



THE LAW AND EDUCATIONAL INEQUITIES:
IN OTHER WORDS, THE DILEMMA OF
WRITING WHILE BLACK

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“In other words, law school, despite its claims to be color-blind, is not culturally neutral; it provides inherent preferences for students who can act, think, and write white.”¹

INTRODUCTION

Other scholars have previously examined the plights of African Americans as they suffer the effects of Driving While Black,² Shopping While Black,³ Purchasing While Black,⁴ Acting While

¹ Judith G. Greenberg, *Erasing Race From Legal Education*, 28 U. MICH. J. L. REF. 51, 56 (1994); *See generally* Kimberly Sambol-Tosco, *Slavery and the Making of America – The Slave Experience: Education, Arts, & Culture*, PBS, <http://www.pbs.org/wnet/slavery/experience/education/history.html>. (Discussing the benefits of Blacks who were able to read and write including enhanced status in the slave community and being of more use to their slave owners in work-related tasks that required literacy.)

² *See, e.g.*, Katheryn K. Russell, “Driving While Black”: Corollary Phenomena and Collateral Consequences, 40 B.C.L. REV. 717 (1999).

³ *See, e.g.*, Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1, 18-19 (2003).

⁴ *See, e.g.*, Matt Graves, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace*, 7 MICH. J. RACE & L. 159 (2001).

Black,⁵ Talking While Black,⁶ Judging While Black,⁷ Serving as a Congressional Representative While Black,⁸ and Being President While Black.⁹ Thus far, the amazing commonalities between Driving While Black and Writing While Black have not been explored until this article.

As suggested by the quote above, law schools reward students who “write White.” However, the Writing-While-Black problem does not only appear in legal education. Instead, the problem has been prevalent throughout the history of secondary education in the United States, with its implications affecting Black learning. Thus, the purpose of this paper is to discuss the implications for persons who are Writing While Black. The discussion will address obvious and obscure racial inequities in academia that affect Black students and professors alike as they relate to scholarship in writing.

To begin, these writing inequities can be traced back to the early history of this country and the legal measures that were intentionally taken to prevent¹⁰ and eventually, hinder¹¹ Blacks from learning to read and write. The law continues to play a role

⁵ See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law & Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1275 (1992).

⁶ See e.g., *Curtis v. Dimaio*, 46 F. Supp. 2d 206, 213 (E.D. N.Y. 1999).

The second was a joke about Ebonics—a term used for a certain usage of English spoken allegedly by some African-Americans. The humor in this joke was supposed to come from the misuse of English words in a variety of sentences. When Murphy received this e-mail, he resent it to a number of his colleagues at Citibank, using Citibank’s e-mail system. The defendants concede that these jokes were ethnically and racially insensitive. The case law makes clear that the sending of a single offensive e-mail does not create a hostile work environment.

⁷ See, e.g., David L. Hudson, Jr., *High Court Steps in Between Judge, Lawyer*, 4 No. 14 ABA J. E-REPORT 4 (2005).

⁸ See Paul Kane, *‘Tea Party’ Protestors Accused of Spitting on Lawmaker, Using Slurs*, THE WASHINGTON POST, Mar. 20, 2010, available at http://www.washingtonpost.com/wpdyn/content/article/2010/03/20/AR2010032002556_pf.html.

⁹ See *Carter Again Cites Racism as Factor in Obama’s Treatment*, CNN.COM, Sep. 17, 2009, <http://www.cnn.com/2009/POLITICS/09/15/carter.obama/index.html>.

¹⁰ NELL IRVIN PAINTER, *CREATING BLACK AMERICANS: AFRICAN-AMERICAN HISTORY AND ITS MEANINGS, 1619 TO THE PRESENT* 100 (2007).

¹¹ *Cumming v. Richmond Cnty Bd. of Educ.*, 175 U.S. 528 (1899) (held that the closing of a Black high school to free funds for the education of Black primary school students was constitutional).



today, through the much criticized, No Child Left Behind Act.¹² Recent studies suggest that this government-mandated institution of a standardized method of education does not advocate a classroom focus on reading and writing skills.¹³ The focus on standardized testing rather than on reading and writing, harms students from all racial backgrounds, but especially harms those students who are Writing While Black, and suffering from generations of law-based inequities.

