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MINORITY STUDENTS IN LAW SCHOOL

BLACK LAWYERS AND THE STRUGGLE FOR RACIAL JUSTICE IN THE AMERICAN SOCIAL ORDER

HENRY W. MCGEE, JR.*

No one with a mop can expect respect from a banker, or an attorney, or men who create jobs, and all you have is a mop. Are you crazy? Whoever heard of integration between a mop and a banker?

— [Black] man, age about 38¹

I would like to see the day when my people have dignity and pride in themselves as black people. And when this comes about, when they realize that we are capable of all things, and can do anything under the sun that a man can do, then all these things will come about—equality, great people, presidents—everything.

— [Black] man, age 19²

INTRODUCTION

El-Hajj Malik El-Shabazz lamented in the story of his life that his “greatest lack” was that he did not have the kind of education he “wished” he had been able to get.³ “I do believe,” he said, “that I might have made a good lawyer. I have always loved verbal battle, and challenge. You can believe me that if I had the time right now, I would not be one bit ashamed to go back into any New York City public school and start where I left off at the ninth grade, and go through a degree.”⁴

It was not the first time El-Hajj Malik El-Shabazz had expressed an ambition to practice law. In eighth grade he told his English teacher Mr. Ostrowski, “I’ve been thinking I’d like to be

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1. Quoted in K.B. CLARK, *DARK GHETTO* 2 (Torchbook ed. 1967).

2. *Id.* at 10.

3. *THE AUTOBIOGRAPHY OF MALCOLM X* 386 (1965).

4. *Id.*

a lawyer." His "surprised" instructor responded, "Malcolm, one of life's first needs is for us to be realistic. Don't misunderstand me, now. We all here like you, you know that. But you've got to be realistic about being a nigger. A lawyer—that's no realistic goal for a nigger. You need to think about something you *can* be. You're good with your hands—making things. Everybody admires your carpentry shop work. Why don't you plan on carpentry? People like you as a person—you'd get all kind of work."⁵

Evidently Mr. Ostrowski's doubt about the realism of "nigger goals" was shared at least in part in some quarters of American legal education. Northern law schools, "nominally open to Negro applicants,"⁶ were until recently virtually lily-white, and "except for the occasional 'Jim Crow' institution, Southern law schools were completely closed to the Negro until the 1950's."⁷ Those few blacks who slipped through the variety of barriers placed in their paths by the American social order and graduated from law school, found themselves relegated to the "fringe of the profession."⁸ Opportunities in firms, business, and government were virtually non-existent, so much so that Secretary of Labor Wirtz called the legal profession "the worse segregated group in the whole economy or society."⁹ Almost any black lawyer who graduated from law school prior to 1967 can substantiate from personal experiences severely circumscribed professional opportunities. This combination of limited educational and occupational opportunity produced the notorious "one per cent" statistic. In 1966, there were, accord-

5. *Id.* at 36-37.

6. Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L. REV. 1069.

7. *Id.*

8. *Id.* at 1070. The author cites some of the standard studies considering black lawyers. Especially important are G. MYRDAL, *AN AMERICAN DILEMMA* 325-26 (1944) (a classic study of race relations) and C. WOODSON, *THE NEGRO PROFESSIONAL MAN AND THE COMMUNITY* 184-249 (1934).

9. Address by the Secretary of Labor, W. Willard Wirtz, Association of American Law Schools Convention, Dec. 29, 1963. Some verification of Secretary Wirtz' charge may be found in Brown, *Racial Discrimination in the Legal Profession*, 53 J. AM. JUD. Soc'y 385 (1970), where it is said that in 1967 (the last year for which complete figures were available when the article was written), "the 30 largest New York law firms employed a total of only 3 black attorneys. In Chicago, the seven largest firms employed one black lawyer. In the ten largest firms in the nation's capital, and the two largest in Boston, not a single black attorney was employed."

Four years after the Wirtz statement the problem was still so pervasive that two authors suggested use of federal civil rights legislation to attack the legal profession's "traditional pattern of discrimination." Paone & Reis, *Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers*, 40 S. CAL. L. REV. 615 (1967).

