of the state bar associations actively discriminated against African descendant attorneys.[111] There is no indication that those present at the ABA's organizing committee articulated any interest whatsoever in addressing issues of race generally, much less race from the vantage point of diversifying the organization.

Evidently, the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments did not give the organizers pause to consider the

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104 *Id.* at 9-10 (Louisiana, Maryland, Mississippi, Virginia, Georgia, Arkansas, Tennessee, Florida, South Carolina, West Virginia, and the District of Columbia).

105 *Id.* at 10 (Ohio, Missouri, Indiana, Nebraska, Kentucky, Illinois, Michigan, and Iowa).

106 *Id.* (Pennsylvania, New York, New Jersey, and Delaware).

107 *Id.* There were thirty-eight states at the time of the ABA's founding. Colorado, the thirty-eighth state admitted to the United States, was admitted in 1876. North Dakota, the thirty-ninth state, was admitted in 1889. THE NEW ENCYCLOPAEDIA BRITANNICA 153 (15th ed. 1998).

108 *See* FRANKLIN & MOSS, *supra* note 7, at 227-31 (describing the overthrow of Reconstruction in the South, including the creation of the "White Leagues" that led riots and eventually to President Hayes' withdrawal of federal troops from Louisiana in 1877).

109 Baldwin submitted a proposed draft of a constitution to the constitution committee that was formed at the Saratoga meeting. The draft was adopted by the committee with virtually no changes and submitted to the attendees for approval. SUNDERLAND, *supra* note 28, at 6. A man was eligible for ABA membership if he was a member of a state bar association for five years prior to application (Article II); if he was nominated by the state bar to which he belonged (Article IV); if he was elected by a committee appointed at the organizing conference for that purpose (Article V); and if he paid dues as provided for in the constitution (Articles V and VII). *Id.* at 6-8; *see also* ABA Rep. 20-22 (1879).

110 AUERBACH, *supra* note 3, at 63.

111 Gelhorn, *supra* note 49, at 108; WOODSON, *supra* note 35, at 199, 205 (examples of Baltimore and Chicago exclusion even in the 1930s).

propriety of having an organization that excluded African descendants. None of the Standing Committees or Special Committees created at the Saratoga meeting included a focus on race.[112] African descendants were basically invisible. The ABA's founders simply ignored both African descendant attorneys and the importance of legal issues pertaining to the African descendant community, and these issues remained insignificant to the ABA through its first thirty-two years.

C. Were There No Leading African Descendant Attorneys?

Slavery and post-slavery discrimination were major impediments to African descendants becoming lawyers. By the Eighteenth Century, most colonies and states enacted requirements for practicing law, including obtaining the support of a licensed attorney.[113] Some of the Southern colonies/states levied criminal sanctions against African descendants who dared to learn to read or write.[114] Despite the impediments, some African descendants did enter the legal profession prior to the ABA's formation in 1878.[115]

The first African descendant attorney was Macon Allen.[116] Between 1844 and 1878, a number of African descendant males, and

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112 For example, the charges to the standing committees formed in the organizing conference made no mention of race. SUNDERLAND, *supra* note 28, at 10-11. Likewise, none of the special committees formed in what Sunderland terms the "Saratoga Era," the first twenty-five years of the association, appear from their titles to address issues of race. *Id.* at 25. Sunderland opines that "almost every conceivable question affecting legal education was raised and discussed, during the closing decade of the Saratoga Era." *Id.* at 74. Yet, his list of topics includes no reference to African Americans and the law although it includes "law as a field for women." *Id.* at 74-75. Similarly, there appears to be no focus on race as an important aspect of the legal and organizational work of the association over the next 50 years as it refined its structure. For example, the Committee on Judicial Administration and Remedial Procedure surveyed the members representing the various states concerning criminal laws and procedures. One question was on the existence of lynching and whether it indicated a dissatisfaction with the administration of the criminal law. Neither the question nor any of the answers raised race as an issue in lynching. *See* 19 ABA Rep. 367-74 (1896).

113 *See supra* note 55.

114 Virginia, for example, had a statute making it a crime for "any slaves, free negroes or mulattoes" to gather for the purpose of instruction in reading or writing, and it made it a crime for any white person to teach "slaves, free negroes or mulattos" to read or write. Acts of the General Assembly of Virginia, 1848, Chapter 12, p. 120.

115 SEGAL, *supra* note 36, at 125-27, 132, 138, 171, 196-97, 208; SMITH, *supra* note 5, at 55, 208.

116 SEGAL, *supra* note 36, at 208; SMITH, *supra* note 5, at 208. However, there appears to have been some dispute as to whether Robert Morris, Jr. was admitted to the Bar prior to Macon Allen. *See* SEGAL, *supra* note 36, at 208 n.3.

one African descendant woman,[117] were admitted to a number of state bars including Maine,[118] Massachusetts,[119] Illinois,[120] Ohio,[121] Michigan,[122] New York,[123] as well as the bar of Washington, D.C.[124] These pioneering African descendant attorneys engaged in a diverse practice, including civil and criminal law.[125] A number of them took cases that advocated for the civil rights of African descendants.[126] Some of these ground-breaking African descendant attorneys gained the respect of the legal profession in their communities and held legal positions of influence in these communities. For example, Macon Allen was appointed a justice of the peace in Boston in 1847,[127] and the legislature selected him for a judgeship in South Carolina during Reconstruction.[128] Robert Morris, Sr. was commissioned as a magistrate in Essex County, Massachusetts, in 1851, and had a thriving private practice, being retained "[to keep] the books of one of the wealthy railroad companies in Boston, a business almost entirely confined to lawyers."[129] Edward Garrison Walker was the first African descendant elected to a legislative body in the United States, when he was elected to the General Court (the Massachusetts legislature) in 1866.[130] George Lewis Ruffin was the first African descendant attorney to graduate from Harvard Law School; in 1869, he was admitted to the Massachusetts Supreme Judicial Council and the following year, he was elected to the state legislature.[131] Ruffin was appointed to

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117 Charlotte Ray was the first African descendant woman to graduate law school in the United States. She graduated from Howard University School of Law in 1872 and was admitted to the D.C. Bar. SEGAL, *supra* note 36, at 197; SMITH, *supra* note 5, at 55.

118 SEGAL, *supra* note 36, at 125.

119 *Id.* at 125-27.

120 *Id.* at 132.

121 *Id.* at 138.

122 *Id.* at 208.

123 *Id.* at 171.

124 SEGAL, *supra* note 36, at 196-97.

125 *Id.* at 197-200.

126 For example, Robert Morris, Sr. the second African Descendant lawyer in the United States, filed the first lawsuit in the United States, with co-counsel Charles Sumner, to desegregate a public school system (the public school system in Boston), thus setting in motion a jurisprudence of resistance to segregation that provided a foundation for *Brown v. Board of Education*, 347 U.S. 483 (1954). SMITH, *supra* note 5, at 97. The Massachusetts legislature acted in 1855, to provide the remedy requested in the unsuccessful lawsuit. *Id.* at 97 n.30.

127 SMITH, *supra* note 5, at 96.

128 SEGAL, *supra* note 36, at 208.

129 SMITH, *supra* note 5, at 99.

130 *Id.* at 100.

131 *Id.* at 103.

another judicial position in 1883.[132] John Mercer Langston was the second African descendant attorney admitted to practice before the United States Supreme Court; in 1869, John Mercer Langston became the founding dean of Howard University School of Law.[133] The presence of African descendant attorneys of distinction, who received recognition of their status from the white-dominated power structure, lends credence to the conclusion that the "leading men" that Simeon Baldwin and his colleagues called to attend the ABA's organizational meeting were "leading men" because of their race and status in the legal community, not simply because of their status in the legal community.

III. THE ABA ACTS AFFIRMATIVELY TO EXCLUDE AND RELUCTANTLY TO INCLUDE

> For sixty-six years black lawyers were barred from membership in the American Bar Association solely on the basis of race. During this period, from 1878 to 1944, black lawyers played no role in the development of the ABA policy that directly affected them. They were legally outcast. The exclusion was similar at the other national bar groups: in the Federal Bar Association and the National Association of Women Lawyers, blacks were barred between 1925 and 1945, and between 1899 and 1943, respectively.[134]

A. The Intention to Exclude African Descendants From Membership Is Revealed

In 1912, the ABA was forced to address the issue of its membership's racial composition when its Executive Committee unwittingly admitted three African descendant attorneys.[135] The admission of the African descendant attorneys violated an unwritten policy of exclusion of African descendants from the membership ranks.[136] The unsuccessful attempt to rescind the African descendants' admission, and the passage of a resolution to make clear the exclusion of African descendant attorneys from membership in the ABA,[137] clearly demon-

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132 SEGAL, *supra* note 36, at 209.

133 *Id.* at 129.

134 SMITH, *supra* note 5, at 584-85.

135 AUERBACH, *supra* note 3, at 65.

136 1968 Report of Secretary, *supra* note 29, at 1 & Exhibit A; SMITH, *supra* note 5, at 541; AUERBACH, *supra* note 3, at 65; SEGAL, *supra* note 36, at 17.

137 1968 Report of Secretary, *supra* note 29, at 1; AUERBACH, *supra* note 3, at 65-66.

strated that the exclusion was based on race and not "competency." All three African descendant attorneys met every qualification for admission to the ABA, with the exception of race.[138] Indeed, these lawyers, if they had been Anglo-Saxon males, would have been considered "the cream of the crop."

The three African descendant attorneys admitted to the ABA were William Henry Lewis, Butler Roland Wilson, and William R. Morris. William Henry Lewis graduated from Harvard Law School with honors and was admitted to the Suffolk County Bar in 1885. In 1911, President Taft appointed him to serve as the Assistant Attorney General, the first African descendant to hold that post.[139] Indeed, he was the "highest-ranking black public official in the history of the nation."[140] Butler Roland Wilson graduated from Boston University School of Law in 1884 and was a respected practicing lawyer in Boston.[141] William R. Morris was one of the first African descendant attorneys in Minnesota and was considered a lawyer "of prominence."[142] The state ABA councils for all three African descendant attorneys recommended these attorneys for membership to the ABA Executive Committee.[143]

The resolution passed in 1912 in response to this inadvertence on the part of the Executive Committee made it clear that African descendant attorneys were not welcome in the ABA:

> *Resolved:* That, as it has never been contemplated that members of the colored race should become members of this Association the several local councils are directed that, if at any time any of them shall recommend a person of the colored race for membership they shall accompany the recommendation with a statement of the fact that he is of such race.[144]

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138 37 ABA Rep. 11 (1912) ("The committee has not rejected any one of the three mentioned gentlemen for membership in the Association, or assumed to determine the desirability of electing to such membership a colored man otherwise qualified . . . ."). The discussion concerning these three gentlemen assumed their qualifications for membership with the exception of their race. *Id.* at 11-14.