In today's world of academia, numerous studies suggest an across-the-board racial inequity between Blacks and non-Blacks in writing achievement, including students and professors.¹⁴ This racial inequity in academia and scholarship has had far reaching consequences for Blacks in past educational experiences and in future career enhancing possibilities. While it may not be easy to recommend workable changes to correct the wrongs of the legal system, it is not a hard task to show the points of law that have produced this climate of disparities. Further, some recommendations may be garnered by examining proposals regarding the parent of the "Writing-While-Black" dilemma, i.e. Driving While Black, which will be the approach taken in this paper to suggest remedies for Writing While Black.

Therefore, this paper will be divided into six parts. Part I will begin with a discussion of this country's historical legal structure and how it has created and continuously impacted the racial inequities that exist among Black students and faculty in the areas of scholarship through writing. The discussion continues in Part II with a look at the special problems that these racial inequities in academic scholarship are causing. These problems range from a smaller percentage of Black students in institutions of higher learning, to Blacks being subjected to possible subjective bias of their writing/scholarship efforts from professors, peers, and the institutions in general, to the possible self-fulfilling prophecy stemming from internalized perceptions Black students may have

¹² No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2001); See Aida M. Alaka, *The Grammar Wars Come to Town*, 59 J. LEGAL EDUC. 343, 344 (2010) (criticizing No Child Left Behind Act for its effect on education); Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 889-898 (2001).

¹³ See Joe Navarro, *The No Child Left Behind Act Does Not Serve Students*, HOLLISTERFREELANCE.COM, Jan. 6, 2006, available at <http://www.freelancenews.com/printer/article.asp?c=176269>.

¹⁴ John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L. Q. 655, 689-91 (2001) (discussion of how standardized tests are more detrimental to low-income students of color than they are beneficial).

of their own scholarship potential as a result of how they are perceived. The barriers in education relating to lack of actual or perceived writing/scholarship abilities of Blacks not only affect students but faculty scholars as well, and this paper seeks to address this issue in Part III.

Part IV will analogize Writing While Black to Driving While Black. Here, the contours of this problem will be summarized to illustrate how Writing While Black poses similar inequities. Part V will look at what is or should be the role of the law in rectifying this problem of lack of Black scholarship in writing. Other non-legal suggestions will be discussed in Part VI including championing legislative action and reintroducing the Black family, community, and church into the solution to this problem by attacking educational inequities and limited opportunities for experience to overcome the disadvantages of Writing While Black. This paper will conclude with the motivation behind and the overall purpose of this paper. Finally, included at the end of this paper are the lyrics to my song, “Kupenda’s Song,” which was inspired by both Professor Kupenda and the topic of this paper.

I. HISTORICAL STRUCTURE

Various points in our legal history—ranging from the institution of slavery of peoples foreign to America and/or whose native language was not English,¹⁵ to laws making it illegal to teach enslaved Black persons to read and write,¹⁶ to post-Reconstruction and de facto continuation of slavery, to sharecropping schemes that led to Black students not being able to attend school full-term,¹⁷ to the segregationist doctrine of separate but equal being held constitutional by the highest Court in the land,¹⁸ to the more recent institution of the No Child Left Behind Act¹⁹—show that the legal system has contributed to the phenomena of Writing While Black.

Since the institution of slavery, the law has been intricately involved in the mass institution of illiteracy directed toward and absorbed by Blacks.²⁰ This illiteracy stemmed from English not being the native language of the slaves²¹ and the legal system not

¹⁵ See FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLAS: AN AMERICAN SLAVE 79 (Henry Louis Gates, Jr. ed., 1984).

¹⁶ See generally powell, *supra* note 14.

¹⁷ See PAINTER, *supra* note 10 (addressing struggles of Blacks in obtaining education).

¹⁸ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁹ 20 U.S.C. § 6301 (2001).

²⁰ Greenburg, *supra* note 1, at 55; Sambol-Tosco, *supra* note 1, at 2.

²¹ See PAINTER, *supra* note 10, at 56.



allowing Blacks to learn to read and write to overcome this obvious barrier.²²

As English was not the first language for slaves from Africa, their abilities to communicate and, certainly to read and write, were hindered. In America, those who spoke other languages were at distinct disadvantages and were even punished by the law.²³ Former slaves were actually denied opportunities to assimilate in English, as their education was routinely sacrificed with more funding given to White students. Often the curriculum in American schools has not made provision for those with limited abilities to speak English as a first language.²⁴ So, this deficit continues, with the descendants of those denied such basic education now blamed for these consequences of illiteracy and reading and writing challenges.

