Racial Integration and Pre Start at Emory University: Ben F. Johnson, Jr., and the Emergence of the Second New South

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Racial Integration and Pre Start at Emory University: Ben F. Johnson, Jr., and the Emergence of the Second New South

Emory University is the quintessential Atlanta institution. Just as Atlanta is perennially caught between North and South, between Old South and New South, between Herman Talmadge and Jimmy Carter, so Emory has, throughout its history, experienced the same dichotomy. All of the South's many quirks and contradictions, its greatest beauty and its worst ugliness, come back ultimately to the issue of race, and Emory is no exception.[1] Atlanta and Emory both were at their most southern in their handling of race issues until Emory made its most unsouthern choice by deciding to integrate voluntarily in 1962, the same year in which Mississippi governor Ross Barnett resuscitated the decrepit legal concept of "interposition" in a desperate attempt to justify defying a federal court order to admit an African American student to the state's flagship university. Or, Emory was not so much unsouthern as it was a leader, on the eve of the second reconstruction, in the emergence of the second New South.

This article explores Emory's integration, and the unique affirmative action program in its law school from 1966 to 1972, as an interesting case study in Southern identity from the beginning of the second New South[2] just before the Second Reconstruction. Just as Emory was a deeply southern institution from its founding, so the men who decided to integrate it were deeply southern. Yet they ultimately decided that national recognition as a major research university was more important to them as leaders of Emory than was segregation, even if that meant acquiescing to the demands of northern institutions and the federal government – a distinctly unsouthern set of priorities at a time when other leaders in the South seemed eager to sacrifice anything, including education, to the god of segregation. Georgia was one of several southern states that seriously considered closing its public schools rather than comply with the desegregation requirement of *Brown v. Board of Education.*[3] Georgia Governor Eugene Talmade cost the University of Georgia its accreditation with his efforts to purge "integrationists" from its faculty.[4]

This transition bears marked similarities to emergence of the first New South. Emory's leaders of the early 1960s were pragmatists, not particularly interested in abstract definitions of southern identity, especially as those definitions required unrepentant racism and defense of segregation. They exhibited no interest at all in nursing the wounds of the War of Northern Aggression, and they had to defend their actions against critics who were veritable self-caricatures in their reliance on the worst sort of stereotypes about African Americans.[5] They accepted the legitimacy of the federal government, and strove to make Emory a respectable university according to national standards that increasingly condemned southern racism.

"Emory…is in the South."[6]

From its founding in Oxford, Emory faced the dilemma of being a southern institution in a world that increasingly condemned southern racism. Methodist Bishop James O. Andrew, a trustee of Emory, incurred the condemnation of the Methodist Church at the 1844 General Conference, where the Church split into northern and southern branches over slavery, because heowned a slave.[7] He had inherited the slave from his wife on the condition that he give her the opportunity to move to Liberia at age 19.[8] When the slave refused, Bishop Andrew continued to employ her and provide her with a residence, but state law prohibited him from emancipating her.[9] Thus did Georgia statutes exacerbate the problem of race for Emory's leaders well before *Emory v.Nash* . No lawsuit challenging a statute that prohibited the emancipation of slaves would have succeeded in Georgia in 1844.[10]

Bishop Andrew's situation equally reflects the fact that Emory's history generally, and its history with respect to race in particular, is also the history of the Southern Methodist Church in the United States. The founders named the town, Oxford, after the university that John Wesley, founder of Methodism, attended. They named the college, Emory, after a leading American Methodist bishop.[11] Writing in 1881, Emory President Atticus Haygood called on white Southerners to treat African Americans in a more Christian manner.[12] Education would benefit African Americans, he argued, and it would benefit the whole South. In this respect, Haygood echoed the sentiments of other advocates of a New South whose citizens would devote their time to economic growth, rather than nurturing the wounds of the Lost Cause.[13] He also anticipated his institutional successors in advocating education for African Americans. Although we now associate the term, "New South," with Atlanta newspaper editor Henry Grady, Haygood actually coined it. Emory thus contributed to the emerging self-image of the first new south.[14] Emory's move to Atlanta and elevation to university status in 1915 were the result, *inter alia*, of the decision by Vanderbilt to minimize the control of the Southern Methodist Church over it.[15] The Church's desire to have a research university affiliated with it east of the Mississippi River coincided with the aspirations of Emory College trustees in Oxford to expand their institution.[16]

Although Methodists split North and South over slavery in 1844, during the twentieth century, Methodists in the South became increasingly moderate on race issues.[17] Historian Henry Warnock has even made the case for intimations of moderation on racial issues in another episode involving discussions of race at Emory.[18] In 1902, Andrew Sledd, a professor of Latin at Emory College and the son-in-law of Warren Candler, Bishop of the Methodist Church, South, and former President of Emory, published an article on the condition of African Americans in the South.[19] Although he explicitly accepted the prevailing sentiment at the time among white supremacists that African Americans were inherently inferior, Sledd also took white southerners to task for denying African Americans the political equality they deserved, and for allowing lynchings. Several weeks later, he resigned from Emory under pressure.[20]

This event indicated that at least some Emory constituents were willing and able to get ahead of their neighbors on the issue of race relations and segregation. At the turn of the twentieth century, however, in Oxford, Georgia, Emory College was still very vulnerable to outside pressure, the vast preponderance of which supported segregation, and did not care to hear open and honest discussion of the topic. Warnock argues that Sledd and Emory administrators gave in too quickly, and that Sledd's views indicated an emerging moderation on race issues among Southern Methodists. Certainly it seems peculiar that President Haygood could get away with calling for more Christian treatment of African Americans and more education for them in 1881, but Sledd would resign over similar sentiments in 1902. But, as David Ford Godschalk argues in writing about the 1906 race riot in Atlanta, during the late nineteenth and early twentieth centuries, "white decision makers who were driven by political and economic considerations consciously steered white southerners away from more racially progressive alternatives into a wasteland of reflexive racist prejudices and hatreds."[21]

Emory University was by no means immune to external pressure, but Atlanta in 1962 was a very different place from Oxford in 1902. The Methodist influence continued strong. At the same meeting in January 1961 where the Board of Trustees considered steps toward racial integration, they received a financial report indicating that contributions for December 1960

from individual Methodist congregations in Georgia and surrounding states, amounting to as little as three dollars in some instances, in the aggregate exceeded contributions from corporations by some $2,400.[22] Contributions from Methodist congregations were modest as a revenue source for Emory compared to foundations and government agencies, but they were not insignificant, and they undoubtedly created a sense of investment in the University by those congregations.[23]

More directly, the Vice President and Dean of Faculties at the time, Judson C. Ward, gave an address entitled "A Christian University" as part of the celebrations for the institution's 125th anniversary.[24] Meeting on May 17, 1962, the Board of Trustees officially stated their "pride in our Methodist origin and in the close and cooperative attitude which has always been evidenced by the leadership of the University and the Church toward each other."[25] Shortly after news of Emory v. Nash, Ward responded to a letter congratulating Emory from a representative of the Methodist Church's Woman's Division of Christian Service, based in New York.[26] When Henry Bowden retired as Chair of the Board of Trustees in 1979, the Wesleyan Christian Advocate described him as "Mr. Methodist."[27] Presumably, then, when, twenty years earlier, Bowden began receiving letters from prominent Methodists indicating that Emory was beginning to embarrass itself within the denomination as the last segregated Methodist divinity school,[28] that news carried some weight.

And by 1962, the Atlanta influence had become strong. To some extent, Atlanta had always been different, a northern city in the South.[29] It w as a center of transportation and commerce from its founding, with few planters and few slaves. It attracted residents, including political leaders, from outside the South before the Civil War, and it attracted manufacturing activity and African American residents after the War. By the early 1960s, the roster of the Emory Board of Trustees read like a who's who of Atlanta's commercial and cultural leaders.