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ing to the Bureau of the Census, 313,462 American lawyers.¹⁰ As of 1968, one calculation, self-described as "probably an overestimate," placed the number of black lawyers at 3,000.¹¹ The highest estimate was 4,000, made by the President of the National Bar Association (the Negro equivalent of the American Bar Association).¹² Using the widely acknowledged undercount of the 1960 census,¹³ blacks comprised 10.5 per cent of the population.¹⁴ By 1966, the official figure was about 11 per cent.¹⁵ Even if a system was imposed which would hold the number of attorneys at the 300,000 figure, 30,000 more blacks would have to become lawyers before there would be parity in the profession.¹⁶

Nevertheless, despite the awesomeness of the goal, law schools have at last joined the struggle against discrimination and segregation which "have long permeated much of American life [and]

10. 1968 STATISTICAL ABSTRACT OF THE UNITED STATES 155.

11. Gellhorn, *supra* note 6, at 1073.

12. Toles, *The Negro Lawyer in the United States*, 112 CONG. REC. A5458 (1966). The National Bar Association's National Bar Foundation has recently compiled a list of nearly 5,000 black lawyers. The list is not final, however, and is in the process of verification. Interview with Donald M. Stocks, NBF Program Director, in Los Angeles, Cal., Nov. 6, 1970. Undoubtedly, the precise number of Negro lawyers can never be known. First, some lawyers who are classified as "white" may in fact, by some racial standards, be black. Secondly, many black lawyers in the past have been unable to make a living as attorneys and have gone to work in the U.S. Post Office or some other governmental agency and have relegated their law degree, law license and professional identity — in the words of Countee Cullen's poem, *Epitaph For a Poet* — to "a silken cloth . . . laid . . . away in a box of gold." C. CULLEN, *ON THESE I STAND* 31 (1947).

13. Commentary on the blacks "lost" by the census includes the following: "[W]e have recently become aware that 14 per cent of Negro males and only 2 per cent of white males were not counted in the 1960 census, and if they were counted they would probably lower the average figures for Negro earnings, education, employment, housing." Glazer, *The Negro's Stake in America's Future*, N.Y. Times, Sept. 22, 1968, §6 (Magazine), at 90, col. 4.

"Some persons are, of course, missed in all employment surveys. But the 'undercount' is especially high in slum areas, particularly among Negro men in the twenty-to-thirty-nine-year bracket, because some of them have deserted their families, some have no permanent address, and some simply do not wish their existence to be known because they are engaged in numbers-running or other illegal activities. Even in the last decennial census in 1960, Census Bureau officials believe, about 9 percent of the Negro population was missed." FORTUNE, Jan., 1968, at 224 n.*.

14. 1968 STATISTICAL ABSTRACT OF THE UNITED STATES 27.

15. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 227 (1968). The percentage is predicated on a count of about 21.5 million blacks out of nearly 198 million Americans. It should again be pointed out that these official figures are, as to the number of blacks, probably low. A black scholar has said that there are "about 40 million blacks" in the United States. Anderson, *Mathematics and the Struggle for Black Liberation*, 2 THE BLACK SCHOLAR 20 (1970).

16. Gellhorn, *supra* note 6, at 1073.

now threaten the future of every American."¹⁷ The measures used to bring blacks to the hitherto all or virtually all-white law schools are by now well known.¹⁸ Pioneer programs were instituted at Harvard and New York University in 1965-66 which were essentially summer programs with financial aid for minority students who were admitted under a different set of academic criteria. Both schools then joined in the Council on Legal Education (CLEO) program along with other law schools.

CLEO is, of course, now the largest of the law school "head-start" or "prestart" programs, although the 1970 program was not as large as that of the preceding summer. The cutback apparently was due both in part to a shortage of scholarship funds for "successful" CLEO students, partly to some second thoughts about the ability of the short summer session to really make a difference in the long three-year law school haul. It must also be noted that there are indications that law school minority programs may be reduced in scale as a result of a mix of economic and political considerations.

While the number of black attorneys will still be piteously small,¹⁹ some initial assessment of this sudden and, relatively speaking, potentially large scale increase in the number of attorneys from racial minority groups is in order. These very brief suggestions about the social implications of an increase in black attorneys are concentrated in three areas: 1) the effect upon the dominant or majority group; 2) the effect upon black people as a group, and 3) the ways in which the lawyers themselves will be affected—the personal or psychological aspects of the situation.