139 SEGAL, *supra* note 36, at 127.

140 SMITH, *supra* note 5, at 542.

141 *Id.*

142 *Id.* (highly educated and well known beyond the borders of his state); SEGAL, *supra* note 36, at 169 (lawyer of prominence).

143 SEGAL, *supra* note 36, at 128.

144 1968 Report of Secretary, *supra* note 29, at Exhibit A.; 37 ABA Rep. 11-16 (1912).

There was unsuccessful opposition to this resolution.[145] Attorney General Wickersham noted his objection to the ABA's attempt to rescind the three African descendant attorneys' ABA membership.[146] However, Attorney General Wickersham did not base his opposition on objection to the unwritten policy of not admitting an African descendant attorney. Rather, he objected based on his belief that William Henry Lewis had met the minimum qualifications for membership under the ABA's constitution.[147] Indeed, Attorney General Wickersham supported the resolution as a compromise.[148] Moorfied Storey, a former ABA president and the first president of the National Association for the Advancement of Colored People ("NAACP"),[149] however, raised his voice in opposition to the resolution declaring, "[I]t is a monstrous thing that we should undertake to draw a color line in the Bar Association."[150] The resolution, offered by J.M. Dickerson of Tennessee, was seconded by William MacChesney of Illinois, who "reminded the assembly that the 'Southern view' on race was shared by 'some of the gentlemen of the North.'"[151] By passing the resolution, the ABA had "committed itself to lily-white membership for the next half-century. It had elevated racism above professionalism."[152]

The ABA members allowed the three African descendant attorneys to remain members with the assurance, through the resolution, that in the future the Executive Committee would know if any African descendants were offered membership and act according to the intention of the members—i.e., to deny African descendants membership.[153] There was pressure placed on the three African descendant attorneys to resign as ABA members. Although William R. Morris

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145 37 ABA Rep. at 14-16.

146 *Id.* at 14.

147 SMITH, *supra* note 5, at 542-43; *see also* AUERBACH, *supra* note 3, at 65 ("Attorney General George W. Wickersham protested . . . not from any commitment to racial equality but from disgust with procedural irregularities that violated association by-laws.").

148 SMITH, *supra* note 5, at 543-44; 37 ABA Rep. at 14.

149 RHODE & LUBAN, *supra* note 5, at 107.

150 AUERBACH, *supra* note 3, at 65.

151 SMITH, *supra* note 5, at 543; 37 ABA Rep. at 13 ("It [the resolution] states as a matter of fact and of history that it has never been contemplated that colored men were to be members of this Associaions. That is a matter of fact and a matter of history to which all men, north and south, whether in favor of one action or other, must agree.").

152 AUERBACH, *supra* note 3, at 66.

153 *Id.*; SMITH, *supra* note 5, at 543-44.

tendered his resignation, William Henry Lewis and Butler Roland Wilson refused to resign.[154]

B. The ABA Governing Body Thwarts Efforts to Reverse the Policy of Exclusion for More than Forty Years

Efforts continued in some state bar associations to change the ABA policy to exclude African descendants. The 1929 ABA Annual meeting report supports the contention that one other African descendant attorney, T. Gillis Nutter of West Virginia, was admitted in 1929, presumably without the ABA's knowledge of his race.[155] Beginning in 1938, Northern bar associations, particularly the New York Bar Association, and prominent ABA members, including ACLU General Counsel Arthur Garfield Hays, and a coalition of white and African descendant attorneys, began agitating for a change in the ABA's exclusionary policies and practices.[156] This group joined the black press's nearly 50-year crusade against the ABA's admissions policy—the black press called it "the antithesis of democracy" and a "travesty upon Americanism."[157]

However, the ABA did not budge from its exclusionary policies and practices, and prominent members spoke in support of the policy, even when presented with African descendant applicants whose credentials were beyond dispute.[158] For example, the nomination of Wil-

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154 SMITH, *supra* note 5, at 542; SEGAL, *supra* note 36, at 17. Morris tendered his resignation by telegram, stating that he was doing so "because of [his] sincere, respectful and entirely unselfish consideration of the best interests of the leading organization of lawyers in the land." *Id.* (citations omitted). Joseph H. Merrill from Georgia accepted the resignation stating: "I wish to say one word in addition, and I speak to those who with me do not wish to have negroes as members of this Association . . . . It becomes us in bidding Mr. Morris good-bye to voice our appreciation of the exalted sentiments expressed by him in his farewell to us." *Id.* (citations omitted).

155 SMITH, *supra* note 5, at 544.

156 *Id.*

157 *Id.*

158 AUERBACH, *supra* note 3, at 216; SMITH, *supra* note 5, at 544. The ABA president in 1942, George M. Morris, when questioned about the ABA's Jim Crow policy by Judge John Beardsley in response to an invitation to Beardsley to join the ABA, defended the policy in a letter to Beardsley "noting that the Negro racial problem was of great importance to governors in the South." *The Pittsburgh Courier*, an African descendant newspaper, when learning of Morris's statement, retorted that the ABA "is by no means a Southern organization." *Id.* at 544-45. Of course, Morris's attempt to lay the policy at the feet of the Southern members of the board of governors is also refuted by the Northern members' support of the 1912 resolution. *Id.* at 543.

liam H. Hastie for membership in the ABA was not acted upon.[159] At that time, William H. Hastie was a judge in the United States Territorial District Court of the Virgin Islands, appointed by President Franklin D. Roosevelt in 1937.[160] William H. Hastie entered government service in 1932, when President Roosevelt appointed him Assistant Solicitor of the Department of the Interior.[161]

The coalition of white and African descendant attorneys' agitation intensified due to the ABA's stubborn refusal to extend membership to prominent African descendant attorneys. In response to the 1942 rejection of Francis Ellis Rivers, a well-respected African descendant district attorney in New York City and a graduate of Columbia University School of Law, a number of New York ABA members tendered their resignations, and other ABA members in Philadelphia threatened to resign.[162] In 1943, in response to a proposed resolution to address race discrimination in ABA membership, the Resolution Committee, which ushered in the ABA's history of obfuscation, indicated "there is nothing in the organic law of the Association which prescribes any test for membership by reason of race, creed or color."[163] The Resolution Committee recommended a substitute resolution to strengthen its conclusion that the ABA Constitution and By-Laws did not proscribe membership by race: "*Resolved*, that it is the sense of this meeting that membership in the American Bar Association is not dependent upon race, creed or color."[164]

In addition to adopting this resolution, the Board of Governors proposed a change to the ABA's By-Laws requiring the election of membership by majority vote, thus eliminating the provision that two members of the Board of Governors could veto an application for membership. After debate, the ABA approved a substitute motion that four negative votes would be required to veto a membership

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159 AUERBACH, *supra* note 3, at 216. Auerbach indicates that a prominent civil rights lawyer in the ABA "questioned the wisdom of pressing for [Hastie's] admission." *Id.*

160 SEGAL, *supra* note 36, at 201.

161 *Id.*

162 SMITH, *supra* note 5, at 545. Judge Jonah Goldstein, Arthur Garfield Hays, Herman Hoffman, president of the New York County Criminal Courts Bar Association, and Commissioner William B. Herlands, of the New York Department of Investigations, resigned from the ABA. *Id.*

163 1968 Report of Secretary, *supra* note 29, at Exhibit A, p. 2; SMITH, *supra* note 5, at 545.

164 1968 Report of Secretary, *supra* note 29, at Exhibit A, p. 2.

application.[165] However, this was not the end of the process for eradicating racism from the ranks of the ABA membership. Although the 1943 Resolution declared that ABA membership was not dependant on race, creed, or color, the 1912 resolution remained in effect and required the indication of race on *nominations* for membership.[166] From 1912 on, therefore, the membership application included a line for race.[167] In fact, until 1956, the ABA's membership department maintained a "Red File" for applicants it determined should be "processed specially," and the applications of all African descendant attorneys were maintained in this file "along with those [applications] where any irregularity had come to the department's attention."[168]

Between 1950 and 1956, ABA members continued to advocate for the removal of the race question from the membership application. Various ABA members, including members representing the New York County Lawyers' Association, the Association of the Bar of the City of New York, and the Philadelphia Bar Association, requested that the question of race be removed from the membership application.[169] In 1951, an ABA member from Newark, New Jersey, submitted a resolution requesting that a special ABA committee be appointed to investigate the denial of membership to "Negro" applicants from New Jersey as well as other states.[170] The special committee was formed and determined the applicants were not rejected because of their race.[171] However, these rejections of racially identifiable applications, particularly in the context of the racially exclusionary policies and practices, created suspicion that race continued to be a deciding factor in the consideration of ABA membership applications.[172]

In 1954, the Board of Governors denied a request from the Membership Procedures Subcommittee to remove the race identification

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165 *Id.* at Exhibit A, p. 3; SMITH, *supra* note 5, at 545. The adoption of the new rules was not unanimous. Indeed, the Dallas Bar Association attempted to have the rules reconsidered because of a belief that "black membership lowered 'the dignity of the bar.'" SMITH, *supra* note 5, at 545.

166 1968 Report of Secretary, *supra* note 29, at Exhibit C; 35 ABA Rep. 13 (1912).

167 1968 Report of Secretary, *supra* note 29, at 2.

168 *Id.* at 3.

169 *Id.* at 4-5.

170 *Id.* at 4.

171 *Id.*

172 The probability is strengthened by the continued use of the "red file" for African descendant applicants. *See id.* at 3.

question from the ABA application, although the Subcommittee made the recommendation based on a referral to the Board of Governors by the ABA House of Delegates, and, procedurally, the recommendation was considered a "clear mandate to remove the line. The Board did not agree."[173] In 1955, the Commissioner of the New York State Commission against Discrimination, Ms. Caroline K. Simon, an ABA member, asked to appear before the Board of Governors concerning the membership application form. The Board of Governers denied her request to remove the question of race from the ABA application.[174] Finally, in May 1956, after receipt of resolutions from the Philadelphia Bar Association and the New York County Lawyers' Association objecting to the race question on the application, the Board of Governors reluctantly voted to remove the race question.[175] Although J. Clay Smith, a legal historian, may be correct in his calculations that "black lawyers were barred from membership in the American Bar Association based solely on race"[176] for sixty-six years, the cloud over membership created by the race question on the application strongly suggests that African descendants were not allowed access to membership in the ABA on an equal footing with white lawyers for at least seventy-eight years (1878-1956).