Why 1962? The Executive Committee of the Emory University Board of Trustees met on January 12, 1961. They received an "adjusted income estimate" for the coming year of $6,600,792.[30] They learned that the search for a new dean for the law school was proceeding apace, with interviews scheduled on campus over the following two weeks. University President S. Walter Martin requested permission to negotiate terms of leave for Vice President and Administrator of Health Services Boisfeuillet Jones, who wished to accept a position as Special Assistant for Health and Medical Affairs to President-elect John F. Kennedy. Information about newly appointed faculty consisted mostly of academic credentials, but included marital status and religious affiliation.[31]

At the same meeting, by formal motion, the Executive Committee authorized President Martin:

> to convey by private letter to Dr. O.C. Aderhold, president of the University of Georgia, the sympathy of the Emory University Board of Trustees in these difficult days of the integration crisis there, and to advise him of Emory's appreciation for the admirable leadership of the University by him and his staff.[32]

Perhaps most importantly for Emory, however, Board Chair Henry Bowden appointed a "committee to study the policy of Emory University relative to the admission of Negroes as students and to recommend to the Executive Committee at its February, 1961 meeting such changes, if any, it feels would be proper."[33] Bowden thus began the final process that would result in legal permission for Emory to admit African Americans before the end of 1962. No one expressed any concern that integration at Emory would produce riots similar to those at the

University of Georgia, whether because they were so assured of the class privilege they enjoyed as the state's leading private institution, or because no one wanted to tempt fate by even mentioning the possibility, the record does not indicate.

The puzzle about why Emory University's trustees and administrators chose to pursue integration when they did is simply chronological, and the relevant chronology is one in which law suits, legislation, and the African American social movement play prominent roles.[34] That Emory's leaders chose to integrate in 1962 is a puzzle just because no obvious events that would precipitate such action had occurred. Clearly, the move to eliminate racial segregation in the United States was in full swing by 1962. But Emory had just weathered the integration of the University of Georgia, the integration of the Atlanta public schools, and sit-ins against segregation at downtown businesses in Atlanta, with at least some Emory students as active participants.[35] But no one had publicly announced the proposition that Emory should be next in the integration queue. The 1964 Civil Rights Act, with its prohibition on federal funds for segregated institutions, lay unforeseeably two years in the future. Had they wanted to, Emory administrators could probably have learned tactics for delaying integration from their peers at Auburn University, although it seems unlikely that Emory would have been able to rely on state troopers, as administrators in Alabama did, to conduct investigations of African American applicants and intimidate them if necessary.[36]

When they filed *Emory v. Nash*, Henry Bowden and Ben Johnson were not civil rights pioneers, but they were ahead of their time. Historical circumstances made their action reasonable, but somewhat risky just because it was not strictly necessary. Staunch supporters of segregation could blame the University itself, rather than Communists[37] or activist judges in Washington,[38] for Emory's admission of African American students. The most vocal of Emory's constituents, however, strongly supported integration by the time Bowden and Johnson filed *Emory v. Nash* .[39]

While Emory was hiring a new law dean in January 1961, the Emory Board of Trustees faced an even more significant choice: whether to admit African American students, and if so, how.[40] Little did that new dean, Ben Johnson, know that, within a year of starting the job, he would be co-counsel in a law suit to eliminate a segregation provision from Georgia tax law. The Board's solution was that lawsuit, *Emory University v. Nash*.[41] The chair of Emory's Board of Trustees, Henry Bowden, was also an attorney and, at the time, official counsel to the University. Johnson and Bowden served together as counsel for Emory in the suit. The legal problem was that the Georgia statute conferred a tax exemption on all private educational institutions, but only on the condition that they remain segregated. Bowden went so far as to suggest that the University would have to close absent the tax exemption.[42]

The statute announced the tax exemption in general terms as applying to all private educational institutions in the state, then added two provisos. The first proviso held that, to qualify for the exemption, institutions must be open to the general public. The second proviso held that "all endowments to institutions established for white people, shall be limited to white people, and all endowments for institutions established for colored people, shall be limited to colored people."[43]

Bowden was very clear that, under existing principles of statutory interpretation, if a grant depended on a specific condition, and the condition no longer applied, the grant failed. He was worried that, rather than striking the segregation requirement out of the statute—a condition of the grant—the courts would strike the tax exemption-grant entirely, in which case Emory would

have eliminated its own tax exemption and that of all other private educational institutions in the state.[44] But at the same time, Bowden claimed to know of African Americans who were planning a federal suit against Emory on the logic that the tax subsidy amounted to a state contribution to the University, such that decisions requiring desegregation of public universities should apply to Emory as well.[45]

Bowden wrote that, personally, he would prefer to keep segregation,[46] but he could see the inevitable and believed it was better for Emory to try to bring about integration on its own terms, rather than risk having it imposed via a federal court order. Johnson, by contrast, seems to have been committed to racial integration as an inherent good. Family members assert that after Johnson's Baptist congregation decided to "integrate" by allowing African Americans to worship in the basement during regular services, Johnson organized a group of white parishioners to sit in the basement with the African Americans.[47] His subsequent conduct organizing Pre-Start buttresses the belief that, for Johnson, racial integration was the morally necessary as well as the institutionally astute thing for Emory to do.

Bowden asked Johnson for his opinion regarding the possibility that a law suit challenging the segregation component of the state tax statute would have the effect he feared, eliminating the exemption entirely.[48] In doing so, Bowden was not just automatically turning to the most obvious university administrator. Johnson's substantive expertise as an attorney lay in state tax law. In 1959, in his capacity as an assistant attorney general for the state of Georgia, Johnson had successfully argued a state tax question before the United States Supreme Court.[49] For five years, 1960 to 1965, Johnson served as one of a ten-person advisory group on state and local taxation to a committee of the United States Congress. He was also active in the state tax law section of the American Bar Association.[50] Johnson's letter reassured Bowden that it was highly unlikely the Georgia Supreme Court would strike the entire exemption. He predicted accurately what the substantive outcome of the case would be—the court would strike the segregation provision but leave the rest of the exemption in place.[51]

With the express authorization of the Executive Committee of the Emory Board of Trustees, Bowden and Johnson filed suit in May 1962.[52] They asserted three arguments. First, they made what would have been the legally obvious equal protection claim—that the segregation provision in state tax law was state action in support of racial segregation, which must fail in light of *Brown v. Board of Education* and other precedents. By its own terms, *Brown* applied only to public education, but the key issue was the same for the private Emory—state action requiring segregation. The court ignored this argument in its opinion.

The second argument involved the statute's applicability to Emory. Bowden had appointed a committee of Trustees to study the integration issue in January 1961.[53] One of the key points their report emphasized was that Emory's founding documents make no reference to race.[54] This stood Emory in happy contrast to Rice and Tulane, both of which had language in their founding documents specifying that the institutions should educate "white" people.[55] Bowden exchanged correspondence after the decision in *Emory v. Nash* with a trustee at Rice, who asked Bowden about any appeal to *cy pres* doctrine in Emory's suit.[56] *Cy pres* is the doctrine judges rely on when they confront a bequest to an institution that no longer exists, or that no longer functions as the donor thought it did, making the bequest impossible to execute on its own terms. Absent any reference to race in Emory's founding documents, this issue did not come up for Emory. Bowden and Johnson argued that the segregation provision, specifying as it did the conduct of institutions "for white people" and "for colored people," literally did not apply

to Emory, which was not by its founding documents either for white people or for black people.[57] The court ignored this argument as well.

The third argument in the *Emory v. Nash* petition was the point that the two provisos in the tax code contradicted each other. It was impossible for institutions to be both open to the general public and segregated at the same time. This was the argument that the Georgia Supreme Court ultimately adopted.[58] One suspects that they knew the United States Supreme Court would reverse them if they upheld the segregation provision, but for political reasons they wished to avoid appearing to ratify the equal protection reasoning of *Brown* in a state that had seriously contemplated closing its public schools rather than comply with the desegregation requirement in that decision. Instead, they chose a politically anodyne justification for their decision that had the benefit of implicitly blaming the problem on the legislature for writing self-contradictory statutes. That the legislature apparently saw no contradiction when they wrote the statute is an interesting indication that they did not consider African Americans to be part of the general public.