The forced illiteracy of Blacks was further propelled with the climate of fear associated with literate Blacks displaying that they could, in fact, read and write.²⁵ Whites feared literate and educated Blacks, and sometimes sought to punish them for their own accomplishments. Even for Blacks who could read and write and did so well, they were told they could not because the state justified denying their right to vote.²⁶

The involvement with the legal system was addressed head-on in *Brown vs. Board of Education*,²⁷ where the constitutionality of the legal system's assumption of separate-but-equal was challenged.²⁸ This idea was challenged because the educational climate the legal system had created had separate learning institutions for Black and White students that were not equal in educational resources.²⁹ In an era where Blacks were already considerably behind in literacy, to sustain institutions that were inadequate to teach Black students was an obvious showing of the

²² Sambol-Tosco, *supra* note 1, at 2.

²³ See Juan F. Perea, *Demography and Distrust: An Essay on American Language, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 328-49 (1982).

²⁴ See Dussias, *supra* note 12, at 873; Juan F. Perea, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1427-29 (2004).

²⁵ DOUGLASS, *supra* note 15, at 78 (White master said a Black person who could read and write would be unfit for slavery).

²⁶ KEVIN BROWN, LAW, AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION 124 (Carolina Academic Press, 2005).

²⁷ *Brown v. Bd. of Educ*, 347 U.S. 483 (1954).

²⁸ *Id.*

²⁹ *Id.* at 491-92.

legal system's involvement in advancing measures to keep the Blacks from becoming proficient in reading and writing.

Despite the government's intentional measures to institute structural mechanisms that would keep Blacks from becoming literate, Blacks have continued to value education and for much of our nation's history, have fought and/or sought out alternative means of education.³⁰ 94% of polled Black parents value writing compared to only 82% percent of White parents.³¹ This study shows that the perception of the need to be educated, and primarily, to be literate is still strong in the Black community today.³²

II. SPECIAL PROBLEMS: BARRIERS IN EDUCATION THAT STUDENTS FACE

The legal system's complicity in keeping Blacks comparably incompetent in reading and writing has resulted in current disparities at our nation's educational institutions. Although we are at a point in our history where more Blacks are enrolling in higher institutions than ever before, there remain disparities in enrollment, advancement, and the attainment of advanced degrees. These disparities more than likely can be traced to the necessity of scholarship. This scholarship is more than likely evidenced through writing. Here we discuss how writing affects a student's career starting with taking the entrance exam to enter college and culminating with graduating with a terminal degree. There is special significance placed on law students here because success at a law school relies almost solely on a student's writing ability.

A. Barriers in Colleges

The ACT and other standardized tests can pose great barriers of access to higher education. This was not always the case. According to the ACT's website, "Prior to 1959, there was just one national college-entrance testing program, a program that focused on identifying the most academically-able students for admission to the nation's selective universities. The remainder . . . were admitted either on the basis of scores earned on entrance exams offered by individual states or colleges or on the basis of family ties."³³

³⁰ Sambol-Tosco, *supra* note 1, at 2.

³¹ 83% of parents think writing skills are more important today, ITFACTS.BIZ (May 23, 2008), February 10, 2010, <http://www.itfacts.biz/83-of-parents-think-writing-skills-are-more-important-today/10539>.

³² *Id.*

³³ See *History of the ACT*, ACT.ORG, <http://www.act.org/aboutact/history.html> (last visited April 7, 2010).



Considering the race-relation climate in our country during the late '50s and early '60s, it is not hard to imagine the small likelihood of Blacks being able to attend the country's colleges and universities.³⁴ Moreover, it is worth noting that colleges began to use more restrictive admission requirements during the late '50s, after the ruling in *Brown v. Bd. of Education*³⁵ and other cases ending formal segregation in public schools and higher education. It may be that this was no coincidence and part of a continued agenda to keep Blacks unfit for full freedom from the handicaps of having once been an enslaved people.