The 1963 statement of principle adopted by the ABA upon the recommendation of the Committee on Civil Rights and Racial Unrest stated that it "has long welcomed and continues to welcome into membership all duly admitted members of the bars of the several states, of good moral character, regardless of race or creed" is a distortion of the ABA's history.[177] It was, at best, an aspirational statement rather than a statement of historical fact. A more accurate description of the 1963 statement of principle is a cosmetic change that lacked any significant impact on the integration of African descendants into the organization. Even five years after the adoption of this statement, there had not been an African descendant member

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173 1968 Report of Secretary, *supra* note 29, at 5.

174 *Id.*

175 *Id.* The Board said (one would suspect with tongue-in-cheek) that "while this question has no bearing on eligibility for membership in the Association and racial discrimination is not being practiced by the Association, it was the opinion of several members of the Board that the Association has the right to ask the question and to receive the information as a matter of identification and record. It was recognized, however, that the question is resented by many others, and that its continuance hampers the membership campaign." *Id.* at 5-6.

176 SMITH, *supra* note 5, at 584.

177 1968 Report of Secretary, *supra* note 29, at 6.

of the Board of Governors. And, the only African descendant attorney granted membership to the House of Delegates in that five year period was Thurgood Marshall, and he held an "ex-officio" (non-voting) position.[178]

IV. THE EFFECT OF EXCLUSION FROM THE MAINSTREAM BAR ASSOCIATIONS WAS FAR FROM BENIGN

A. African Descendants Had No Voice in the Rules that Governed Their Ability to Practice Law

The ABA had significant influence in, and in some instances control over, the rules that affected lawyers and their practice.[179] Therefore, the exclusion of African descendants from the ABA prevented African descendants from contributing their perspectives on the policies and practices that would govern them and affect their communities.[180] In 1906, the ABA directed the Section on Legal Education and Admission to the Bar to draft rules of admission, and the Section appointed a committee to draft a set of rules.[181] Between 1906 and 1911, the Section on Legal Education and Admission to the Bar circulated copies of the draft rules to ABA members, and the Section received the member's comments and incorporated these comments into a report.[182] In 1911, the Section circulated the revised report to the ABA members for comments.[183] Notably, there were no African descendant members in 1911. The Section on Legal Education and Admission to the Bar reviewed the proposed rules drafted by the committee and edited them after receiving input from ABA members,[184] who, with the exception of two African descendant members inadvertently admitted in 1912, were all white.[185]

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178 *Id.* at 8.

179 ROGERS, *supra* note 28 (ABA played a significant role in the National Conference of Uniform State Laws).

180 AUERBACH, *supra* note 3, at 4.

181 SUNDERLAND, *supra* note 28, at 140.

182 *Id.*

183 *Id.*

184 *Id.* at 140-42.

185 There is no record of Wilson and Lewis, the two African descendant males who refused to resign when inadvertently admitted to the ABA in 1912, being active in the ABA after admission.

Of the nine rules submitted to the ABA in 1918, the ABA membership approved all but one.[186] If African descendant attorneys had been involved in the process, it is conceivable, given the history of racism in the United States and the fact that some states had few, if any, African descendant attorneys,[187] that the African descendants would have objected to the fifth rule, which required an applicant to the bar to have three affidavits in support of admission, two of which must be from members of the bar of the state in which the applicant sought admission.[188]

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186 SUNDERLAND, *supra* note 28, at 143. The nine rules included: (1) Examinations for admission to the Bar should be conducted in each state by a paid board of five members approved by the highest appellate court. (2) A law diploma should not entitle the holder to admission to the Bar without examination by this board. (3) The candidate should at the time of his admission be a citizen of the United States. (4) He should also be a citizen of the state in which he is applying for admission or prove that it is his intention personally to practice law therein. (5) There should be an examination by the board as to the moral character of each applicant for admission to the Bar, which examination should be in addition to the requirement of certificates as to his moral character, and in addition to educational qualifications. And each applicant should be required to file with the board evidence that he is a person of good moral character which should include the affidavits of three responsible citizens, two of whom should be members of the bar of the state, and the affidavits should set forth how long a time, when and under what circumstances those making the same have known the candidate and that he is to the knowledge of the affiants a person of good moral character. (6) Three years' practice in states having substantially similar requirements for admission to the Bar should be sufficient in the case of lawyers from other jurisdictions applying for admission on grounds of comity, provided the board after an independent investigation is satisfied as to the moral character and professional standing of the applicant in the state from which he has removed. (7) Every candidate should satisfy the board that he has passed the necessary requirements for entrance to the collegiate department of the state university of the candidate's state, or of such college or colleges as may be approved by the state board of law examiners, or an examination equivalent thereto conducted by the authority of the state. (8) Every applicant should be required to have successfully completed the prescribed course of instruction and passed the examination of a law school approved by the board, which requires for the completion of its course not less than three years of resident attendance during the day time, or not less than four years of resident attendance if a substantial part or all of the exercises of the school are in the evening. (9) At least 30 days before the state board's certificate should be issued to any candidate who shall have passed the examination, the name of each candidate should be published by the state board in a newspaper of general circulation, and also in a law periodical, if there be one within the state jurisdiction. *Id.* at 142-143. The eighth rule was not approved. *Id.* at 143.

187 Finkleman ed., *supra* note 55, at vii. *See generally*, SMITH, *supra* note 5; SEGAL, *supra* note 36.

188 SUNDERLAND, *supra* note 28, at 142. A similar requirement for references from the established bar in the state in order to be admitted to the practice of law in that state resulted in no African descendant lawyers being admitted to the bar of Pennsylvania between 1933 and 1943. AUERBACH, *supra* note 3, at 128. During Reconstruction when African descendants became members of the state legislative bodies, they focused on creating a constitution and legislation for the benefit of African descendants. Most state constitutions drafted with signifi-

The official exclusion of African descendant attorneys from the ABA also meant the standards for legal education lacked their input.[189] One model the ABA used in developing the legal edicuation standards was derived from the Council of Medical Education in the American Medical Association ("AMA").[190] The rules the AMA adopted led to the closing of six of the eight African descendant medical schools.[191] Although African descendants had no input in the development of the ABA standards, the African descendant law schools had to comply in order to become accredited and graduate law students eligible for admission to the state bar, resulting in the closure of, or curriculum changes in, a number of schools with high African descendant enrollment.[192]

B. Other Mainstream National Bar Groups Adopted the ABA Policy of Exclusion

The ABA's exclusion of African descendants affected the membership policies of other national bar groups. The National Association of Women Lawyers ("NAWL") and the Federal Bar Association ("FBA") were founded after the formation of the ABA and were influenced by the ABA's exclusionary policies and practices. Anglo-Saxon women, who were excluded from the ABA, formed the

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cant African descendant participation, for example, abolished property qualifications for voting. FRANKLIN & MOSS, *supra* note 7, at 265. Civil rights and education were also the chief concerns of African descendants elected to Congress. *Id.* at 269. The increased involvement of African descendants in the formation of the ABA Task Force on Minorities in the Profession in 1984 and its 1986 report led to the heightened presence of programs and resolutions that focused on ending the disparity of "minorities" in the profession.

189 There is no evidence that the two attorneys admitted in 1912, who refused to resign, were active in the ABA and the 1968 Report of Secretary indicates no African descendants had ever served in a leadership capacity in the ABA. There is no evidence to support a conclusion that they did or did not receive the questionnaires circulated to obtain member input, for example, on the legal standards as described by Sunderland. *See* SUNDERLAND, *supra* note 28, at 145.

190 *Id.* at 143-44.

191 AUERBACH, *supra* note 3, at 109.

192 SMITH, *supra* note 5, at 48-49 (stating that Howard University met accreditation requirements after making unpopular changes in curriculum); *id.* at 59-60 (stating that some schools, e.g., Central Law School, were unable to meet accreditation standards). The ABA's influence can be seen by observing the number of states that began to adopt some, if not all, of its recommendations for legal education. In 1921, when the ABA initially adopted the standards for legal education, only one state required two years of college education; in 1936, thirty-two states required two years of college. In 1930, there were thirty-two states that required a three-year law program; in 1937, forty states mandated a three-year law program. SUNDERLAND, *supra* note 28, at 147; *see also* discussion *infra* Part IV.

NAWL. They identified more with race than gender, and did not include African descendant women as members. Rather, they followed the ABA's example and excluded African descendant women from the NAWL founding in 1899 until 1943, shortly after the passage of the ABA's 1943 resolution.[193]

Organized in 1925, the FBA was composed of attorneys who worked for the federal government, and its constitution restricted membership to whites only.[194] The FBA maintained its racially discriminatory policy until 1945, when it admitted Louis Rothschild Mehlinger, described as "a black lawyer of 'mixed heritage.'"[195] The inherent contradiction in having government lawyers charged with enforcing the laws of the United States, maintaining an association for whites only, was as clear then as it is today.[196] The NAWL and FBA provide two examples of the negative side effects of the ABA's discriminatory policies.

C. *Exclusion of African Descendant Attorneys from National Bar Associations Affected Their Ability to Earn a Living and Exacerbated the Stigma Already Imposed on African Descendants*

The exclusionary policies of the ABA and other national bar associations had a myriad of negative repercussions, including a detrimental impact on the professional growth and employability of African descendant attorneys. Members of the exclusive national bar associations were well-connected to the powerful "elites" in the state and federal governments.

> The ABA was a center of power and influence, not only in legal circles but in political circles as well. After all, since its founding, most of the justices of the United States Supreme Court and the federal courts had come from the ABA's ranks. Indeed, presidents of the United

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193 SMITH, *supra* note 5, at 546. The ABA's exclusion of women, as with its exclusion of African descendants, was not enshrined in its constitution. ROGERS, *supra* note 28, at 179; 1968 Report of Secretary, *supra* note 29, at Exhibit A, p. 2 (noting that nothing in the "organic law" of the Association excluded African descendant members). However, unlike African descendants, Anglo-Saxon women were successful in becoming members of the ABA, starting in 1918. ROGERS, *supra* note 28, at 179 (discussing the first election of a woman to ABA membership).

194 SMITH, *supra* note 5, at 547.

195 *Id.* at 549-50.

196 *Id.* at 550 (citing a statement by an African descendant attorney Marjorie McKenzie reported in the November 11, 1943, *Pittsburgh Courier*).