Bowden expressed some dissatisfaction with how the court decided the case, but acknowledged that he should not complain since he won.[59] The language of the opinion was unequivocal: "we hold that Emory, as a private school, can accept colored students without jeopardizing its tax exemptions and that the trial court erred in its holding to the contrary and in refusing to grant its application for the injunction sought."[60]

Pre-Start

That this law school, two years hence, will, out of this group, graduate almost twice as many Negro lawyers [8] as have ever been produced by the three accredited law schools in this State is significant.[61]

Emory v. Nash came down in October 1962. At the time of the decision, Emory had already admitted an African American student in a non-degree class. In January 1963, they admitted two African American students to the nursing program. No one reported any problems.[62] Critics of the integration decision apparently predicted that large numbers of African Americans would immediately apply to Emory, but that was not the case.[63]

But Ben Johnson was dissatisfied. As of 1965, the Law School had enrolled one African American, Ted Smith, in its evening program. Johnson engaged in a bit of ad hoc affirmative action the same year when he saw a young black man, Marvin Arrington, sitting in the Emory law library. He asked Arrington what he was doing, to which the reply came that Arrington was a law student at Howard University home on break who needed a good place to study. Johnson immediately offered Arrington admission to Emory Law, and expanded the offer to include Arrington's good friend, another Howard Law student from Atlanta, Clarence Cooper.[64] Both accepted.

But no other African Americans showed up from other schools to use the Emory law library, and Johnson genuinely wanted to increase the number of African Americans, both as Emory Law students, and as attorneys in the South. It seems likely that die-hard segregationists would particularly oppose this goal, given the prominence of federal court decisions and African American attorneys in dismantling segregation. White supremacists always found education for African Americans threatening. Legal education would likely have seemed doubly or trebly so. At the state and local levels, political leaders are disproportionately lawyers, and effective, sympathetic legal representation for African Americans would probably benefit African American criminal defendants.[65] Legal education, then, was perhaps more effective than other

sorts in term of its multiplier effect, in that its beneficiaries could in turn provide more than their share of benefits to fellow African Americans.

Johnson also recognized that, in the early 1960s, any African American student who clearly demonstrated aptitude for the study of law got offers from the nation's most prestigious institutions and took those offers, rarely returning to the South.[66] He was also well aware that a simple statement by the university that it no longer discriminated on the basis of race was unlikely to have much impact in reducing the mistrust that African Americans harbored after decades of slavery and segregation.[67] So he created Pre-Start.[68]

Starting in 1966, Emory professors systematically solicited nominations of likely college seniors from pre-law or similar faculty at historically black institutions. They invited the nominated students to come to Emory during the summer to take law classes that were as ordinary as the faculty could make them given the inevitable differences between summer courses and regular courses. Students who earned an average of 70 or above in their summer courses then had the option of matriculating at Emory as regular students.

The Field Foundation of New York funded Pre-Start throughout its existence.[69] The Field Foundation consistently demonstrated a substantial interest in African American civil rights, and law-related efforts in particular. It gave substantial sums to the NAACP Legal Defense and Education Fund, in addition to various other organizations. One of the Legal Defense Fund (LDF) programs it funded brought recent law school graduates to LDF offices in New York for a year of training in civil rights law.[70] After that training, the participants received a declining three-year subsidy to return to the South and practice law. At least two Emory graduates participated in this program.[71] That white supremacists found the program threatening was obvious from clippings regarding the fire-bombing of an LDF-trained lawyer's office in North Carolina.[72]

Pre-Start was small. In 1968, Emory participated as one of the founding campuses for the Council on Legal Educational Opportunities (CLEO). That year, they had forty students enrolled. Ordinarily, however, the maximum number of students in Pre-Start was twelve. The difference lay in the approach of the two programs. For CLEO, there is no necessary correlation between where the student spends the summer and where the student ends up matriculating in law school. During the CLEO year, Emory sent students to the law schools at Temple, Texas, Rutgers, Berkeley/Boalt Hall, Georgetown, Yale, and others, in addition to matriculating some of them itself.[73] The premise of Pre-Start, by contrast, was that all of the successful participants would matriculate at Emory. Thus, Johnson could allow into Pre-Start only students whom he could reasonably expect to absorb into the incoming class.

Johnson and Leslie Dunbar, Executive Director of the Field Foundation, were both critical of the CLEO model, which they adopted from Harvard. According to one description, the Harvard model ran for twelve weeks. It "included a variety of programs, seminars, and speakers as well as student participation in a mock trial." What it did not include, by contrast to Pre-Start, was any instruction in courses that were designed to replicate as much as possible actual law school classes.[74]

Dunbar expressed his preference for the Emory over the CLEO model:

> The Emory plan takes the Negro college and its degree seriously, puts the student on the real track, and allows him to prove himself against a standard of the real world. The Harvard plan, on the other hand, is one of the myriad of recent outcroppings of the moral unease of American universities, beset by the demands of the Negro question and their

> own historically achieved remoteness from it. What so many of these actions have in common is the offer by college A to give remedial, non-credit, instruction to college B's students.[75]

When Dunbar first learned that Emory would participate in CLEO, possibly to the extirpation of Pre-Start altogether, he sounded almost wistful in writing to Johnson. He asserted that he thought Emory's presence in CLEO would do CLEO good, but he doubted that Field would want to fund CLEO.[76]

Johnson wrote in a draft letter to the Ford Foundation, which provided substantial funding for CLEO, "In substance, then, ours is a unique program; it is different from CLEO and other programs which appear to have as their objective to get black students in and through law school on a volume basis, as 'high-risk' students. I think we are all agreed that we do not wish to participate in this sort of program."[77] Shortly after the end of Emory's CLEO year, Johnson wrote to Dunbar that CLEO "simply offers a plan for 'buying' minority students into law schools." It also provided "a 'peg' of a sort on which to justify their departure from normal admission procedures in admitting these students."[78] Johnson did not approve of either practice. As it happened, CLEO decided for summer of 1969 to select an entirely different set of campuses than 1968 to spread the experience as widely as possible. Emory returned to the Pre Start program.[79]

This was not an academic debate. Many others during the late 1960s and early 1970s were concerned to increase the number of racial and ethnic minorities in law school—representatives from Texas institutions were quick to note that increased representation of Hispanics was important as well.[80] Johnson and Nat Gozansky, the other Emory professor who was most closely associated with Pre-Start, attended various meetings on the topic under the sponsorship of the American Bar Association, the National Bar Association, the Association of American Law Schools, the Law School Admission Test Council (as it was then known), and others.[81] Also, with the involvement of the newly created Legal Services Corporation came the possibility of federal funds, always a boon to educational institutions.

Johnson wrote in his official report on the 1966-67 Pre-Start program that these entities were beginning to show interest in the issue of increasing minority enrollments in law schools, and of course they learned of Pre-Start.[82] Insofar as Johnson had any genuine hope that national organizers would try to implement Pre-Start at other institutions, however, it appears that the game was lost from the outset. A Proposal for Enlarging the Ranks of Lawyers Coming from Minority Group or Low Income Backgrounds described the Harvard and Emory models equally as options for a national program.[83] A January 24, 1968, memo from CLEO as an organization, however, described what they expected the 1968 summer program to look like, and it was already the Harvard model, not the Emory model.[84]

To Johnson, one great virtue of the Pre-Start approach was that it allowed the Law School to evaluate African American students without reference to their LSAT scores. Indeed, a subsidiary purpose of Pre-Start was to establish that a significant population of African American students existed who could succeed in law school despite deficient LSAT scores. Reporting to the President of Emory after the first year of the program, Johnson asserted that "it has demonstrated that significant numbers of students, easily capable of legal education, are being weeded out by the LSAT."[85] The first year of the program, a few of the students took the LSAT only after Emory had accepted them for Pre-Start. Johnson expressed satisfaction that those students' scores were much too low to qualify them for admission to Emory under ordinary

circumstances—high LSAT scores from those students would have undermined the experiment.[86]

On the other hand, Johnson was emphatic that these students were not "high-risk." His point was that they had all the intellectual ability they needed. That ability simply did not show up in the LSAT because the LSAT was designed by and for middle-class white people, such that it could not capture the intellectual ability of most African Americans.[87] In the first report on Pre-Start to the Field Foundation, Johnson wrote

> It is difficult, insofar as their day-to-day performances were concerned, to characterize the group as "culturally deprived." The students manifested a high level of sophistication in racial, social and political matters. Several were active in civil rights organizations and one was a student leader in a local chapter of the "Young Democrats." There was never any feeling on the part of the instructor that he was instructing a disadvantaged group.[88]

Johnson thus exhibited a level of respect for African Americans' intellectual abilities, and the quality of education that they received in institutions under African American control. Around this time, Henry Bowden received a letter from a correspondent who stated his incredulity at reports that Bowden had expressed doubts about the alleged intellectual superiority of "Anglo-Saxons" over Africans and African Americans.[89]

In contrast, the Office of Economic Opportunity developed a proposal according to which participants would start out as tutees to practicing attorneys and only enroll in non-credit classes. The assumption seemed to be that African American students would initially lack the motivation and ability necessary to function as law students. The other problem with the OEO approach was the persistent confusion between African Americans as a class, and poor people as a class.[90] The evidence from Pre-Start indicates that few of these students were poor, and few of them needed two years of preparatory work before starting law school.