Since the returns are not yet in (the largest number of the bumper crop of black law students is still in law school),²⁰ any prediction about the impact of the increase of minority lawyers will have to be predicated largely on the bleak experiences of the past. Moreover, an assessment at a time of deepening reaction and lowering of national sights is bound to reflect some of the "cautious pes-

17. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

18. See generally Comment, *Current Legal Education of Minorities: A Survey*, 19 BUFFALO L. REV. 639 (1970).

19. The original CLEO program was designed to produce 300 additional minority lawyers by 1973, thereby barely scratching the surface of the disproportion.

20. Comment, *supra* note 18, at 641.

simism"²¹ of the time in which it is made. Nonetheless, the emerging cadre of black law students represents the newest source of leadership in the struggle for black liberation. They are part of a surging tide of blackness that may yet save the nation from the decay and death of racism. As such they command attention and respect.

I. STEREOTYPES AND THE RE-EDUCATION OF WHITES

The juxtaposition of the black executive with the white hard hat, both praising the same product, is by now an advertising cliché. It reflects the notion that whites must and can be re-educated about their notions of acceptable roles for black people. While an attempt to tap the lucrative black purchasing dollar is undoubtedly the principal motivation for the sudden appearance of blacks in advertising, a subtle but meaningful shift in the commitment of the private sector to racial harmony is also a factor in the new and reasonably widespread attempt to upgrade the image of the black American.

In his classic study of white racism, Gordon W. Allport notes the fact that most blacks are at or near the bottom of the occupational ladder, that "Negroes are usually servants, not masters; doormen, not executives; laborers, not foremen."²² Allport suggests that the differential status in occupation is a significant factor in the creation and maintenance of prejudice. He cites a study of a group of veterans which discovered that men "who had known Negroes only as unskilled workmen had favorable attitude scores in [only] five percent of the cases. . . . Those who had encountered skilled or professional Negroes outside the armed services, or had worked with Negroes of the same skill level as themselves . . . [while in the armed forces], had favorable scores in 64 per cent of cases."²³

21. The phrase is Whitney Young's, Executive Director of the National Urban League. At a Los Angeles Press Conference two days after the November second elections, Young said the election of five new black congressmen nationally and California's choice of Wilson Riles as State Superintendent of Public Instruction provide black people "with a little more hope for the political process. . . . [However], this is not a time for anything but cautious pessimism. It's not a moment to relax." Los Angeles Times, Nov. 6, 1970, § II, at 4, col. 7.

22. G. ALLPORT, *THE NATURE OF PREJUDICE* 261 (Anchor ed. 1958).

23. MacKenzie, *The Importance of Contact in Determining Attitudes Toward Negroes*, 1948 J. OF ABNORMAL AND SOCIAL PSYCHOLOGY 417-41, cited in G. ALLPORT, *supra* note 22, at 262.

Thus, one beneficial effect of any increase in the occupational status of blacks may be the reduction of white prejudice which, after all, is the primary force promoting and maintaining inferior job opportunities for blacks in the first place. Law school minority programs thus may be a wedge through racism's vicious circle. Since lawyers are among the most respected of occupational groups, the widespread diffusion of blacks throughout the legal profession could have a salutary effect upon race relations.

II. PROFESSIONAL ATTAINMENT AND BLACK PRIDE

Of no less importance, however, is the impact on black self-esteem of a significant increase in the number of black attorneys. As Grier and Cobbs have argued:

For black and white alike, the air of this nation is perfused with the idea of white supremacy and everyone grows to manhood under this influence. Americans find that it is a basic part of their nationhood to despise blacks. No man who breathes this air can avoid it and black men are no exception. They are taught to hate themselves, and if at some point they are the object of this hatred, they are faced with an additional task, nothing less, for the imperative remains — Negroes are to be despised.²⁴

The continued powerlessness of black Americans can only serve to reinforce their pervasive feelings of inferiority. Widespread self-attainment in business and the professions is no certain antidote to this most crushing of the consequences of white racism. But it can be an important and constructive factor in movements in the black community which are aimed at building a sense of black pride, without which, there can be no black power.