> States, several members of Congress, attorneys general at the federal and state levels, and "most of the leading legislators and judges of the land" were members of the ABA.[197]

The proscription against African descendant's membership in these "white-only" national bar associations affected not only the African descendant attorneys' ability to influence the development of the law, but it also hindered their ability to obtain clientele, and their access to the resources necessary to adequately represent clients. In addition to denying access to the legal profession's leaders in state and federal government, the ABA's exclusionary policies and practices also denied African descendants the opportunity to interact informally with partners in major law firms, other leading bar members, courtroom personnel, and judges. The exclusionary practices of the ABA denied African descendant attorneys the common professional networking opportunities afforded to their white counterparts, which negatively affected the ability of African descendant attorneys to develop their practices.[198] Furthermore, due to their exclusion from local bar associations, African descendant attorneys did not have access to the bar's resources, such as libraries, which directly affected the African descendant attorneys' ability to adequately represent their clients.[199]

The history of enslavement and racial discrimination stigmatized African descendant attorneys.[200] Their exclusion from mainstream professional associations exacerbated this stigma. In addition to not receiving legal business from whites,[201] African descendants in need of legal representation often only used African descendant attorneys for

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197 *Id.* at 545-46. *See also* WARREN, *supra* note 28, at 84 (quoting John Adams in the importance of association to the determination of who should be lawyers); SUNDERLAND, *supra* note 28, at 4 (quoting the Call For a Meeting to Form the American Bar Association (1878)).

198 SMITH, *supra* note 5, at 546; AUERBACH, *supra* note 3, at 124 (quoting a Chicago member of the Illinois Bar as saying that he would not "welcome social intimacy . . . with members of the all-black Cook County Bar Association").

199 SMITH, *supra* note 5, at 577-78 (asserting that the D.C. Bar Association membership was required to use its law library, "costing clients dearly").

200 J. Clay Smith suggests that "Negrophobia," the fear of African descendants that was a creation of whites to maintain the subjugation of African descendants, was responsible for a low use of African descendant lawyers. SMITH, *supra* note 5, at 3.

201 In addition to the lack of social intercourse between white and African descendant lawyers, the failure to get legal business from whites may also be attributed to the "colored" section of Martindale and Hubbell, which existed until 1940. *Id.* at 567.

small matters or for "virtually hopeless" criminal matters.[202] Because African descendant attorneys often struggled financially, the African descendant community perceived them as incompetent, since they lived a spartan existence in comparison to their prosperous white peers.[203] In the South, the threat of economic reprisals for employing an African descendant attorney compounded the inability to get business and the financial struggles of African descendant attorneys.[204] However, the migration north did not eliminate the preference of African descendants for white lawyers since a lawyer had to go before a white judge (frequently against white opposing counsel), and many potential clients viewed accepting African descendant representation as stacking the deck against the prospect of victory.[205]

Even the NAACP, founded in 1909, embraced the view that African descendant attorneys could not adequately represent African descendants' legal matters; a view demonstrated by the NAACP's decision not to hire an African descendant attorney to lead its legal program until 1934, when it hired Charles Hamilton Houston.[206] However, it was through the NAACP's representation of African descendants in civil rights cases that African descendant attorneys began to develop a reputation for being skilled and competent attorneys.[207]

The negative stigma of African descendant attorneys and the ABA's exclusionary policies and practices negatively affected African descendant attorneys' employment in government and white-dominated law firms. Even in the New Deal Administration,[208] African descendant attorneys, with rare exceptions, were unable to obtain

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202 *Id.* at 4. African descendant lawyers did develop an expertise in criminal defense work, and in some respects may have had a corner on that market since "the police system was primarily for Negroes." *Id.* at 12.

203 *Id.* at 13. However, the Amos & Andy show fed this view of the incompetence of the African descendant lawyer and probably strengthened this belief not only in the white community but also in the African descendant community. *Id.* at 14-15.

204 *Id.* at 13 (stating that African descendants in the South were threatened with economic reprisals if they used African descendant lawyers); *see also* WOODSON, *supra* note 35, at 232 (stating that at times African descendants employed white lawyers rather than African descendant lawyers because the "boss" told them to do so).

205 SMITH, *supra* note 5, at 4-5, 14; AUERBACH, *supra* note 3, at 289-300.

206 SMITH, *supra* note 5, at 16; AUERBACH, *supra* note 3, at 214.

207 SMITH, *supra* note 5, at 15, 558; AUERBACH, *supra* note 3, at 215.

208 The New Deal is a historical period following the Depresssion and associated with Franklin Roosevelt's presidency and social reforms. *See* AUERBACH, *supra* note 3, at 190.

meaningful attorney positions in the Federal government.[209] An applicant for a federal government legal position, who waited for three hours while all the white applicants were interviewed and then told the position was filled, expressed the sense of rejection and despair felt by some African descendant attorneys through the statement that "[o]ne is driven to hate either your color or your country."[210] African descendant attorneys with superior credentials seeking employment in white law firms would probably echo this sentiment. It was obvious that race was the reason for white law firms' refusal to hire African descendant attorneys with prestigious credentials and recommendations from recognized white leaders in the profession.[211] Likewise, white law schools denied African descendant attorneys teaching positions.[212] The ABA was complicit in the major law firms' insistence on excluding African descendants since these firms' partners were in the leadership of the ABA and local bar associations.[213]

D. The National Bar Association Was Formed to Fill the Void

Facing the exclusionary policies and practices of the ABA and other national bar associations, and the perpetuation of the sterotype of African descendant attorneys as professionally incompetent, African descendant attorneys formed the National Bar Association ("NBA") in 1925.[214] The NBA filled a void for the African descendant attorneys, and provided a forum through which the African descendant attorneys could network and develop strategies to address the pressing problems of African descendants.[215] However, the failure of many government and non-governmental agencies to hire African

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209 *Id.* at 188.

210 *Id.*

211 *See id.*; SMITH, *supra* note 5, at 36-37, 64.

212 *Id.* at 547.

213 *See* Friedman, *supra* note 28, at 487.

214 SMITH, *supra* note 5, at 545-46 (exclusion stigmatized African descendants); *Id.* at 552-55 (National Negro Business League formed in 1900 by Booker T. Washington included African descendant attorneys offering them an opportunity to meet African descendant businessmen and form corporate legal practices as well as enabling them to form a national network of lawyers. These lawyers formed an auxiliary, the National Negro Bar Association (NNBA), in 1909. The NNBA broke off from the NNBL in 1922 and three years later the NBA was formed.); 1968 Report of Secretary, *supra* note 29, at Attachment B (National Bar Association formed because of African descendants' exclusion from the white bar association and the need for networking and development of the African descendant lawyer); SMITH, *supra* note 5, at 585 (formation a direct result of exclusion and enhanced importance in the legal community).

215 SMITH, *supra* note 5, at 557-60.

descendant attorneys mirrored the ABA's exlusionary policies and practices. The NBA embraced a major campaign to create employment opportunities for African descendants and, in 1942, included in that campaign, a challenge to end the continued exclusion of African descendant attorneys from ABA membership.[216]

The NBA was a strong voice for African descendants' civil rights and the rights of African descendant attorneys. For example, NBA lawyers were important participants in civil rights litigation,[217] the NBA was a strong advocate for the appointment of African descendants as federal and state judges,[218] and the NBA launched a campaign, in 1940, to eliminate Martindale Hubbell's "colored lawyer" classification section because it contributed to the stigmatization of African descendant attorneys, and deprived them of the right to compete in the legal marketplace on an equal basis.[219] In 1937, with the founding of the National Lawyers' Guild ("NLG"), a predominantly white, progressive bar association formed on the basis of racial equality, the NBA found an ally for many of its campaigns.[220] Some NBA lawyers joined the NLG and became part of its leadership.[221] The NLG was

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216 *Id.* at 569-70.

217 1968 Report of Secretary, *supra* note 29, at Exhibit B; SMITH, *supra* note 5, at 563-64, 571 (Charles Hamilton Houston and Thurgood Marshall active in NBA).

218 SMITH, *supra* note 5, at 571. The ABA's exclusionary policy and practice was a mirror of the exclusion of African descendants from judgeships. Its failure to speak out against this exclusion coupled with its own practices gave support to this exclusion. *See also* ELMER C. JACKSON, JR., ESQ. AND JACOB U. GORDON, PH.D., A SEARCH FOR EQUAL JUSTICE BY AFRICAN-AMERICAN LAWYERS: A HISTORY OF THE NATIONAL BAR ASSOCIATION 26-27(VANTAGE PRESS NEW YORK 1999) (quoting an excerpt from a speech by Judge A. Leon Higginbotham, Jr., delivered at the Summit of Black Lawyers in America in 1983 in which he stated: "The major protagonist for change certainly was not the American Bar Association. In the 1940's it was struggling with the question of whether blacks should even be members; so was the Federal Bar Association. In terms of access to the federal judiciary, there was only one steady voice speaking with clarity, tenacity and often muted anger. It was the National Bar Association.").

219 SMITH, *supra* note 5, at 567.

220 *Id.* at 550-51; AUERBACH, *supra* note 3, at 200.

221 SMITH, *supra* note 5, at 550; AUERBACH, *supra* note 3, at 200.

considered a liberal and radical legal association[222] and often took positions that alienated influential members of the ABA.[223]

The ABA, however, continued to hold the keys to entry into the mainstream of the legal profession, particularly for African descendant attorneys desirous of developing a corporate legal practice, expanding their criminal law practice, or erasing the image of incompetence and inability to successfully represent clients before a white judge, a predominately white jury, and white opposing counsel.[224]

V. THE ESSENTIALITY OF A VOLUNTARY REPARATIONS MODEL

A. The ABA's History of Exclusion and Its Effects on African Descendants Calls for the Development of Reparative Programs

The justification for the development of a voluntary reparations model lies in the history of the ABA's exclusionary policies and practices throughout its first seventy-eight years and the effects of that history on African descendants. The ABA's success in becoming the "premier" national bar association in the country during that period was in large part due to its exclusionary policies and practices and its practice of catering to the "leading men" of the profession. Its exclusionary policies and practices denied African descendants the opportunity to mingle informally with attorneys and judges and to share ideas and advance their legal careers.[225]

The ABA's policies and practices supported the exclusion of highly qualified African descendant attorneys from the major corporate law offices and government employment based solely on race.[226] The ABA was an active partner in the exclusion of African descend-

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222 Liberals generally support civil liberties and the use of governmental powers to create social reforms to benefit the poor and other disadvantaged groups. The NLG was considered liberal because its membership was not restricted by race. SMITH, *supra* note 5, at 550. "It spoke to lawyers who were committed to the liberal issues of the day: the right of workers to organize, civil liberties, and minority rights." AUERBACH, *supra* note 3, at 198. It was considered radical or progressive because a number of its members considered themselves defenders of the political left. *Id.* at 256.

223 *Id.* at 234-37. Indeed, the NLG criticized the ABA by saying the ABA's "concern for liberty has been secondary to its concern for property." *Id.* at 199.

224 *See, e.g.*, 1968 Report of Secretary, *supra* note 29, at Exhibit B; SMITH, *supra* note 5, at 11 (African descendant lawyers in North were not retained by the commercial community where wealth could be accumulated.).

225 *See supra* Part IV.D.