Thus, the creation and reliance on standardized testing to measure ability and access is suspect. This suspicion is warranted, especially based on the following observation:

In 1923 Carl Campbell Brigham in *A Study of American Intelligence*, declared that Nordic White Intelligence in the United States was being diluted because of the introduction of inferior Negro stock. A few years later, Brigham designed an intelligence test that professed to measure native ability but incorporated a bias that would award high scores for knowledge of facts associated with the Anglo culture. Shortly thereafter, Brigham became director of testing for the College Board . . . ; his test became known as the Scholastic Aptitude Test and is still given to millions of high school students today. The organization has not repudiated his teaching . . . the library at the College Board's Educational Testing Service still bears Brigham's name.

Today, many of the nation's colleges and universities use the ACT score or the SAT score as basic requirement for college admission.³⁶ Moreover, most colleges have included a writing

³⁴ Though access to higher education for Blacks is certainly better than during slavery and during Jim Crow, the numbers are still disturbing. Statistics concerning Black attendance in the nation's colleges and universities show the following:

As indicated in the chart above, **80% of African Americans** over age 25 have high school diplomas. The average number of African Americans that have at least a bachelor's degree increased one percentage point to **18%** from the year 2000. This however is still **ten percentage points lower** than the national average.

African Americans & Education, BLACKDEMOGRAPHICS.COM, <http://www.blackdemographics.com/education.html> (last visited April 6, 2010).

³⁵ *Brown, v. Bd. of Educ.* 347 U.S. 483 (1954).

³⁶ See *History of the ACT*, *supra* note 33.

component in their applications.³⁷ Also, college entrance exams include some sort of writing evaluation.³⁸ The nation's most widely used college entrance exams, the American College Testing Assessment (ACT) and the SAT Reasoning Test (SAT), both aim to assess a student's writing skills.³⁹

In a study conducted in 1989 focusing on "[t]he differential performance of Black and White college freshmen on a direct measure of writing skills, the essay portion of the American College Testing Program's Collegiate Assessment of Academic Proficiency (CAAP) was studied."⁴⁰ The results of the study indicated that Black examinees did not perform as well as did White examinees on the essay portion of the test.⁴¹ Also, "the Black⁴² examinees' [essays] were shorter than the White examinees' essays," where "[l]ength was measured by the average number of sentences written and the average number of words per sentence."⁴³ The same performance disparity appeared in the study's analysis of students' performance on the multiple-choice test of writing skills that also formed part of the CAAP.⁴⁴

Today emphasis is still placed on the SAT writing section in admissions decisions. Some colleges also use the SAT writing score to place students in the appropriate first-year writing class.⁴⁵

³⁷ Writing deficiencies may still impact access, as indicated below:

The 2009 College Board's College Admission and Enrollment Statistics found that while grades, secondary school record and admission tests are the top factors in the college admission decision, a majority of colleges and universities consider **the essay to be important or very important** in determining which academically qualified students they would choose.

College Application Essay, COLLEGEBOARD.ORG, <http://professionals.collegeboard.com/guidance/applications/essay> (discussing how important the essay is in college applications) (last visited April 6, 2010).

³⁸ See, e.g., *The Widening Racial Scoring Gap on the SAT College Admissions Test*, THE JOURNAL OF BLACKS IN HIGHER EDUCATION, http://www.jbhe.com/features/49_college_admissions-test.html (last visited Feb. 24, 2010).

³⁹ Catherine Welch, *Differential Performance on a Direct Measure of Writing Skills for Black and White College Freshmen*. ACT Research Report Series 89 – 8. (1989).

⁴⁰ *Id.*

⁴¹ *Id.* at 6.

⁴² *Id.* at 6.

⁴³ *Id.* at 7.

⁴⁴ *Id.* at 6.

⁴⁵ Writing While Black is a problem that carries an even more dramatic negative impact when Blacks attempt to obtain access to Ivy League schools. Access to these schools could open doors for many opportunities. As explained by one writer:



A student's ability to write satisfactorily for admissions personnel may play a major role in that student being accepted to more selective undergraduate schools. As a result of this inequity and disparity in writing skills, the percentage of Black students that are enrolled in the majority of our nation's top institutions wane far behind their White counterparts.⁴⁶

So it is easily understandable that if a student's writing ability is not developed to a level that can lead to a good entrance exam score, and subsequent acceptance and financial aid to institutions of higher learning, then that student is locked out of the academic system,⁴⁷ and locked into lower future earnings. While this

The College Board, which administers the test, said its surveys and checks of university websites show that 56 percent of the roughly 1,000 four-year colleges do not use the writing section for admissions, although the overwhelming majority of the nation's 61 most selective colleges use it in some fashion.