It is true of course that the black lawyer has been a part of the ghetto scene for a long time. However, his image, reinforced by his lack of numbers has, until recent years, been not unlike that of counsel for Amos and Andy, Algonquin Calhoun. The bleak picture that Gunnar Myrdal drew a generation ago of the Negro lawyers in the south is not entirely obsolete and to some extent has nationwide application.²⁵ The belief is still widespread among

24. W. GRIER & P. COBBS, *BLACK RACE* 166 (Bantam ed. 1969).

25. G. MYRDAL, *AN AMERICAN DILEMMA* 325-26, 550 (1944).

many blacks that white lawyers can accomplish more for them than blacks—a belief apparently shared by that paradigm of black militancy and pride, the Black Panther Party.²⁶ One would not have to look far in the black community for Myrdal's "Negroes [who] sometimes believe that Negro lawyers are not permitted in court-rooms even where they are permitted."²⁷ And also still partially true is Myrdal's observation about the "other handicaps for Negro lawyers: their clients are usually poor; they cannot afford extensive equipment; they have not had the experience of handling important cases; they cannot specialize."²⁸ The fact of the exceptional competency of scores of black lawyers cannot alone overcome the less than adequate image of the average black lawyer in his own community. As long as the number of black lawyers is minuscule, the experiences of the black community with black lawyers will be limited and thus subject to the self-deprecating folklore of the black community which, while trumpeting the beauty of being black, still respects the power that inevitably goes with being white.

The growth of a cadre of black lawyers who perform important roles in many sectors of the legal and economic life of the black community cannot help but raise the estimate of the black community of the worth of its own professionals. As large numbers of these lawyers prove their ability to accomplish essential legal tasks, there is bound to be an increase in the use of their skills by black people.²⁹ In turn, these lawyers themselves will undoubtedly

26. I know of no official position of the party on this question, and at least two Chicago black lawyers, Kermit Coleman of the AGLU and Cornelius E. Toole of the NAACP have defended Panthers. It has been suggested that some Panthers feel black lawyers cannot be trusted because they are too "dependent upon the man" and thus not independent enough to wage a truly aggressive defense. It is also probably true, however, that many black lawyers have not rushed to the defense of the Panthers for a variety of reasons, the most salient of which is fear that an image of militancy might reap political dividends for the Panthers, but would greatly reduce the lawyer's effectiveness for the balance of his clientele.

27. G. MYRDAL, *supra* note 25, at 550.

28. *Id.*

29. Perhaps in time there will also occur the displacement of the black minister by the black lawyer as leader and spokesman for the black community.

Whites naturally look to lawyers for political leadership, and the role of the Bar in manning the posts of governmental and private organizations is well known, indeed taken for granted. A similar role is played in the black community by the ministry. Martin Luther King was squarely within a black tradition unbroken since whites first preached the gospel to their slaves, then entrusted the tasks to blacks. King consciously rejected a career in law and medicine to work in the ministry in order to help black people. Columbia Broadcasting System Television Special, April 5, 1968; TIME, April 12, 1968, at 19.

be even more sympathetic to the needs of the black community than have previous generations of black attorneys. This new breed of lawyers will be in a position to command the respect and loyalty of their less educated brothers. In Vincent Harding's words, black students, tomorrow's lawyers, are seeking to "find some significant pathways into their black communities. . . . [B]lack students insist that the university either assist them in finding a new life for the black community or leave them with a sense of freedom in their own search."³⁰

III. THE BLACK MAN'S BURDEN—PERSONAL COSTS OF INTEGRATION

While an increase in the number of black lawyers should have a salutary impact upon race relations and at the same time achieve new dimensions of justice for black people, this new vanguard must expect no freedom from the frustration and rage that goes with being black in America. Despite considerable educational and professional attainments, blacks must still expect to encounter discrimination and circumscribed occupational opportunity. Blau and Duncan have revealed, in their landmark study, the profound effect that race plays at every step of the occupational ladder, an "interaction effect of color and education [which] means that the highly educated Negro suffers more from occupational discrimination than the less educated Negro."³¹ Blau and Duncan suggest that the college-educated black's greater knowledge and stronger achievement motivation makes him particularly sensitive to discrimination in employment and advancement.