The primary purpose of Pre-Start, however, was to increase the number of African American attorneys in the South. Johnson's characteristically forthright explanation of this point sounds patronizing to the modern ear, but the key point is that Johnson saw a specific problem and saw that he had the capacity to do something about it, which he did. According to Johnson,

> Unfortunately, there are segments of our society—the lower socio-economic groups, of which the Negro community is only one—which are suspect or even hostile to the rule of law, particularly in its implementation and operation with respect to their people. Simply stated, they believe the law is their oppressor and their enemy. One confirmation of this, in their eyes, at least, is that practically none, or at most only a few, of their people are involved as lawyers in the development of law and administration of justice; they naturally conclude, consciously or subconsciously, that neither the law nor the legal profession is for them or their kind.
>
> The Program proceeds on the assumption that a witness to these people is needed concerning the importance of the rule of law in our society, and that this witness can best be made by persons of a kindred background whose education in law and participation in the legal profession will speak for itself.[91]

Johnson's use of the term "witness" here illustrates what he was—an evangelist for law and legal education. He drew on the language of his Southern Baptist heritage to describe what he wanted to accomplish with Pre-Start.

This statement indicates that Johnson saw African Americans as a monolithic bloc that would

respond reliably to a widely accepted leadership class. The evidence indicates that he was wrong on this point. As early as the sit-ins, which lasted in Atlanta from March 1960 through March 1961 (actual desegregation occurred in September 1961), disputes emerged between established African American leaders and newer, more militant leaders.[92] But Johnson was making a point here more about the legal system, and by implication American government as a whole, than about African Americans. His concern was that, in practice, the options were either to take vigorous steps to improve African Americans' representation in legal and political systems, or face a stark choice between increasing lawlessness and increasing police power.[93]

A key concern that Johnson nowhere mentioned explicitly, but which must have been part of his thinking, was the outbreak of riots by African Americans in major cities with distressing regularity each summer from 1965 through 1968. As Hugh Graham has demonstrated, the riots had a direct, if somewhat unpredictable, effect on Congress and federal legislation.[94] Graham also explains that Nixon's much-reported "Southern Strategy" was really more a border-state strategy, as he calculated that any appeal for the die-hard segregationist vote – requiring direct competition with George Wallace -- would cost more in moderate support than it was worth.[95]

Not everyone agreed with Johnson's assessment that the law was an effective vehicle for solving problems of race and racism in the United States. Writing as editor in the second volume of the Law and Society Review in 1967, Richard D. Schwartz asserted that "[t]he violence that erupted in inner cities around the country wrote in blood and fire the message that law had been weighed in the balance and found wanting."[96] Johnson's justification for Pre-Start indicates that, from his perspective, the problem lay not with the law, but with lawyers, or the fact that very few lawyers at the time were African American.

Johnson, Bowden, Randolph Thrower, Boisfeuillet Jones,[97] and probably others formed something of a new old boys' network in Atlanta, sharing similar values and working closely together to bring about changes in keeping with those values. All were attorneys, so it is not surprising that one of their set would see increasing the number of African American attorneys as an important goal in resolving the injustice of race. Explaining Pre-Start, Johnson pointed out that, of 5,000 lawyers registered with the State Bar of Georgia at the time (he gives no date), only 34 were African American. Of those, twelve worked for the federal government. Johnson assumed that the remaining 22 were in private practice.[98] He considered the mere fact of segregation inherently unfair at least in part because of his religious beliefs.[99] But he also had the very lawyerly perspective that the absence of African American attorneys necessarily undermined the legitimacy of the legal system. This was apparently not an important goal for the "conservatives" who were willing to engage in illegal acts of violence to perpetuate segregation.

Gozansky and DeVito also explained of Pre-Start that "[r]ecruitment is concentrated in the South. This decision is based on the theory that the place which is in most need of black attorneys is the South."[100] They chose not to specify exactly why they believed the need for African American attorneys was greatest in the South. The answer seems obvious – most of the African Americans in the United States lived in the South,[101] and southern states uniquely had statutes requiring racial segregation. But one can also infer the logic Gozansky and DeVito used from the fact that they served for several years as faculty advisors to the Emory Chapter of the Law Students Civil Rights Research Council,[102] "a nation-wide movement of law students to aid attorneys engaged in civil rights litigation by doing legal research and brief writing."[103]

The specific details were impossible to predict, but Johnson, DeVito, and Gozansky must have foreseen that training African American attorneys at Emory University would have a disproportionate impact on the law of race and on race relations relative to training such attorneys elsewhere, or not training them at all.

It has also contributed in an unpredictable way to Emory's stature as university: as of this writing, the Chief Justice of the Georgia Supreme Court, the Attorney General of Georgia, and the District Attorney of Fulton County are all African American graduates of Emory Law School. But for segregation, this fact would be unremarkable – one would expect that graduates of the state's most prestigious law school would go on to leadership positions in state government. Because of segregation and Emory's unique history of integration and affirmative action in its law school, these success stories reflect even more favorably on Emory than they otherwise would.

The total number of Pre-Start students is too low to allow for any meaningful statistical generalizations. It is worthwhile, however, at least to take a census of those students based on the data in Johnson's files. As Pre-Start was winding down in 1971, Johnson wrote a detailed account of relevant information about the participants. At that time, Pre-Start had enrolled a total of ninety-nine students. Twelve of those were currently enrolled. Of the remaining eighty-seven students, seventy-one gained admission to law school. Sixteen did not. This represents a success rate of 82 percent. Forty-one of the successful students enrolled at Emory.[104] The twenty-nine others, participants in the CLEO year, attended other schools. Of the forty-one who enrolled at Emory, fourteen left without graduating, two transferred to other law schools, nine were current students, and eighteen graduated from Emory.[105]

In the same 1971 report, Johnson also offered information on bar passage rates for all African American students at Emory, not just Pre Start students. He noted that, of a total of twenty-eight African American graduates at the time, sixteen had passed some bar exam, nine were preparing to take an exam, and he did not know the outcome for three. Assuming the three unknowns failed but the nine who were preparing passed, the bar passage rate for African American graduates of Emory would be 84.2 percent. Around the same time, Johnson asserted that "over 85%" of Emory graduates generally passed a bar exam on the first try, so the rate for African Americans was comparable.[106]

Johnson gave conflicting explanations for the end of Pre-Start. To James Sibley, a prominent attorney in Atlanta who chaired the commission that produced the compromise desegregating Atlanta's public schools,[107] he asserted that Pre-Start would end in 1972 because the Field Foundation was no longer willing to fund it. "They feel that the objective of the experiment has been accomplished."[108] To Leslie Dunbar, Executive Director of the Field Foundation, however, Johnson asserted that Pre-Start was no longer necessary—Emory Law School had begun to receive an ample supply of applications from African Americans whose credentials allowed them admission without any special consideration.[109] In other words, Leslie Dunbar at the Field Foundation thought Pre-Start had accomplished its purpose because Ben Johnson told him so.

It is true that Johnson was addressing a slightly different point in his letter to Sibley. From the beginning, Pre-Start had provided, in addition to admission to Emory, full tuition and a stipend for the first year. After the first year, however, Pre-Start students would have to pay their own way no differently from other students.[110] During Pre Start, The Field Foundation, at least according to Johnson, was unwilling to provide grants to pay students' tuition beyond the

first year.[111] Johnson made a last-ditch effort in 1971 to find more tuition money for African American students from sources in Atlanta. His letter to Sibley was part of that effort. There is no evidence to indicate how successful he was in this quest.