Linda K. Wertheimer, *Many Colleges Ignore SAT Writing Test*, THE BOSTON GLOBE, available at http://www.boston.com/news/local/articles/2007/09/20/many_colleges_ignore_s_at_writing_test/ (referencing colleges using the SAT writing score to place students in the appropriate first-year class).

⁴⁶ *African Americans & Education*, *supra* note 34.

⁴⁷ One study reports:

A new study from the Justice Policy Institute (<http://www.justicepolicy.org>), a Washington, DC-based think-tank that advocates for alternatives to prison, has found that after two decades of harsh, criminal justice policies, there are more black men in jail or prison than in college. At the end of 2000, 791,600 black men were behind bars and 603,032 were enrolled in colleges or universities. By contrast, in 1980—before the prison boom—black men in college outnumbered black men behind bars by a ratio of more than 3 to 1, the study found.

The report, “Cellblocks or Classrooms? The Funding of Higher Education and Corrections and Its Impact on African American Men,” also found that spending on education has suffered as a result of the imprisonment binge. Between 1985 and 2000, the increase in state spending on corrections was nearly double that of the increase to higher education (\$20 billion versus \$10.7 billion), and the total increase in spending on higher education by states was 24%, compared with 166% for corrections.

However, other studies compare based on age. In 2003, according to Justice Department figures, 193,000 black college-age men were in prison. While 532,000 black college-age men were attending college. Now, the number of young black men in prison is too high, however not as high as others would lead us to believe. But other studies compare based on age.

unsettling phenomenon is occurring across the board in academia, it is nowhere more relevant than at our nation's law schools.

B. Barriers in Law Schools

Similar dynamics are at work in legal education. Law review editors are considered “the crème de la crème of the country’s law school students.”⁴⁸ This forces one to wonder, how much more is this accomplishment worth at the prestigious law schools? Prior to our nation’s civil rights era, i.e. the “Jim Crow period, a few handfuls of Blacks made law review at the prestigious law schools.”⁴⁹ Even after gaining access and despite their accomplishments, these law students were met with open hostility from White classmates and even White faculty who questioned the Black scholars’ abilities.⁵⁰

A little over 10 years ago, Blacks were considered to have made major progress in law school enrollments.⁵¹ Yet they only had a minor presence on the editorial board of most law reviews.⁵² The *Journal of Blacks in Higher Education* surveyed 12 of the most prestigious “law schools to determine the number of Black editors on their law reviews.”⁵³ That study “found that only 50 Black students were on these law reviews.”⁵⁴ “Overall, [B]lack students make up 4.8% of the 1,038 law review editors.”⁵⁵ Also, a study of all of the nation’s law school reviews found that 76% of them have no African American members at all.⁵⁶

This minute presence does not necessarily infer that only a small, insignificant amount of Black law students ever attempted to

More Black Men in Prison Than College, Study Finds, DRUG WAR CHRONICLE, Aug. 30, 2002, , <http://stopthedrugwar.org/chronicle-old/252/jpistudy.shtml> (last visited Feb. 1, 2010); *African Americans & Education*, *supra* note 34.

⁴⁸ See *Many of the Nation’s Most Prestigious Law Reviews Have Lily-White Editorial Boards*, 19 J. OF BLACKS IN HIGHER EDUC. 55 (Spring 1998).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 56. The battle for the admission of Blacks to legal education was arduous. Some states set up separate and unequal law schools for Blacks to avoid integration. See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 84 (1973) (Marshall, J. dissenting) (arguing that inequities in case were in violation of equal protection rights as were inequities in *Sweat v. Painter*, 339 U.S. 629 (1950)).

⁵² *Many of the Nation’s*, *supra* note 48, at 56.

⁵³ *Id.*

⁵⁴ *Many of the Nation’s Most Prestigious Law Reviews Have Lily-White Editorial Boards*, 19 J. OF BLACKS IN HIGHER EDUC. 55 (Spring 1998).