College-educated Negroes are a highly select group. Coming, unlike college-educated whites, from depressed origins, college-educated Negroes have had to overcome more serious obstacles. The fact that they have surmounted these obstacles educationally suggests that they are more highly motivated (or more able) than

30. Harding, *Black Students and the Impossible Revolution*, 1 J. OF BLACK STUDIES 75, 85-86 (1970). Concerted efforts are also underway in the legal profession to return newly graduating black law students back to their communities. The National Bar Foundation, in conjunction with the Black Law Students Association, is organizing a placement service which will direct student attention towards employment opportunities in black neighborhoods and organizations. The service is *not* designed primarily to place black law students in large all-white law firms. Interview with Donald M. Stocks, NBF Program Director, in Los Angeles, Cal., Nov. 6, 1970.

31. P. BLAU & O. DUNCAN, *THE AMERICAN OCCUPATIONAL STRUCTURE* 211 (1967).

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their white counterparts. Yet despite this greater selectivity of non-whites with college experience, they do not manage to achieve an occupational level comparable to that of whites and even fail to rise as far above their lower social origins as college-educated whites arise above their higher ones. Whereas the lower occupational status of Negroes may be in part attributable to their more disadvantageous parental background, the latter cannot account for their lesser chances of achieving upward mobility compared to whites, because it provides *more* room above their origins into which to move than is the case for whites.³²

Blacks who undertake professional careers cannot therefore expect either a reprieve or immunity from racism. Quite the contrary. For the foreseeable future, they must be prepared to bear the brunt of racial prejudice. As Blau and Duncan observe, "Although there is some indication that discrimination against Negroes has declined in this century, . . . the trend is not consistent, does not encompass all areas of occupational life, and has only begun to penetrate into the South. . . . Indeed, the data suggest that the relative position of the Negro in regard to the higher levels of attainment has become worse in recent decades."³³

IV. ALTERNATIVES AND CONCLUSION

These very tentative and deliberately optimistic suggestions about the impact of increased numbers of black lawyers upon the American social order are, it should go without saying, subject to modification. Should the polarization which proceeds apace and seems to nearly outstrip change in this society continue, it is entirely possible that law school minority programs will be regarded as "wild a dream" as brotherhood itself.

Thus, rather than working a change in white attitudes toward blacks, a whole new series of explanations may mushroom to offset and check the advances in black professional accomplishment.

32. *Id.*

33. *Id.* at 241. Things seem to be getting worse for blacks everywhere. According to an article in the Los Angeles Times, August 7, 1970, § 1, at 1, col. 1, "Unemployment among Negroes in the Watts area soared 61% from the time of the 1965 riot to the end of 1969, a U.S. Department of Labor study disclosed. . . . While the Negro jobless rate shot up in the South-Central section of the city, overall unemployment for the Los Angeles area as a whole went down 14%."

Some evidence of this may already be seen in the undercurrent of dissatisfaction with minority recruitment programs in the law schools and elsewhere. Even some white students have exhibited fundamental misconceptions about the nature of the relationship between blacks and the major institutions of this society.

The feeling that blacks are getting special advantage to the detriment of whites is a disturbing development that could ultimately lead to the dismantling of programs designed to increase the numbers of black attorneys. Criticism by students, some faculty, and even national political leadership flows from an ignorant and false assessment of the admission requirements for blacks. As William F. Soskin has observed, "The awesome shame and guilt that might otherwise overwhelm millions of fair-minded and well-meaning whites in both North and South is held in check by ignorance of the shocking facts or assuaged by pernicious rationalizations."³⁴ This massive ignorance must be decisively met by educational programs at every level of this society which demonstrate that relevant admissions criteria do not amount to concessions or favors, that justice is not charity.

Of course some of the hostility to the special programs can be laid to fears of competition in the labor market, though, to be sure, this feeling is undoubtedly far less pronounced among professionals and students than among, for instance, blue collar groups. Nevertheless, a shrinking market for professionals could find whites exhibiting at upper occupational levels traces of the regressive attitudes that have blocked black participation in the building trades.