In the initial application to the Field Foundation, Johnson represented Pre-Start as imposing a certain opportunity cost on Emory Law School, which was already enrolling "the maximum number of students it can physically handle," with "relatively high" admissions qualifications coming in.[112] Pre-Start students, that is, would take places that would otherwise go to well-qualified white students. The inevitable question becomes, to what extent does the obsession with students' incoming qualifications in the era of *U.S. News and World Report Rankings* reduce the number of minority students attending law school? No sane dean would voluntarily reject students with the highest credentials in favor of less well credentialed students under the current regime.

But Johnson also identified various benefits to the law school as an institution, and to the white students who made up its more traditional constituency. "While there is a tendency to focus on the Program's benefit to the pre-start students, their presence in the Law School has brought an easily overlooked value to the student body at large." As a specific example, Johnson noted, "[t]he students are facing the problem of integrating their legal fraternities, and a great deal of responsible and mature thought and action has been generated because of this."[113]

In 1969, Johnson predicted that Emory would routinely have twenty to thirty African American students. "This," he wrote, "is a comfortable size for us." He noted that it was necessary to have a minimum number of African American students, both for the benefit of the African Americans, and for the benefit of everyone else. He asserted that "the worst thing that can happen is to encourage the enrollment of one, two, or three black students in a predominantly white law school where they will inevitably be treated either too casually or too patronizingly and inevitably feel their alienation more bitterly."[114] This, of course, sounds suspiciously like the concept of "critical mass" that the dissenters in *Grutter v. Bollinger* disparaged so mightily.[115]

Pre-Start was an integral part of Johnson's vision for the future of the Law School. He was well aware of the necessity of attracting the best possible students as an important ingredient in the School's reputation. In his 1966-67 Report, he wrote, "There are, perhaps, several definitions of a 'national' law school, but certainly one characteristic of a national law school is the extent to which its students come from throughout the country."[116] Again, the desire to attract persons from outside the South to the South is a distinctly unsouthern attitude. Another important characteristic of a national law school's students, at least based on Johnson's focus in his annual reports, was LSAT scores. Presumably Johnson meant what he wrote about the inadequacy of the LSAT as a predictor of law school performance being race- and class-specific. Even as he created the Pre-Start program as a substitute for the LSAT for identifying qualified African American students, he relied heavily on rising average and mean LSAT scores as an indicator of the aggregate quality of Emory Law students.[117]

In 1969, he conveyed to University administrators a memo from the Law School's recruitment committee asserting flatly that Emory already attracted all of the highly qualified students it could get from the South, necessitating recruitment in other regions.[118] That memo indicated that only one southern state, Virginia, could claim an average LSAT score for its residents, 525, that exceeded the national average, 517. Florida's average was 516, Georgia's was 497.[119] For students entering Emory Law School in fall 1961, the average score for those

who took the LSAT (77 of 90 – 13 did not take the test) was 501.[120] By the time Pre-Start began
in 1966, the average score for students entering Emory Law School was 545. [121]

Thus, for anyone who valued striving for the highest level of achievement, being a southern institution was itself an impediment, as the South's historical refusal to invest in education apparently manifested in part as deficient LSAT scores among its population. In that sense, then, the aspirations of Johnson and other Emory administrators to make of Emory a nationally competitive institution was unsouthern.

Conclusion

Emory was not so much unsouthern as it was a leader in the creation of the second New South. Johnson reflected his predecessor, Atticus Haygood, with the important difference that Johnson became dean just as the African American Civil Rights movement was hitting its apogee. He thus had a much greater opportunity than Haygood had to act on his belief that education would benefit African Americans and the whole South. Johnson, then, contributed directly in a small but important way to the emergence of the second New South.

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To cite all of the literature on this point would take over the entire volume of the Journal. I would commend my dissertation director, Paul Conkin's, excellent address as President of the Southern Historical Association, "Hot, Humid, and Sad," Journal of Southern History XX (199X), where he waxes almost poetic in both professional and personal terms on race as the great tragedy of the South.

[2] Howard N. Rabinowitz, *The First New South.*

[3] Thomas Victor O'Brien, "Georgia's response to Brown v. Board of Education: The Rise and Fall of Massive Resistance, 1949-1961," Ph.D. diss., Emory University, 1992

[4] Melissa Fitzsimons Kean, "At a Most Uncomfortable Speed": The Desegregation of theSouth's Private Universities, 1945-1964," Ph.D. diss., Rice University, 2000, 38-39.

[5] Various letters in folder, "Integration – Correspondence," Henry Bowden files, Emory University Archives (EUA), Robert W. Woodruff Library, Emory University, Atlanta, GA.

[6] Statement by Emory President S. Walter Martin to "Selected Faculty Members," March 31, 1960, box 1, Desegregation Documentation, EUA.

[7] The connection between Bishop Andrew and Emory's decisions about racial integration in the 1960s are surprisingly direct in a distinctly southern way. Charles T. Lester, who served as a professor and dean of Emory for many years, was Andrew's great-great grandson. This information comes from Charles T. Lester, Jr., partner at Sutherland, Asbill, & Brennan and graduate of Emory Law School, class of 1967 (and of Emory College, 1964). Author interview with Lester, March 6, 2007, Atlanta, GA. See also, Diamond, supra note 33 at 177 n. 89, citing interview with the elder Lester.

[8] GARY S. HAUK, A LEGACY OF HEART AND MIND: EMORY SINCE 1836, 13 (1999). Starting in 1816, the American Colonization Society (ACS) promoted the proposition that free blacks should "return" to Africa. See ERIC BURIN, SLAVERY AND THE PECULIAR SOLUTION: A HISTORY OF THE AMERICAN COLONIZATION SOCIETY (2005).

[9] Hauk, supra at 13.

[10] See Jenny Bourne Wahl, "Legal Constraints on Slave Masters: The Problem of Social Cost," 41 AM. J. OF LEGAL HIST. 1 (1997) (explaining that primary legal limit on slave owners' control over their slaves, 1802-1861, was cost of that control on the larger society); Joseph Conan Thompson, "Toward a More Humane Oppression: Florida's Slave Codes, 1821-1861", 71 FLA. HIST. Q. 324 (1993); Mason W. Stephenson and D. Grier Stephenson, Jr., "To Protect and Defend": Joseph Henry Lumpkin, The Supreme Court of Georgia, and Slavery, 25 EMORY L. J. 579, 582 (1976), reprinted in THE LAW OF AMERICAN SLAVERY: MAJOR HISTORICAL INTERPRETATIONS 522, 525 (Kermit L. Hall, ed. and intro. 1987): "the Georgia Supreme Court while under the dominance of Justice Lumpkin was not a neutral forum which heard disputes and applied even-handed justice in the factual and legal situations presented, but was an active arm of government, committed to the preservation of the slave system"; Cleland v. Waters, 19 Georgia 35 (1855), reprinted in THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK 148, 149 (Paul Finkelman, ed. 1986): "If this was a bequest of freedom to the slaves, to take effect immediately in this State, it would… be void."
[11] English, supra note 5. Hauk, supra note 50 at 13.
[12] ATTICUS GREENE HAYGOOD, OUR BROTHER IN BLACK (1881). See also, Where "The New South" Was Born , EMORY MAG. Summer 1998 (explaining Haygood's use of the term, "The New South" to indicate increased emphasis on economic production and improved race relations before Henry Grady, editor of ATLANTA CONSTITUTION, gained fame for using it). See also, ALLISON DORSEY, TO BUILD OUR LIVES TOGETHER: COMMUNITY FORMATION IN BLACK ATLANTA, 1875-1906 at 1 (2004): "Atlanta was manifestly a city of the New, rather than the Old, South." On the distinction between the New and Old Souths, see NUMAN V. BARTLEY, THE NEW SOUTH, 1945-1980 (1995); DEWEY W. GRANTHAM, THE SOUTH IN MODERN AMERICA: A REGION AT ODDS (1995); HOWARD N. RABINOWITZ, THE FIRST NEW SOUTH, 1865-1920 (1992); EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION (1992); DEVELOPING DIXIE: MODERNIZATION IN A TRADITIONAL SOCIETY (Winfred B. Moore, Jr., Joseph F. Tripp, and Lyon G. Tyler, eds. 1988); GAINES M. FOSTER, GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, AND THE EMERGENCE OF THE NEW SOUTH, 1865 TO 1913 (1987); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH (1951).
[13] See James Aaron Frith, "The Manger of the Movement: Atlanta and the Black Freedom Struggle, 1890-1950," Ph.D. diss., Yale University, 1997, at 18. See also, DON DOYLE, NEW MEN, NEW CITIES, NEW SOUTH: ATLANTA, NASHVILLE, CHARLESTON, MOBILE, 1860-1910 (1990); ROLLIN G. OSTERWEIS, THE MYTH OF THE LOST CAUSE (1973).
[14] Rabinowitz, The First New South.
[15] English, 10-11; Conkin, 149-84. See also, Petition, Superior Court of DeKalb County, Georgia, Dec. 7, 1914, by members of the Educational Commission of the Methodist Episcopal Church, South, requesting incorporation as Emory University, "to establish for and in behalf of the Methodist Episcopal Church, South, an institution or institutions of higher education, of the grade of a university, including also a school of theology, and… to secure to the Methodist Episcopal Church, South, the ownership and control of the same in perpetuity," and Order, Jan. 25, 1915, granting such incorporation, both attached as Exhibit A to Petition for Declaratory Judgment and Injunction, Emory v. Nash, Superior Court of DeKalb County, Georgia, May 1962, in box 1, Desegregation Documentation.