226 *See supra* Part IV.C.

ants from law schools and from membership in the local bar associations, particularly in the South.[227] Finally, its exclusionary policies and practices contributed to the perception that African descendant attorneys were incompetent, making African descendant attorneys unlikely choices for individual whites and leading white law firms and often the last resort for African descendants in need of legal assistance.[228]

This seventy-eight-year history leads to the conclusion that the ABA bears significant responsibility for what Secretary of Labor W. Willard Wirtz called "the worse [sic] segregated group of the whole economy or society."[229] The continuing low representation of African descendants in the legal profession reveals the lingering consequences of the ABA's exclusionary polices and practices. As compared to other professions, it is still one of the most segregated professions.[230] In the 1964-1965 academic year, African descendant students comprised approximately 1.3% of the national law school enrollments.[231] Forty years later, African descendants comprise 6.5% of law school enrollment, an increase of only 5.3%.[232] In 1960, African descendants made up .76% of the legal profession.[233] In 2000, African descendants comprised 3.9% of the profession, an increase of only 2.14% over 40 years.[234] In 1965, there were reportedly only three African descendant attorneys in large (white) law firms.[235] In 1996, African descendants

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227 *See supra* Part IV.C.

228 *See supra* Part IV.C.

229 McGee, *supra* note 30, at 211-12.

230 *See, e.g.*, AMERICAN BAR ASSOCIATION, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (2000) [hereinafter AM. BAR ASS'N, MILES TO GO 2000] (comparing the representation of African descendants and Hispanics among lawyers in 1998 to their representation among accountants, physicians, college and university teachers, engineers, dentists and natural scientists, and finding that the only professions with lower representation of African descendants and Hispanics were dentists and natural scientists). In 2000 African descendants were thirteen-percent of the U.S. population and 3.9% of the lawyers in the U.S. COMMISSION ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION, AMERICAN BAR ASSOCIATION, STATISTICS ABOUT MINORITIES IN THE PROFESSION FROM THE CENSUS LINKS.

231 William C. Kidder, *Law and Education: Affirmative Action Under Attack: The Struggle for Access from* Sweatt *to* Grutter*: A History of African American, Latino, and American Indian Law School Admission, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 7 (2003).

232 The Association of American Law Schools, http://www.aals.org (last visited Aug. 11, 2007).

233 Kidder, *supra* note 231, at 6.

234 American Bar Association, Commission on Racial & Ethnic Diversity in the Profession, http://www.abanet.org/minorities/links/2000census.html (reporting 2000 Census data) (last visited Aug. 11, 2007).

235 Kidder, *supra* note 231, at 6 (citing to 1964 study by ERWIN O. SMIGEL, THE WALL STREET LAWYERS: PROFESSIONAL ORGANIZATION MAN?).

comprised only 3.7% of the associates in the 250 largest law firms and 1.2% of the partners.[236]

It is the history of the ABA's exclusionary practices and policies combined with the ABA's embracing of the principles of racial equality during the civil rights movement in the 1960s that makes the ABA a good candidate for the development of a voluntary reparations model. Upon the recommendation of the Committee on Civil Rights and Racial Unrest, the ABA adopted the 1963 statement of principle that heralded the change in the ABA's perspective. The ABA's statement that it "has long welcomed and continues to welcome into membership all duly admitted members of the bars of the several states, of good moral character, regardless of race or creed"[237] appears to have set the stage for the ABA to reinvent itself and transition from a harborer of racial segregation to a supporter of "equal rights" for minorities.

The growth and successes of the Civil Rights Movement and the resultant white reaction were familiar themes in the period from 1954 to the 1980s,[238] during which time the ABA passed several resolutions attesting to its support for racial equality. In 1965, it passed a resolution that in many respects mimicked the 1943 resolution,[239] declaring that the ABA policy was "not to discriminate against any person because of race, color, creed, or national origin."[240] However, in contrast to the 1943 resolution, the 1965 resolution urged the leadership to "endeavor to use all reasonable means to effectuate this policy."[241] In 1972, more than thirty years after the NBA began focusing on discriminatory hiring practices, and perhaps due to the increase in NBA

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236 AM. BAR ASS'N, MILES TO GO 2000, *supra* note 230, at 8.

237 88 ABA Rep. 617 (1963). This statement of principle was passed the year Martin Luther King made his famous "I Have A Dream" speech. Thurgood Marshall's influence on the ABA also can be seen in the passage of this statement of principle. In 1968, he became the first and only member of the House of Delegates, and he was afforded "ex-officio" (non-voting) status. There had rarely if ever been an African descendant member of Standing and Special Committees. 1968 Report of Secretary, *supra* note 29, at 8.

238 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (striking down "separate but equal" in the context of the primary and secondary levels of public education); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (finding reverse discrimination in the denial of admission to a white male medical school applicant).

239 *See supra* Part III.B.

240 ABA TASK FORCE ON MINORITIES IN THE LEGAL PROFESSION, REPORT WITH RECOMMENDATIONS 69 (1986) (quoting Assembly declaration of 1965).

241 *Id.*

African descendant members,[242] the ABA passed a resolution condemning discriminatory hiring practices in the legal profession.[243] This period in the ABA history, coinciding with civil rights activism throughout the country, created fertile soil for the development of more focused programs to address the effects of the ABA's exclusionary policies and practices.

The adoption of racial justice programs to address issues pertaining to "minorities in the profession" in the 1980s is further evidence of the propriety of selecting the ABA to lead the development of a voluntary reparations model. It signifies an interest in addressing the lingering effects of slavery and Jim Crow, reflected in its exclusionary policies and practices. In 1980, ABA President William Reece Smith, Jr. brought the ABA's attention to the need to examine the "concerns and problems" of "minority lawyers."[244] Succeeding ABA administrations and the Board of Governors approved a number of projects culminating in the creation of the Commission on Opportunities for Minorities in the Profession.[245] Subsequent to the creation of this Commission, the ABA created other task forces and projects in an effort to address the problems attendant to the disproportionately low numbers of "minorities in the profession," including issues of access to justice.[246]

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242 In 1965 the ABA cross-checked its membership list with the NBA membership list and found 292 members of whom 166 were still members of the ABA in 1968. 1968 Report of Secretary, *supra* note 29, at 8. Ironically, the NBA's application to affiliate with the ABA was stalled in 1968 due to an ABA constitutional provision that fifty-percent of an affiliate applicant's members must be members of the ABA. 1968 Report of Secretary, *supra* note 29, at 6-7. This is reminiscent of the rules that implicitly barred African descendants from membership–requiring two letters of support from members of the local bar association.

243 ABA TASK FORCE, *supra* note 240, at 69.

244 *Id.* at 8.

245 The Task Force on Minorities in the Legal Profession created by the ABA's Board of Governors in 1984 recommended the formation of the Commission on Opportunities for Minorities in the Profession in its 1986 Task Force Report. *Id.* at 1, 8. The ABA adopted that recommendation in 1986 at its annual meeting. 111 ABA Rep. 831 (1986).

246 The ABA formed the Task Force on Minorities and the Justice System in 1992, shortly after the acquittal of the police officers in state court in the Rodney King case. TASK FORCE ON MINORITIES AND THE JUSTICE SYSTEM, AMERICAN BAR ASSOCIATION, ACHIEVING JUSTICE IN A DIVERSE AMERICA 1 (1992). Following a recommendation of the Task Force, it formed the Council on Racial and Ethnic Justice that year. AMERICAN BAR ASSOCIATION, OVERVIEW OF THE COUNCIL ON RACIAL & ETHNIC JUSTICE (1992-2001) 1 (2001). The ABA created a Center for Racial and Ethnic Diversity as an "umbrella" entity for ABA groups that directly address racial and ethnic diversity issues, including Commission on Racial and Ethnic Diversity in the Profession (originally the Commission on Opportunities for Minorities in the Profession), Council on Racial and Ethnic Justice, Presidential Advisory Council on Diversity in the Profession,

The data summarized above suggests that, despite the ABA's more recent embrace of the principles of racial equality, and the ABA's development of programs to effectuate these principles, there continues to be a disturbingly low number of African descendants in the legal profession, and the numbers of African descendant students in law schools are decreasing rather than increasing.[247] The voluntary reparations model proposed below would enhance the chances of success in increasing African descendant representation in the legal profession and access to justice for African descendants by reconciling the ABA's past exclusionary policies and practices with efforts to eliminate the continuing consequences of those past practices. The voluntary reparations model adds an essential element to the development of racial equality principles and programs—making a full acknowledgment of the injury inflicted by the ABA on African descendants via its exclusionary policies and practices. Once the ABA acknowledges this injury, reparative programs corresponding to the injurious conduct can be developed.

B. The Voluntary Reparations Model

The ABA's history of racial exclusion, its past support for exclusionary policies and practices, and the resultant racial disparities in the profession can serve as an example for deeds that call for the voluntary reparations model. The grassroots-initiated movement for repa-

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and ABA Legal Opportunity Scholarship Committee. AMERICAN BAR ASSOCIATION, CENTER FOR RACIAL AND ETHNIC DIVERSITY: RAISING THE TEMPO ON DIVERSITY IN THE ABA AND IN THE PROFESSION (2005).

247 American Bar Association, Section of Legal Education & Admissions to the Bar, African-American J.D. Enrollment, http://www.abanet.org/legaled/statistics/charts/stats%20-%2013.pdf (last visited Aug. 23, 2007) (African-American first year J.D. enrollment in 2005-2006 was 350 students less than in 2004-2005). During the past fifteen years, African descendant law school enrollment peaked at 7.6% in the 1995-96 academic year. African descendant law school enrollment has stayed below 7% in each of the past four academic years (2003-2004, 2004-2005, 2005-2006, and 2006-2007), while overall law school enrollment has increased by 2.4% in those four years and 10% in the past fifteen years. *Id.*; American Bar Assoication, Section of Legal Education & Admissions to the Bar, Enrollment and Degrees Awarded, http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf (last visited Aug. 23, 2007). *See also* Dianne Hayes, *Members of Congress Want Investigation Into Black Law Student Decline*, DIVERSE: ISSUES IN HIGHER EDUCATION, Oct. 8, 2006, *available at* http://www.diverseeducation.com/artman/publish/article_6491.shtml. An announcement circulated by email declared that the Congressional Black Caucus would devote an hour to the issue of the declining "Black" law school enrollment on Monday, July 30, 2007, to be broadcast by C-Span. E-mail from Professor Vernellia R. Randall, Professor of Law, University of Dayton, to Adjoa A. Aiyetoro and others (July 27, 2007, 11:08 CST) (on file with author).

rations for African descendants has focused on legislative and litigation strategies against governmental entities and, more recently, for-profit corporations. Although these strategies have been mostly unsuccessful in obtaining reparations, they have served to expand the dialogue on reparations for African descendants.[248] Reconciling the crimes of slavery and de jure discrimination is unfinished business in the United States.[249] With the one exception,[250] government entities have resisted providing reparations to African descendants for the atrocities of slavery and Jim Crow. In the private sector, J.P. Morgan Chase's $5 million scholarship fund and Brown University's response to the study of its relationship to slavery are the examples of private reparations.[251] If society is to heal the lingering effects of these abominable acts,[252] a voluntary reparations model must be embraced.[253] The failure to adopt a voluntary reparations model for the injuries caused by slavery and Jim Crow implies that the offenders'[254] successors share the values of the offenders rather than sharing values with those subjected to racial exploitation and exclusion.[255] The ABA's adoption of the voluntary reparations model is appropriate for two reasons: (1) the ABA bears responsibility for the history and lasting effect of

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248 Aiyetoro, *Formulating*, *supra* note 11; Chisholm, *supra* note 11; Westley, *supra* note 11.