As for the elusive question of black self-esteem, Grier and Cobbs have suggested that this can cut both ways. While it may build self-confidence among blacks to see tangible evidence of professional attainment, it could also lead to a destructive estrangement of blacks from those who should normally assume leadership roles. As individual blacks achieve success, a success due in part to emulation of life-styles of white professionals, they may as a result feel more competent, but at the price of feeling that other blacks

34. Soskin, *Riots, Ghettos, and the "Negro Revolt,"* in STAFF PAPER, OFFICE OF PLANNING, NATIONAL INSTITUTE OF MENTAL HEALTH (1964).

are incompetent.³⁵ "In this way they develop a contempt for themselves, because, however much they avoid it, they remain black, and there are things about themselves that will yet remind them of their blackness and those reminders will evoke feelings of self-hatred and self-depreciation."³⁶ This drive to emulate whites and to copy white life-styles as the price of success, if not offset in some way, can leave black professionals so estranged from and alien to the black community as to make it impossible for them to interpret and serve the interests of that community.

Finally, the frustration that this new cadre of black professionals will surely experience from a predictable consistent denial of opportunity could produce a leadership and a class no longer willing to rely solely upon the slow and uncertain process of traditional strategies of social change. The words of the most celebrated black intellectual of this century, perhaps in American history, written in 1934 and sadly appropriate nearly 40 years later, are relevant to this discussion:

It is doubtful if there is another group of twelve million people in the midst of a modern cultured land who are so widely inhibited and mentally confined as the American Negro. Within the colored race the philosophy of salvation has by the pressure of caste been curiously twisted and distorted. Shall they use the torch and dynamite? Shall they go North, or fight it out in the South? Shall they segregate themselves even more than they are now, in states, towns, cities or sections? Shall they leave the country? Are they Americans or foreigners? Shall they stand and sing "My Country 'Tis of Thee"? Shall they marry and rear chil-

35. The inaugural issue of a publication of the Black Law Students Association of the University of California, Los Angeles School of Law, contains the following message to black law students:

UCLA Law School has men on its faculty who are masters of developing *individualism* among potential Black leaders. These faculty members use promises of excellent grades, prestigious jobs, and high salaries as inducements to divert you from your *duty of service* to Black people. These men want to separate, yes isolate you, from your brothers by causing you to think that you are smarter, sharper than the rest of your brothers here. These men are masters of the doctrine "divide and conquer." Dig, Brother — If you are *used* to being divided and conquered, you will be at home here at UCLA. If you happen to be one of these unfortunate Brothers (if one can truly say that you are a Brother), then you are going to be faced with making a crucial decision that will have far-reaching effects on your relationship with your fellow Black students and Black people who you are destined to serve. Let's hope you make the right decision.

BULLET, Vol. 1, Nov. 1970, at 1.

36. W. GRIER & P. COBBS, *supra* note 24, at 194.

dren and save and buy homes, or deliberately commit race suicide?

Ordinarily such questions within a group settle themselves by laboratory experiment. It is shown that violence does not pay, that quiet persistent effort wins; bitterness and pessimism prove a handicap. And yet in the case of the Negro it is almost impossible to obtain such definite laboratory results. Failure cannot be attributed to individual neglect, and success does not necessarily follow individual effort. It is impossible to disentangle the results of caste and the results of work and striving. Ordinarily a group experiments—tries now this, now that, measures results and eliminates bad advice and unwise action by achieving success. But here success is so curtailed and frustrated that guiding wisdom fails. Why should we save? What good does it do to be upstanding, with self-respect? Who gains by thrift, or rises by education?

Such mental frustration cannot indefinitely continue. Some day it may burst in fire and blood. Who will be to blame? And where the greater cost? Black folk, after all, have little to lose, but Civilization has all.

This the American black man knows: his fight here is a fight to the finish. Either he dies or wins. If he wins it will be by no subterfuge or evasion of amalgamation. He will enter modern civilization here in America as a black man on terms of perfect and unlimited equality with any white man, or he will enter not at all. Either extermination root and branch, or absolute equality. There can be no compromise. This is the last great battle of the West.³⁷

37. W.E.B. DuBois, *BLACK RECONSTRUCTION* 703 (1935).