[16] English, supra note 5 at 12-13.
[17] PETER C. MURRAY, METHODISTS AND THE CRUCIBLE OF RACE, 1930-1975 (2004).
[18] Henry Y. Warnock, Andrew Sledd, Southern Methodists, and the Negro: A Case History, 31 J. OF SOUTHERN HIST. 251 (1965). See also, Terry L. Matthews, The Voice of a Prophet: Andrew Sledd Revisited, 6 J. OF SOUTHERN RELIGION 2 (2003).
[19] Andrew Sledd, The Negro: Another View , 90 ATLANTIC MONTHLY 65 (1902).
[20] Ibid.
[21] David Fort Godschalk, *Veiled Visions: The 1906 Atlanta Race Riot and the Shaping of American Race Relations* (Chapel Hill: University of North Carolina Press, 2005), 5.
[22] Report of the Treasurer and Controller, Executive Committee Minutes, Jan. 12, 1961, EUA.
[23] Id. Total contributions from Methodist Church sources were $19,925.25; from corporations, $17,593.00; from foundations, $196,962.50; from federal and state government sources, $399,817.24.
[24] Board meeting minutes, November 1-2, 1962, EUA.
[25] Board meeting minutes, May 17, 1962, EUA.
[26] Letter, Judson Ward to Mrs. J. Fount Tillman, Woman's Division of Christian Service, Board of Missions of the The Methodist Church, New York, NY, Dec. 14, 1962, in folder, "Desegregation," box 19, Ward Papers, EUA.
[27] Henry Bowden is "Mr. Methodist," WESLEYAN CHRISTIAN ADVOCATE, Nov. 28, 1979. See also, description of Emory President S. Walter Martin as "a well-known Methodist layman," press release announcing Martin's appointment as President, April 18, 1957; press release announcing attendance of Martin and Vice President Judson Ward at meeting of Methodist-related universities, Aug. 30, 1961, S. Walter Martin papers (hereinafter, "Martin papers"), EUA
[28] Various, in folder, "Integration – Correspondence," Bowden files, EUA.
[29] Frith, supra note 55 at 5; supra note 54.
[30] See Diamond, 150 (putting the Woodruff family's later gift of $105 million to Emory into larger context of historical circumstances, including effective leadership by Emory administrators and trustees).
[31] Emory University Board of Trustees Executive Committee meeting minutes (hereinafter, "Executive Committee minutes"), Jan. 12, 1961, EUA.
[32] Ibid
[33] Executive Committee Minutes, Jan. 12, 1961.
[34] See Gadsden.
[35] Emory President S. Walter Martin, speaking to faculty about University policy on race issues, lamented the participation of Emory students in picketing Rich's department store because the Rich Foundation was "part of the Emory family."
[36] See Olliff, 114-15.
[37] See Walker, 67, quoting Georgia Gov. Ernest Vandiver suggesting that African American student leaders' "An Appeal for Human Rights," with which they preceded the sit-ins in Feb. 1960, was really the work of Communists.
[38] See, e.g., Eugene Cook, Georgia Attorney General, Foreward, in COMPILATION OF GEORGIA LAWS AND OPINIONS OF THE ATTORNEY GENERAL RELATING TO

SEGREGATION OF THE RACES (State Law Dept., comp. and ed., 1956): "In reliance upon the separate-but-equal doctrine early sustained in 1896 under the Fourteenth Amendment by the United States Supreme Court, the State of Georgia, as did numerous other states – Northern and Southern alike – instituted elaborate and costly educational and recreational facilities only to be informed fifty-eight years later that the only basis upon which they would have been established in the first instance is now illegal, not because the Court was wrong in 1896, but rather because the doctrine is presently out-moded under notions of sociology prevailing in the minds of nine judges, no one of whom has been [sic] received particular recognition even in the field of jurisprudence, much less in the field of social science."

[39] Various letters in folder, "Integration – Correspondence," box 4, Bowden files, Emory University Archives.

[40] See Emory University Board of Trustees Executive Committee meeting minutes, Jan. 12, 1961, EUA. At this meeting, the Executive Committee heard a report on progress in the search for a new law dean, and Board Chair Henry Bowden appointed a special committee to investigate the issue of admitting African Americans.

[41] 127 S.E.2d 798 (Ga. 1962).

[42] Letter, Bowden to E. Clinton Gardner, Professor of Christian Social Ethics, Candler School of Theology, Emory University, May 31, 1961, in "Integration—Letters," box 4, Bowden files, EUA.

[43] Petition for Declaratory Judgment and Injunction, Emory v. Nash, Superior Court, DeKalb County, Georgia, May 1962; Brief of Plaintiffs in Error, June 1962; Supplemental Brief for Plaintiffs in Error, July 1962, all in Desegregation Documentation, box 1. In 1966, Emory administrator Norman C. Smith, with Henry Bowden's assistance, compiled documents relating to racial integration at Emory from a wide range of sources. In 1976, he deposited his compilation in the University Archives. Memo, Norman C. Smith to Don L. Bosseau, Director of Emory Libraries, Jan. 12, 1976, box 1, Desegregation Documentation. This excellent compilation provides a useful starting point for research on the topic.

[44] Letter, Bowden to Gardner, supra note 14.

[45] Letter, Bowden to unnamed recipient, June 7, 1962, in folder, "Integration— Letters," box 4, Bowden files, EUA. See Meredith v. Fair, 305 F.2d 343 (5th Cir. 1962), cert denied, Fair v. Meredith, 371 U.S. 828 (1962) (ordering district court to issue injunction requiring University of Mississippi to admit African American applicant); Holmes v. Danner, 191 F. Supp. 394 (1961) (order prohibiting state officials from cutting off University of Georgia's state appropriations if it admits African American students); Lucy, et al. v. Adams, 350 U.S. 1 (1955) (reversing trial court's stay of its own injunction pending appeal to require University of Alabama to admit African American student).

[46] Letter, March 8, 1961, Bowden to Hugh Comer, box 4, Bowden files, EUA.

[47] "A Life of Courage and Commitment," Emory Magazine, Aug. 2006 at 37.

[48] Letter, Ben Johnson to Bowden, Oct. 13, 1961, in folder, "Integration—Letters," box 4, Bowden files, EUA.

[49] Williams v. Stockham Valves & Fittings, Inc., 358 U.S. 450 (1959) (reported as Northwestern States Portland Cement Co. v. State of Minnesota) (states may tax the interstate activities of

[50] Lamar School of Law, 1960-61 Annual Report to the President at 5. School of Law Annual Report to the President, 1961-62 at 11, 1962-63 at 3, 1963-64 at 5, 1964-65 at 5. All EUA.