249 LAZARE, *supra* note 1, at 201.

250 The Rosewood Compensation Act, 1994 Fla. Laws c. 94-359.

251 Eliana Johnson, *Slavery Funds Helped Found Brown University*, N.Y. SUN, Oct. 19, 2006, at 6; *J.P. Morgan Chase Admits Predecessors' Slavery Ties*, STAR-LEDGER (Newark, N.J.), Jan. 21, 2005, at 49, *available at* 2005 WLNR 23794632; Bob Kemper, *Cash Joins Symbolism as Penance for Slavery*, ATLANTA J.-CONST., July 26, 2005, at A1, *available at* 2005 WLNR 11679097; Response of Brown University, *supra* note 22.

252 BROOKS, *supra* note 6, at 141; ABA TASK FORCE, *supra* note 240, at 6 ("The lingering inequality of educational and employment opportunities for minorities is an urgent nationwide problem.").

253 The reparative model evaluates the relationship between the conduct of an entity and the resulting harm and develops remedies to ameliorate the harm. *See* Brophy, *World*, *supra* note 11, at 109. *See also* Brooks, *supra* note 6, at 155 (arguing that reparations expiate past sins); Maulana Karenga, The Ethics of Reparations: Engaging the Holocaust of Enslavement 3 (June 22, 2001) (paper presented at the N'COBRA Conference) (repair and healing).

254 The offenders include those who exploited the bodies and labors of African descendants during slavery, those in power who supported or allowed such exploitation, and those who created or benefited from Jim Crow policies and practices.

255 The apology scholars discuss the importance of apology, an aspect of reparations as modified herein, as being the recognition that the offender and offended indeed have shared values. *See, e.g.*, LAZARE, *supra* note 1, at 242-47 (2004) (relating the account of how a Scottish soldier who was a Japanese prisoner of war during World War II forgave a Japanese interpreter whom he believed bore responsibility for his suffering after meeting him fifty years later and learning that they shared basic values).

excluding African descendants from its membership; and (2) more recently, the ABA has demonstrated some leadership in the area of racial equality. Additionally, the ABA's stature in the society would assist in ending governmental and private sector resistance to reparations for African descendants.

The voluntary reparations model is one that encourages and builds on private entities' interest in developing effective remedies for the lingering consequences of slavery and Jim Crow. The voluntary reparations model flows from ethical principles that underlie reparations, including the importance of telling the truth and taking responsibility for one's actions.[256] The voluntary reparations model is adapted from a review of the literature on apology and reparations, including scholarship and literature on resistance to reparations.[257] Therefore, rather than simply calling on the ABA to apologize for its historic misdeeds and their continuing consequences, the voluntary reparations model calls for both a public acknowledgment and material reparations, and includes a statement of sorrow, regret, or remorse as an optional component.

1. Full Public Acknowledgment

The voluntary reparations model calls for a full public acknowledgment. Although reparations scholars and activists have called for an apology for slavery and Jim Crow,[258] there is no consensus on the elements of this apology. Typically, the apologies for the conduct of a collective group that harmed another collective group are primarily

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256 A number of scholars have discussed the relationship between ethics, morality, truth telling, and reparations. *See, e.g.*, BROOKS, *supra* note 6, at 142 (atonement model of reparations creates new moral aspirations), 144-46 (government reclaiming humanity and moral character), 148 (need to set historical record straight), 168 (government must provide substantial reparations to remedy wrong); Karenga, *supra* note 253, at 1 (reparations is an ethical issue and reparations advocates must have the moral high ground before they have the standing to define the injury and its nature); Craig McGarty, et al., *Group-Based Guilt as a Predictor of Commitment to Apology*, 44 BRIT. J. SOC. PSYCH. 659, 677 (2005) (in-group guilt focuses on the group's responsibility for the injuries and results in a desire to make restitution).

257 *See* Aiyetoro, *Reality*, *supra* note 11; BROOKS, *supra* note 6; Karenga, *supra* note 253; McGarty, *supra* note 256; Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006) (government actors); LAZARE, *supra* note 1; NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION (1991).

258 BROOKS, *supra* note 6; Karenga, *supra* note 253; NATIONAL COALITION OF BLACKS FOR REPARATIONS IN AMERICA (N'COBRA), REPARATIONS AND THE NATIONAL COALITION OF BLACKS FOR REPARATIONS IN AMERICA (N'COBRA): AN INFORMATION SHEET (2002).

full public acknowledgments.[259] The general consensus among scholars and activists is that an acknowledgment of the offending conduct, and the injuries caused by the conduct, is essential.[260]

The purpose of the reparations movement is consistent with the scholarship on apology. The reparations movement seeks to obtain an acknowledgment of the colossal wrongs African descendants sustained, and the continuing consequences of these wrongs, in addition to the provision of material reparations.[261] In order for reparations to be complete, therefore, the ABA must make a public acknowledgment to correct the public record.[262] The ABA's exclusionary conduct was in the public arena, and it reinforced and sustained the misperception of African descendants' inferiority, as described by the late A. Leon Higginbotham, renowned scholar and jurist.[263] Failure to make a full acknowledgment raises the specter of Higginbotham's precept of inferiority, allowing ignorance of the exclusionary policies and practices to support the myth that African descendants are not as "good" as whites.[264] Failure to make a public acknowledgment allows ignorance about a major cause of the disparity between African descendants and whites in the legal profession to continue. The ignorance is based on the creation of a "false historical narrative"[265] that justifies the disparities, and it is this false historical narrative that must be corrected for racial healing to occur.[266] Public acknowledgment, there-

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259 TAVUCHIS, *supra* note 257, at 102-03.

260 BROOKS, *supra* note 6, at 144; Karenga, *supra* note 253, at 1; White, *supra* note 257, at 10; N'COBRA, *supra* note 258, at 2; LAZARE, *supra* note 1, at 23.

261 Aiyetoro, *Development*, *supra* note 11, at 133; N'COBRA, *supra* note 258, at 2 ("A necessary requirement of all forms of reparations is an acknowledgment . . . that it committed acts that violated the human rights of those making the claim for reparations. Some groups want an explicit apology . . . .").

262 TAVUCHIS, *supra* note 257, at 102-04 (asserting that sorrow and regret have less significance because they do not correct the public record).

263 HIGGINBOTHAM, *supra* note 34, 3-17 (discussing the tenacity of the precept of inferiority of African descendants created during enslavement).

264 *Cf.* White, *supra* note 257, at 1285 (apology reestablishes notions of equality). In this case, since the myth of inferiority was created in the early seventeenth century, this society has not known a commonly accepted view that Africans and their descendants are equal to whites. Thus, it would not be to "reestablish notions of equality," but to establish such notions.

265 *See* Brief for the National Lawyers Guild, the National Conference of Black Lawyers, the Center for Constitutional Rights, and the National Association for the Advancement of Colored People as Amicus Curiae Supporting Petition for Certiorari, Alexander v. Oklahoma, 544 U.S. 1044 (Apr. 7, 2005) (No. 04-1198), 2005 WL 847568; *see also* BROOKS, *supra* note 6, at 148 (apologizing requires setting the historical record straight).

266 Full acknowledgment or "the perpetrator setting the record straight" is crucial because it results in an agreed historical narrative—"a collective judgment regarding the magnitude of

fore, opens a dialogue and reestablishes equality between groups, one of which asserted its power over the less powerful collective, thus harming that collective.[267]

A full, detailed acknowledgment is essential to ending the misconceptions born of a false historical narrative that explains the low numbers of African descendants in the legal profession, and the decreasing numbers of African descendant students in law school. The ABA's failure to make a full acknowledgment,[268] despite its commitment to addressing the "problems and concerns of minorities in the profession,"[269] indicates that obtaining this acknowledgment will require that the ABA adopt the view that the voluntary reparations model is important to their racial justice work. In 1986, the ABA established a task force to address the concerns and problems of minorities in the profession; however, the 1986 Task Force failed to acknowledge the ABA's role in creating those problems and concerns.[270] The failure to provide a detailed acknowledgment suggests that in the 1980s the ABA was unwilling to correct the historical record and, in fact, was continuing to distort its historical account by implying its only crime was inaction.[271] However, if the ABA adopts the voluntary reparations model, it would be joining an increasing public discourse on reparations. The ABA's example would expand the number of entities deciding to reconcile their current public stance for racial justice with their past history of racial exploitation. The ABA's commitment to racial justice programming in the last twenty-five years and the fact that litigation is highly unlikely[272] should make

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the injustice . . . ." BROOKS, *supra* note 6, at 148. It is essential for the public collective to make a public apology because of a public apology's importance in healing relationships and sending a message regarding acceptable and unacceptable conduct, i.e., establishing social norms. White, *supra* note 257, at 1279, 1281. *See also* LAZARE, *supra* note 1, at 179 (delay risks permanent injury).

267 *See* White, *supra* note 257, at 1279 (apologies clarify the rights and obligations of members of a community); LAZARE, *supra* note 1, at 39 (public apologies restore public dignity).

268 The various task force reports do not contain a detailed account of the past conduct of the ABA that necessitates a racial justice program. *See infra* Part C.1.a.

269 ABA TASK FORCE, *supra* note 240, at 8.

270 *Id.* at 14 ("During the first half of its existence, the Association, like the profession, did nothing to promote equality of professional opportunities for minority and women lawyers.").