Letter, Ben Johnson to Bowden, Oct. 13, 1961, in folder, "Integration – Letters," box 4, Bowden files, EUA
[51] Letter, Ben Johnson to Bowden, Oct. 13, 1961, in folder, "Integration – Letters," box 4, Bowden files, EUA.
[52] Emory University Board of Trustees Executive Committee meeting minutes, Feb. 15, 1962, EUA;
[53] Emory University Board of Trustees Executive Committee meeting minutes (hereinafter, "Executive Committee minutes"), Jan. 12, 1961, EUA.
[54] Report of Special Committee to Executive Committee of Emory University, in folder, Integration—Letters re, box 4, Bowden files, EUA. To minimize confusion for the reader, note here that, among the file folders in box 4 of Bowden's files, one bears the label, Integration—Letters, while another bears the label, Integration—Letters re.
[55] See Melissa Fitzsimmons Kean, At a Most Uncomfortable Speed: The Desegregation of the South's Private Universities, 1945-1964, Ph.D. diss., Rice University, 2000.
[56] Letters, Nov. 30, Dec. 5, 1963, Bowden to Tom Davis, in folder, Integration—Letters re, box 4, Bowden files, EUA
[57] Petition for Declaratory Judgment and Injunction, supra note 15, at ¶ 9.
[58] Petition for Declaratory Judgment and Injunction, supra note 15, at ¶ 9.
[59] Petition for Declaratory Judgment and Injunction, supra note 15, at ¶ 9.
[60] Emory, 127 S.E. 2d at 802.
[61] School of Law Annual Report to the President, 1966-67, at 36, EUA
[62] Letter, Jake Ward to Roland Mackay, Jan. 18, 1963, in folder, Integration—Letters, box 4, Bowden files, EUA; Fred Powledge, "Mother of Four [is] First Emory Negro," Atlanta Journal, Oct. 8, 1962; Emory Nursing School Accepts Two Negroes for January Term, The Emory Wheel, Oct. 18, 1962;" Two Negroes Start Class Quietly at Emory," Atlanta Journal, Jan. 3, 1963; copies in box 1, Desegregation Documentation.
[63] Letter, Bowden to Tom L. Gibson, Jan. 22, 1963, in folder, "Integration—Letters," box 4, Bowden files, EUA.
[64] It is now routine to refer to Marvin Arrington and Clarence Cooper as the first African Americans at Emory Law School. They were the first in the full-time program. Judge Arrington now makes a point when he speaks in public to note that he was not the first African American at Emory Law School, Ted Smith was. Personal observations, Emory Black Law Students Annual Banquet, Feb. 2007; Standing on the Shoulders of Giants, Emory Law School Black History Month event, Feb. 2008. Not all of these persons came to Emory through Pre-Start, but there is value in identifying the African American graduates of Emory Law who now occupy positions of considerable prominence in state and local government: Leah Ward Sears, Chief Justice of the Georgia Supreme Court; Thurbert Baker, Attorney General of Georgia; Paul Howard, District Attorney, Fulton County; William C. Randall, Superior Court Judge, Bibb County (Macon, Georgia), and other judges at various levels too numerous to list. Arrington is now a Superior Court Judge, and Clarence Cooper is a judge in the federal court for the Northern District of Georgia.
[65] Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401, 403 (1987): "I think what I saw in the eyes of those who reached out to me in the hallways of the courthouse was a profoundly accurate sense of helplessness – a knowledge that without a sympathetically effective lawyer (whether judge,

prosecutor or defense attorney) they would be lining those halls and those of the lock-up for a long time to come. I probably got more than my fair share of outstretched arms because I was one of the few people of color in the system at that time; but just about every lawyer who has frequented the courthouse enough has had the experience of being cast as a saviour."
[66] See, e.g., Report on the 1966-67 Pre-Start Program for Prospective Negro Law Students at 21, Oct. 1967, in folder, Emory University (contingent) Fall 1967, Field Foundation files, CAH; draft letter, July 1969, Ben F. Johnson, Jr., to Leslie Dunbar, Executive Director, Field Foundation.
[67] Report on the 1966-67 Pre-Start Program for Prospective Negro Law Students at 21, Oct. 1967, in folder, "Emory University (contingent) Fall 1967, Field Foundation files, CAH.
[68] Various accounts of the Pre-Start Program and its origins exist. See Ben F. Johnson and Michael D. DeVito, Emory University School of Law Progress Report to The Field Foundation: Pre-Start Program for Prospective Negro Law Students, Nov. 10, 1966 (hereinafter Progress Report); Ben F. Johnson, Emory University School of Law Proposal: A "Pre-Start" Program for Prospective Negro Law Students, Jan. 7, 1966 (hereinafter Pre-Start Proposal), appendix A to Progress Report; Ben F. Johnson and Michael D. DeVito, Emory University School of Law Report to the Field Foundation: 1966-67 Pre-Start Program for Prospective Negro Law Students,
[69] There were at one time two Field Foundations, one in New York and one in Chicago. Both derived their capital from gifts by Marshall Field, heir to the department store fortune. He split his fortune between his wife and his son, both of whom created foundations. The Chicago version still exists. The New York version, which funded Pre Start, in keeping with its benefactor's instructions, expended all of its funds and folded in 1989. See <http://www.fieldfoundation.org/history.html> (last visited Mar. 15, 2009); The Field Foundation, 1984, 1985, 1986, annual reports of the Field Foundation of New York, box 2S444, Field Foundation files, CAH.
[70] See memo, Jack Greenberg, Director-Counsel, LDF, to Leslie Dunbar, June 17, 1966, in folder, NAACP Legal Defense & Education Fund, Summer 1966 (General Operations), box 2S410, Field Foundation files, CAH.
[71] Memo, Feb. 19, 1971, Jack Greenberg to Field Foundation, providing overview of Legal Defense and Education Fund Intern Program, in folder, "NAACP Legal Defense & Education Fund (Internship Program) Spring 1971," box 2S410, Field Foundation Records, CAH. List of participants includes Emory graduates William Randall and Bernice Turner. Author interview, William Randall, Oct. 31, 2007, Macon, Georgia. See chart, School of Law Annual Report to the President, 1969-70 at 36; Sibley letter. Both EUA.
[72] See clippings, file, "LDF," Field Foundation records.
[73] School of Law Annual Report to the President, 1967-68 at 29, EUA.
[74] Proposal for Enlarging the Ranks of Lawyers Coming from Minority Groups or Low Income Backgrounds, in folder, Emory University (contingent) Fall 1967, box 2T2, Field Foundation files, CAH.
[75] Letter, Leslie Dunbar to Constance L. Dupre, Legal Services Program, Office of Economic Opportunity, Nov. 6, 1967, in folder, Law School, 1966-71, box 2, Ward files, EUA.
[76] Letter, Dunbar to Johnson, April 15, 1968, in folder, Emory University School of Law, Spring 1969, in box 2T2, Field Foundation files, CAH.
[77] Draft of letter, July 1969, Johnson to Leslie Dunbar, Executive Director, Field Foundation, (hereinafter "draft Dunbar letter") reporting on Pre-Start, in folder, Pre-Start Program for

[78] Letter, Johnson to Leslie Dunbar, Nov. 12, 1968; summary of phone conversation between George Loft, Field Foundation, and Johnson, June 4, 1969; both in folder, Emory University School of Law Spring 1969, box 2T2, Field Foundation files, CAH.
[79] Letter, Johnson to Dunbar, Nov. 12, 1968; letter, Johnson to Dunbar, Jan. 16, 1969; both in folder, Emory University School of Law, Spring 1969, box 2T2, Field Foundation files, CAH.
[80] See Notes on Meeting of Representatives of Southern Law Schools, American Association of Law Schools Meeting, Dec. 27-28, 1970 at 2, 4, in folder, Emory University School of Law 2nd Spring 1970, box 2T2, Field Foundation files, CAH.
[81] Participants' List, Notes on Meeting of Representatives of Southern Law Schools; letter, Earl Johnson, Jr., Director, Legal Services Corporation, to Ben Johnson, Apr. 13, 1967, inviting Johnson to participate in meeting on this topic in May 1967 in Washington, D.C., in folder, Emory University School of Law Spring 1966, box 2T34; press release, Summer Institutes to Prepare 450 Minority-Group Students for Law School, in folder, Emory University School of Law Spring 1969, box 2T2; both Field Foundation files, CAH.
[82] Report on the 1966-67 Pre-Start Program for Prospective Negro Law Students at 2, Oct. 1967; memo announcing creation of CLEO, Jan. 24, 1968, both in folder, Emory University (contingent) Fall 1967, Field Foundation files, CAH.
[83] Proposal for Enlarging the Ranks of Lawyers Coming from Minority Group or Low Income Backgrounds, in folder, Emory University (contingent) Fall 1967, box 2T2, Field Foundation files, CAH.
[84] Memo, Council on Legal Educational Opportunity to All Deans of Approved Law Schools, Jan. 24, 1968, in folder, Emory University (contingent) Fall 1967, Field Foundation files, CAH.
[85] School of Law Annual Report to the President, 1966-67, at 36.
[86] Progress Report, supra note 40, at 10.
[87] See, e.g., 1969 Report, supra note 40, at 1, 7.
[88] Report on the 1966-67 Pre-Start Program for Prospective Negro Law Students at 14, in folder, Emory University (contingent) Fall 1967, box 2T2, Field Foundation files, CAH.
[89] Folder, "Integration – Correspondence," box 4, Bowden files, EUA.
[90] Report on the 1966-67 Pre-Start Program for Prospective Negro Law Students at 14, in folder, Emory University (contingent) Fall 1967, box 2T2, Field Foundation files, CAH.
[91] Progress Report, supra note 40, at 5-6. See also, Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 Harv. C.R.-C.L. L. Rev. 401, 403 (Spring, 1987) ; Peggy C. Davis, Popular Legal Culture: Law as Microaggression, 98 Yale L.J. 1559, 1559 (1989):
[92] Walker, Protest and Negotiation , supra note 42 at 31. Many authors have noted growing tensions among African American leaders in this period. See, e.g., LEWIS WALKING WITH THE WIND, supra note 96 at 125, 184, 231, 303-04.
[93] See Anthony Daniel Perez, Kimberly M. Berg, and Daniel J. Myers, Police and Riots, 1967-1969, 34 J. OF BLACK STUDIES 153 (2003) (examining role of police tactics in exacerbating riots). National Advisory Commission on Civil Disorders (Kerner Commission), *Report of the National Advisoty Commission on Civil Disorders* (1968).
[94] Graham, 175, 255-77, esp. 268: "The tough-minded 90th Congress was primarily interested in cracking down on the nationwide escalation of violence, including both ghetto riots and southern violence against civil rights workers."
[95] Ibid, 303.

[96] Richard D. Schwartz, Law, Violence and Civil Rights, 2 LAW & SOCIETY REV. 7 (1967). See also, ROSENBERG, HOLLOW HOPE, supra note 82 (casting doubt on utility of law as mechanism for social change).
[97] See supra note 39 and accompanying text. Thrower attended law school with Jones and described him as one of his best friends. According to Thrower, they shared most of their values even though Jones served in the Kennedy administration, supra note 39, and Thrower served in the Nixon administration. Author interview with Randolph Thrower, June 9, 2007, Atlanta, GA.
[98] Progress Report at 5-6. See also, Sibley letter.
[99] Author interview with Michael DeVito, January 15, 2007. Johnson's grandson, Ben F. Johnson, IV, reported the following anecdote about his grandfather: when the Druid Hills Baptist Church, which Johnson attended, "integrated" by allowing African Americans only into the basement for worship services, Johnson organized a group of white congregants to sit in the basement with them as a protest. A Life of Courage and Commitment, EMORY MAGAZINE, aut. 2006 at 37.
[100] Gozansky and DeVito, supra note 9 at 724.
[101] See Campbell Gibson and Kay Jung, Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States, U.S. Census Bureau Population Division Working Paper No. 56, Sept. 2002, available at http://www.census.gov/population/documentation/twps0056/twps0056.pdf. Tables 2, 3, 4, and 5 show race and Hispanic origin for the four major regions, Northeast, Midwest, South, and West. In 1990, the percentage of the population in each region that was African American was 11.0 in the Northeast, 9.6 in the Midwest, 18.5 in the South, and 5.4 in the West. It is true that the percentage of the South's population that is African American has declined steadily from a peak of 38 in 1840, to 20.6 in 1960, and to 19.1 in 1970, id., but the point remains that Johnson, Gozansky,and DeVito were empirically correct insofar as they perceived that training African American attorneys at a southern university was likely to have a larger impact on the situation of African Americans generally than training them elsewhere. All of the states with more than twenty percent African American population, AL, DE, GA, LA, MD, MS, NC, SC, are former Confederate states except DE and MD. States with between ten and twenty percent African American population are AR, CT, FL, IL, MI, MO, NJ, NY, OH, PA, TN, TX, VA. VA's percentage African American population is 19.9. As of July 1, 2004, African Americans made up 12.8 percent of the nation's total population.
[102] Law School Annual Report to the President, 1966-67 at 5; 1967-68 at 23; 1968-69 at 25; 1969-70 at 28.
[103] Law School Annual Report to the President, 1966-67 at 20.
[104] Here I report the numbers as I found them in Johnson's documents. The careful reader will note that they do not add up. Forty-one participants at Emory plus 29 CLEO participants equals 70, not 71. In the last sentence of this paragraph, tallying the numbers for individual outcomes gives 43, not 41, total students: 14 + 2 + 9 + 18 = 43. I have no explanation for the discrepancy.
[105] For fourteen of forty-one students to leave without graduating is an extremely high attrition rate. Johnson never addressed this point. He seemed so focused on the successes of Pre-Start that he refused to acknowledge shortcomings
[106] See Richard H. Sander, A Systemic Analysis of Affirmative Action in American Law Schools, 57 Stan. L. Rev. 370, 414, 421, 450-54 (2004). Sander puts considerable emphasis on the relatively high attrition rates for minority students admitted under affirmative action

programs, which Pre Start confirms, and on bar passage rates, claiming that students who get into better law schools than they otherwise would via affirmative action have trouble passing the bar, which Pre Start disconfirms.
[107] Jeff Roche, Restructured Resistance: The Sibley Commission and the Politics of Desegregation in Georgia (Athens, GA, 1998).
[108] Sibley letter, supra note 40.
[109] Letter, Johnson to Leslie Dunbar, Feb. 19, 1971, folder, Emory University School of Law 2nd Spring 1971, box 2T2, Field Foundation files, CAH.
[110] Pre-Start Proposal, supra note 40, at 2, 6; letter, Johnson to Dunbar, June 16, 1969, in folder, "Emory University School of Law Spring 1969," box 2T2, Field Foundation files, CAH.
[111] Sibley letter, supra note 40. In 1976, Field provided $6,000 to Emory Law for the primary purpose of helping African American students with their tuition. Letter, Emory Law Dean L. Ray Patterson to Leslie Dunbar, Apr. 22, 1976, acknowledging receipt of funds; Dean Patterson to George Loft, administrator at the Field Foundation, Feb. 28, 1977, accounting for disbursement of funds; both in folder, Emory Law School Spring 1976, box 2T2, Field Foundation files.
[112] Pre-Start Proposal, supra note 40, at 6-7.
[113] Ibid.
[114] Letter, Johnson to Dunbar, July 15, 1969, in folder, "Emory University School of Law Spring 1969," box 2T2, Field Foundation files, CAH.
[115] Grutter, 539 U.S. 306, 346-47 (2003)(Scalia dissenting) (law school's "mystical 'critical mass' justification for its discrimination by race challenges even the most gullible mind"); at 383 (Rehnquist dissenting) (referring to critical mass as a "sham"); at 389 (Kennedy dissenting) (referring to critical mass as a "delusion").
[116] Law School Annual Report to the President, 1966-67 at 15.
[117] See, e.g., Law School Annual Report to the President, 1963-64 at 11-12; Law School Annual Report to the President, 1965-66 at 20-21.
[118] See memo, Johnson to President Sanford Atwood, Nov. 11, 1969, conveying memo from Professor Stubbs to Law School Recruiting Committee, Oct. 28, 1969, at para. 8, in folder, "Law School, 1966-71," box 2, Ward papers: "The foregoing information concerning southern schools and the evaluated quality of their programs and their students suggests some of the difficulty in developing a first quality student body from the South alone." See also, School of Law Annual Report to the President, 1969-70, at 29.
[119] Ibid.
[120] Law School Annual Report to the President, 1961-62 at 20.
[121] See supra, note 129 and accompanying text.