271 *Id.*

272 There may be concern that a full acknowledgment would lead to costly litigation. However, that concern has been belied in Australia where there have been apologies without litigation. *See* McGarty, *supra* note 256, at 663.

the Board of Governers less resistant to the dialogue that would lead to full acknowledgment.

a. The ABA Board of Governors Should Issue the Full Acknowledgment

Over a period of seventy-eight years, the ABA's Board of Governors sanctioned its exclusionary policies and practices, which prohibited or strongly discouraged African descendant membership.[273] The ABA's Board of Governors, therefore, should issue an acknowledgment of the ABA's past practices.[274]

Seeking full acknowledgment from the ABA's Board of Governors, and thereby having the ABA take responsibility for seventy-eight years of exclusionary policies and practices, and their continuing consequences, may create anxiety and cognitive dissonance.[275] Many members of the Board of Governors may see the acknowledgment as being in conflict with or tarnishing the historian-created image of the ABA.[276]

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[273] *See supra* Part III.

[274] *See* White, *supra* note 257, at 44 (when the offense is severe only an apology from the person with ultimate responsibility really counts). TAVUCHIS, *supra* note 257, at 88 (collectivities act through authorized body/person). A past president of the ABA reportedly apologized to the ABA membership for the ABA's exclusionary practices in a speech to the membership in the 1990's. However, this apology is insufficient for three primary reasons: (1) it did not contain a full acknowledgment of the conduct and injury; (2) it was not given by or authorized by the governing bodies; and (3) it was not made to the general public but to members of the organization that attended that particular session.

[275] *See, e.g.*, White, *supra* note 257, at 25 (cognitive dissonance is created when beliefs, feelings, and actions are not consonant, causing individuals psychological discomfort); McGarty, *supra* note 256, at 661-62 (discussing the relationship between group-based guilt and support for an apology. He hypothesized that those most invested in seeing the in-group in a positive light may resist feelings of guilt and therefore an apology, including restitution, when confronted with historical conduct. The study did not confirm this hypothesis, however, the researchers felt this was due to the broad group identity descriptors). Lazare suggests that guilt results in amends; however, shame leads to hiding one's role in wrongdoing. LAZARE, *supra* note 1, at 136. Lazare also suggests that people don't apologize due to fear of tarnishing their self-images. *Id.* at 160-63. *Cf.* BROOKS, *supra* note 6, at 150-51 (Brooks addresses the psychological barriers that white Americans may have to reparations. He asserts that white Americans need to come to terms with the history of American slavery and the continuing consequences of that enslavement. This can be done by indicating that present-day white Americans are not being personally blamed. However, Brooks does not address the psychological barriers that legislators may have when asked to apologize, thereby accepting responsibility for the acts of the United States government).

[276] *See* SUNDERLAND, *supra* note 28 (no mention of the exclusion of African descendants); Matzko, *supra* note 28, at 75 (extolling the virtues of the ABA and the high status of its founders with no mention of the exclusionary practices and policies). This is itself an injury—"making

Yet there are two "images" of the ABA that are in tension: (1) that of the ABA as a passive observer of discrimination, and (2) the ABA's commitment to racial justice. The dissonance created by the conflicting images of the ABA may be a necessary component of adjusting the ABA's image of passive observer. By correcting the historical record, the ABA would be acknowledging that the organization was not always an advocate of racial justice; but rather, was a participant in racial exploitation. Instead of undermining the ABA's stature, the honest report would increase the respect of the ABA.[277] The fact that the ABA has engaged in racial justice programming since 1986, the policies that served to exclude ended in 1943, and the practices that supported those policies ended in 1956, may minimize the cognitive dissonance created by the ABA's conflicting images.[278]

Africans a footnote in European history." Karenga, *supra* note 253, at 2-3. This may result in further entrenchment, by either excusing past organizational responsibility or denying that the conduct was as harmful as suggested. McGarty, *supra* note 256, at 662-63; White, *supra* note 257, at 1286. *Cf.* Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317, 336 (1987) ("But while the ultimate goal of the cognitive process is understanding or rationality, many of the critical elements of the process occur outside of the individual's awareness. This is especially true when there is tension between the individual's desire for simplification and the complexity of the real world or conflict between an understanding of a situation that preserves the individual's self-image and one that jeopardizes a positive view of himself.") (footnote omitted); Daniel Gilbert, *I'm O.K., You're Biased*, N.Y. TIMES, Apr. 16, 2006, at § 4. Those serving in governing bodies are purportedly most invested in the image of the organization, and thus may have a higher interest in avoiding feelings of guilt. McGarty, *supra* note 256, at 662. *Cf.* LAZARE, *supra* note 1, at 160-63 (ashamed of image).

277 LAZARE, *supra* note 1, at 141 (the offender's stature may be raised if the apology demonstrates "courage and generosity"), 167 (full acknowledgment may result in "good shame" which is a sign of integrity); *Cf. id.* at 41 (suggesting that governing bodies must accept shame for historic atrocities committed by the organization).

278 *Id.* at 163 (a desire to ameliorate a wrong can relieve internal shame). Many times, the only way a relationship can continue after a serious offense has occurred is through an apology that results in both parties feeling they have gained something, or at least "enough," in the end. *Id.* at 205. Derrick Bell's interest convergence theory would lead us to the same conclusion. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 22 (Kimberle Crenshaw et al. eds., The New Press 1995). In addtion, the development of a detailed acknowledgment may increase group-based guilt because the acknowldgement may show that the ABA is responsible for a "harmful disadvantage that continues over time." McGarty, *supra* note 256, at 661. This group-based guilt may be a positive force in obtaining material reparations. *Id.* (group-based guilt may predict support for material restitution); LAZARE, *supra* note 1, at 136 (guilt leads to making amends).

b. The Public Acknowledgment Must Detail Offensive Conduct Without Justification

Since the public acknowledgment is a means to correct the historical record, it must provide sufficient detail of the conduct, including the effect of the conduct on the offended group.[279] The public acknowledgment required of the ABA if it were to adopt this voluntary reparations model must include a description of the policies and practices of the organization and its leading members to exclude and marginalize African descendants in the legal profession. The ABA also must describe the conduct's effects on African descendants and must make this acknowledgment without offering justification, since offering justification minimizes the ABA's responsibility for its actions.[280]

The ABA may have intended the racial justice programming it developed to address the "concerns and problems of minority lawyers"[281] to be an attempt to correct the effects of its past conduct.[282] However, the 1986 Task Force Report, which provided the rationale for recommending a racial justice program, is silent on the ABA's role in creating the disparities. Indeed, the report engages in obfuscation by attributing the exclusionary practices to the "legal profession" and attributes only "inaction" to the ABA.[283] Finally, the report justifies the racial exclusion of the ABA by attributing it to the "mores of American society and the practices of most other professions and organizations."[284] The 1986 Task Force Report failed to provide any of the ABA's exclusionary history; the report begins describing the specific actions of the ABA starting in 1943, when the organization began to address its exclusionary policies and practices.[285]

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279 LAZARE, *supra* note 1, at 75; *cf.* White, *supra* note 257, at 1282 (some people pursue litigation in order to have story told, providing recognition to the importance of acknowledgment of offenses).

280 McGarty, *supra* note 256, at 662 (minimizing responsibility is a way to avoid guilt feelings); White, *supra* note 257, at 1276 (attempt to justify conduct to relieve guilt suggests conduct may be repeated); *see also* TAVUCHIS, *supra* note 257, at 17-19 (excuses are efforts to distance from conduct).

281 ABA TASK FORCE, *supra* note 240, at 8 (In 1980, ABA President William Reece Smith, Jr. encouraged the ABA to attempt to understand these concerns and problems. In 1984, the Board of Governors created the Task Force.).

282 *See supra* note 188.

283 ABA TASK FORCE, *supra* note 240, at 14.

284 *Id.* It fails to reconcile the fact that women were elected to membership in 1918.

285 *Id.*

2. *A Statement of Regret or Sorrow*

There is debate among scholars regarding the essentiality of sorrow, regret, or remorse to reconciling historic wrongs that have continuing consequences,[286] although these emotions are frequently construed to be the hallmark of an apology.[287] Apology scholars suggest that a statement of sorrow or regret may be less important in apologies made by one collective to another, particularly in instances where the harmful conduct was committed by prior organizational leadership.[288]

The voluntary reparations model seeks to be practical while at the same time holding the ABA accountable. The demand for a statement of sorrow by reparations scholars may decrease the likelihood of obtaining a full public acknowledgment and material reparations.[289] Including a statement of sorrow, regret, or remorse as an optional component may avoid the debates over whether the current organization can in fact truly express sorrow and remorse for conduct committed by prior governing bodies and members are avoided.[290] The process of developing the detailed acknowledgment, if it is open, thorough and done with integrity, may generate the healthy shame that is a sign of integrity and result in a statement of regret, i.e. "sorrow aroused by circumstances beyond one's control or power to repair: grief or pain tinged with disappointment."[291]

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286 *See, e.g.*, McGarty, *supra* note 256, at 659 (addressing apology of Australian government to indigenous Australians); MARION OWEN, APOLOGIES AND REMEDIAL INTERCHANGES: A STUDY OF LANGUAGE USE IN SOCIAL INTERACTIONS (1983); LAZARE, *supra* note 1; Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289 (2001); Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 51-52 (1997) (discussing the effects an apology for enslavement would have on attitudes toward government redress of its continuing consequences); Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47 (1997); TAVUCHIS, *supra* note 257, at 347; BROOKS, *supra* note 252, at 142; Karenga, *supra* note 253, at 3.

287 THE AMERICAN HERITAGE DICTIONARY 119 (2d College ed. 1985) ("a statement of acknowledgment expressing regret or asking pardon for a fault or offense").

288 *See* TAVUCHIS, *supra* note 257, at 104; McGarty, *supra* note 256, at 661.

289 *See, e.g.*, BROOKS, *supra* note 6, at 142 and Karenga, *supra* note 253, at 3 (requiring statement of sorrow). Indeed, some suggest that demanding a statement of sorrow and remorse may create more resistance particularly for wrongs committed by past generations. *See* McGarty, *supra* note 256, at 662 (Australians resisting apology to indigenous Australians because past generations seen as responsible).

290 This is perhaps one reason for Tavuchis's view that sorrow and remorse are unimportant in apologies from one collective to another. *Cf.* TAVUCHIS, *supra* note 257, at 104.

291 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1921 (1966). McGarty suggests that the more the in-group perceives that it has received greater advantages because of the treat-

3. A Material Reparations Program Is Indispensable

Restitution or material reparations are essential to reconcile the ABA's exclusionary past with its current support of racial justice. Nicholas Tavuchis, an apology scholar, indicates that the apology (detailed acknowledgment) is itself remediation and reparation.[292] He is in the minority.[293] The more fundamental reason for requiring material reparations is to demonstrate that the organization recognizes that its past conduct has continuing consequences for which it has responsibility for correcting.[294] Material reparations also assist in assuring that the conduct that led to the injury and its continuing consequences will not be repeated.[295] This preventive aspect, combined with the public acknowledgment, influences the entire society, not simply the organizational members who participated in the process or those who read about it in the organization's archives.

The design of the reparative programming must ameliorate the injuries caused by the acknowledged conduct, including injuries to the status of African descendants in the historical record of the organiza-

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ment of indigenous Australians, the more likely the in-group is to support a federal apology. McGarty, *supra* note 256, at 669. It follows that there is a positive correlation between a sense of obtaining position and status at the expense of African descendants, and willingness to express regret and make material reparations. *Cf. id.* at 677. Brooks's atonement model includes the perpetrator asking for forgiveness, which appears to be a form of stating regret. He also suggests that a congressional apology would be considered a statement of regret. BROOKS, *supra* note 6, at 146-54.

292 TAVUCHIS, *supra* note 257, at 109. *See also* McGarty, *supra* note 256, at 661 (apology is a form of moral restitution). However, throughout the article the authors connect material restitution to apology and the level of guilt experienced by entity being requested to apologize. *See, e.g.*, McGarty, *supra* note 256, at 662, 677.

293 BROOKS, *supra* note 6, at 142, 155 (to make amends requires restitution commensurate with wrongs); White, *supra* note 257, at 1310 (an apology without restitution may be seen as "hollow"); Karenga, *supra* note 253, at 3 (material reparations are a moral obligation to repair the injury created by the conduct); LAZARE, *supra* note 1, at 9 (pseudo-apology when you do not offer appropriate reparations), 15 (historical injustices require restitution), 132 (reparations show taking it seriously).

294 The ABA recognizes the importance of addressing continuing consequences of historic exclusion; it simply fails to articulate its role in that exclusion. *See* ABA TASK FORCE, *supra* note 240, at 14.

295 Karenga makes remediation and prevention two separate aspects of reparations. Karenga, *supra* note 253, at 3. This may have merit since otherwise the program designers may minimize one of the two essential purposes of the reparative programs. *Cf.* White, *supra* note 257, at 1276 (importance of apology by perpetrator without justifications for harmful conduct is that justifications suggest that conduct is likely to be repeated).

tion.[296] However, the material reparations program cannot develop until after an acknowledgment of past discrimination, since the voluntary reparations model specifically serves to remediate and prevent the conduct and effects identified through the acknowledgment process.[297] Otherwise, the voluntary reparations model will not serve a reparative function. The current racial justice programming is neither restitution for the past conduct of the ABA, nor an acknowledgement of the injuries caused by that conduct because the ABA did not develop the racial justice programs after an in-depth assessment and publication of the ABA's exclusionary conduct. Additionally, the racial justice programs fail to be reparative because the programs lump all "minorities" into the same programs without assessing whether the discriminatory conduct and its effects were the same for all "minority" groups.[298]

The ABA's racial justice work is based on an "equality" paradigm—the concerns of people of color about race discrimination in the legal profession are treated similiarly because these groups' representation in the profession has been affected by discrimination. This paradigm ignores the fact that, although these various groups of color have all experienced discrimination, the differences in these groups' treatment by society and the ABA vary in quality and quantity and result in the need for different approaches to resolve the problems that arise from their disparate treatment in the profession.[299]

By conflating the groups of color for the purpose of addressing the concerns and problems associated with people of color in the legal

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296 *Cf.* Karenga, *supra* note 253, at 2-3 (African enslavement made Africans a footnote and forgotten casualty in European history). The absence or minimization of the history of African descendants, including their exclusion, in the historical texts written by most Anglo-American legal historians makes African descendants "a footnote and forgotten casualty" in the history of the legal profession in the United States.

297 BROOKS, *supra* note 6, at 157-58.

298 *See generally* ABA TASK FORCE, *supra* note 240; 113 ABA Rep. 214-17 (Report of the Commission on Opportunities for Minorities in the Profession indicating programmatic focus is "minorities"). *But see* BROOKS, *supra* note 252, at 155 (reparations are asymmetrical and only those subject to the specific inhumane conduct should receive it).

299 BROOKS, *supra* note 6, at 161 (although all people of color are victims of systemic racism, the type of systemic racism differs among groups, leading to different experiences and conditions). *But see* Juan Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1213-14 (1997) (arguing that there is a "Black/White paradigm" in the United States that ignores the racism directed at other groups of color, and pointing to similarities between the treatment of African descendants and Latinos, while seeming to ignore or minimize significant differences).

profession, the ABA did not identify its particular responsibility for the current status and condition of any group of color in the legal profession. The ABA, therefore, does not match its exclusionary policies and practices and their consequences for African descendants with the remedial programming it develops.[300] The ABA's approach has resulted in the creation of recommendations and subsequent programming that builds on a "one size fits all" model. By adopting this approach, the ABA has failed to correct the historical record of its treatment of African descendants. Since the ABA has not taken responsibility for the current "problems and concerns" of African descendants in the legal profession, the ABA has not developed remedial programming that has true meaning in this "age of apology." Consequently, the ABA's programming continues to leave African descendants woefully underrepresented in the legal profession,[301] and it fails to satisfy the need of African descendant attorneys to have the historical record of their disparate representation corrected. Thus, the ABA fails to assure African descendant attorneys that it shares their demand for equal treatment by setting the historical record straight and that the ABA, therefore, will not revert to its past practices if the "mores of the society" determined that the consequences of exclusion should go unaddressed.[302]

The results of the investigation that predicates the full acknowledgment will form the basis for creating material reparations. The following is a suggestive list of material reparations that the ABA should provide:

a. ABA Acknowledgments

- Immediately, publish a full acknowledgment in the ABA Journal after passed by the Board of Governors.

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300 The ABA may be supporting McGarty's hypothesis. *See* McGarty, *supra* note 256, at 662 (people most invested in seeing group in a positive light are likely to avoid feelings of group-based guilt if they can).

301 *See* AM. BAR ASS'N, MILES TO GO 2000, *supra* note 230; MINORITY CORPORATE COUNSEL ASSOCIATION, CREATING PATHWAYS TO DIVERSITY – THE MYTH OF THE MERITOCRACY: A REPORT ON THE BRIDGES AND BARRIERS TO SUCCESS IN LARGE LAW FIRMS (2003).

302 BROOKS, *supra* note 6, at 148 (apology requires setting the historical record straight); White, *supra* note 257, at 15 ("Rationalizations [rather than full acknowledgment] suggest offender might repeat."). The ABA's embrace of racial justice resolutions followed by racial justice programming came during the 1960s, 1970s, and 1980s when the accepted view was that discrimination should be ended.

- Place the full acknowledgment on the ABA website immediately after approval by the Board of Governors.
- Provide a copy of the full acknowledgment to the NBA, NLG, and the National Conference of Black Lawyers and encourage these organizations to publish it.
- Provide a copy of the full acknowledgment to all ABA accredited schools and affiliated organizations and require them to publish the acknowledgment on their websites.

b. ABA Commissions

- Commission a group of African descendant led legal historians to write an official history of the ABA, which includes the ABA's exclusionary policies and practices.
- Create a commission of African descendant led lawyers to review reparations litigation efforts and make recommendations concerning litigation strategies that may surmount the procedural hurdles that have resulted in no case being heard on the merits.

c. ABA Member and Affiliate Efforts

- Identify those firms that had partners who were members of the ABA between 1878 and 1956 and did not hire African descendant attorneys or law students. Assure that this information is part of the official history of the ABA. Determine which of those firms continue under some organizational structure today and have partners that are members of the ABA. Educate these firms about their history of exclusion and their shared responsibility for current low representation of African descendants. Encourage the firms that continue to have low representation of African descendants as partners, associates and interns, to increase their number of African descendant partners, associates and legal interns by conducting special outreach to African descendant attorneys and law students.
- Require the ABA to examine any changes in accreditation requirements for their potential impact on African descendant enrollment, and the issuance of an impact statement, including how to ameliorate any negative impact prior to accepting the changes.
- Require state ABA affiliates to investigate their policies and practices concerning the exclusion of African descendants from membership, and publish a full acknowledgment of any exclusionary

policies and practices and the effect of the exclusionary polices and practices on African descendants.

- Create an African descendant led focus group that includes representatives from Historically Black law schools to develop a plan for the ABA to assist Historically Black law schools in obtaining and retaining accreditation and increasing their student enrollments.
- Create an African descendant focus group to investigate the decreasing law school enrollment of African descendants and make recommendations for increasing the enrollment of African descendant students.

d. Congressional and Legislative Efforts and Responses

- Resolve to support H.R. 40, the Reparations Study Bill introduced in the House of Representatives every legislative session since 1989.
- Resolve to support an upcoming House of Representatives bill to waive the statute of limitations in suits alleging violations of federal rights filed by survivors or descendants of the 1921 Tulsa Race Riot.
- Divest organizational funds from any corporation that does business in a jurisdiction with a Slavery Disclosure Ordinance or Bill and does not voluntarily acknowledge its connection to slavery pursuant to the Ordinace or Bill.

e. ABA Financial Supports

- Create a scholarship fund specifically for African descendants admitted to any ABA accredited law school.

CONCLUSION

The voluntary reparations model is designed to rectify the unfinished business of slavery and Jim Crow, exemplified by the ABA's adoption of exclusionary policies and practices that prevented African descendants' access to the benefits of membership and supported the exclusion of African descendants from ABA-approved law schools. The ABA's current efforts to eliminate racial disparities in the profession fail to reconcile its past with its present. These efforts were developed and implemented without a full acknowledgment of its past

conduct and the injuries the conduct caused to African descendants. Thus, the ABA's current racial justice programming fails to assure African descendants that the ABA and African descendants share common values—the most important value being respect for the equality of African descendants and whites. Providing remedial programming without an acknowledgment minimizes the value of these programs because it fails to link the programming to specific conduct and subsequent harms. The acceptance of racial justice programming without an acknowledgment of the conduct that necessitated such programming undermines true reconciliation and maintains, rather than eliminates, the racial divide.[303] The premature acceptance of an incomplete process of reconciliation prevents true reconciliation because it fails to demonstrate that the ABA is truly committed to healing the relationship. The call for the ABA to acknowledge its exclusionary past and make material reparations is a call for it to assume a leadership role in the true reconciliation of African descendants and whites. The ABA can only assume this mantle of leadership if it treasures truth over fears of tarnishing its "self-image."

> "True reconciliation can occur when we honestly acknowledge our painful but shared past"[304]

303 *See* LAZARE, *supra* note 1, at 233. *See also* BROOKS, *supra* note 6, at 168 (wrong to engage in "forgiving without atonement").

304 Elizabeth Eckford, Member, Little Rock Nine, in Andrea Stone, *In Little Rock, a Small Act of Defiance Endures*, USA TODAY, August 30, 2007, at 1A, 2A, *available at* 2007 WLNR 16903423.