⁵⁵ *Id.*

⁵⁶ *Id.*



get on law review.⁵⁷ The success or failure rate of Blacks in getting on law review is a statistic worthy of study. Unfortunately, presently “law schools do not report the ethnicity of students who compete for law review membership, so there is no way to determine the number of Black students who seek positions on the law review or who are elected to the editorial board.”⁵⁸

Yet, if one were to consider the percentage of Black law review editors along with the percentage of Blacks in law school, it would be safe to assume the racial disparity still exists. In view of this disparity, “[m]any of the law reviews surveyed had initiated affirmative action policies to attract minority representation.”⁵⁹ “For example, the *Virginia Law Review* adopted a diversity initiative that considers, in addition to grades and a writing competition, personal statements by students on how their presence on the law review would enhance the diversity of the law review.”⁶⁰

While some schools continue to scramble to increase diversity on their law reviews and some scholars continue to point out that a great racial disparity exists on most of the country’s law reviews,⁶¹ let us examine “Why all the fuss?” Why is membership on law review so critical that writing while Black and law review membership is worthy of consideration?

Law review membership is a pathway to judicial clerkships and employment at large law firms.⁶² However, the law review has been noted to be a worthy achievement not just because it esteems some students higher than others as the most capable, competent, smartest future attorneys, but also because it is an exceptional teaching tool.

Considering its educational value, a greater concern develops about the potential affect this has on Black law students across the country. The perks of being a member of an elite group aside, the racial disparity on most law reviews points to the fact that Black students on a grand scale are being excluded from gaining an ultimate legal education.⁶³ The discussion of *Brown* and its

⁵⁷ *See Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 57.

⁶⁰ *Many of the Nation’s Most Prestigious Law Reviews Have Lily-White Editorial Boards*, 19 J. OF BLACKS IN HIGHER EDUC. 55 (Spring 1998).

⁶¹ *See Id.*

⁶² *Id.* at 55.

⁶³ Mark A. Godsey, *Educational Inequalities, The Myth of Meritocracy, and the Silencing on Minority Voices: The Need for Diversity of America’s Law Reviews*, 12 HARV. BLACKLETTER L.J. 59, 61 (1995).

ultimate results comes to mind: Black students being accepted into White majority schools, but not receiving the same quality of education as their White classmates.⁶⁴ Just as Blacks were once admitted to White schools but relegated to certain spaces, Black law students are often relegated to spaces outside the law review office, missing much training.

The primary purpose of student-run law reviews has always been to train students of law.⁶⁵ Justice Earl Warren referred to the institution of the law review as the most remarkable of the law school world that affords invaluable training to its students.⁶⁶ Another scholar praised the institution for its invaluable editing and writing experience.⁶⁷ Contrary to popular belief, Llewellyn points out “law review editorship has value not for what it took to get on, but for what the editor learns because he has got on.”⁶⁸ The advantage of the membership on the law review is not in the fact that the student made high grades to get on the law review, but that the student is assumed to have been trained in and put to use the best education that the law school has to offer.⁶⁹

Although none of the law schools has explicitly set forth a policy that prohibits Black students from becoming members of the law review, the nature of most law school environments does not foster an equal footing with their White counterparts such that this achievement is even possible.⁷⁰ Black students—Writing While Black—face huge hurdles in gaining access to this exclusive membership. As a result, in many cases Black students elect to start their own law review journals.⁷¹

However, it is very unlikely that such a journal could enjoy the reputation allotted to a school’s primary law review.⁷² Furthermore, the development of secondary journals that cater to minority issues can result in the traditional law review journal being excused from publishing articles that focus on issues relevant to minorities. This once again signals that Writing While

⁶⁴ *See Id.* at 61.

⁶⁵ *Id.* at 63-64.

⁶⁶ *Id.* at 64.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See Id.*

⁷⁰ *See generally Id.*; Sharon E. Rush, *Beyond Admissions: Racial Equality in Law Schools*, 48 FLA. L. REV. 373, 389 (1996).

⁷¹ *See generally* Godsey, *supra* note 63, at 68-69.

⁷² Heather Meeker, *Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers*, 1996 UTAH L. REV. 917, 932 n.32 (1996).



Black on issues of importance to the underrepresented is a secondary form of writing, not valued like Writing While White.

Even before a Black law student faces the law review barriers, the student must cope with law school writing generally. Legal writing creates a barrier for Black law students because legal education employs an analytical style of writing that may be foreign to the culture of some Blacks.⁷³ Some argue that the oral tradition from Africa is quite different from the White culture and the culture of law schools.⁷⁴ According to one scholar, “it is diametrically opposed to the analytical style of legal writing.”⁷⁵ Learning to write like a lawyer means to stop Writing While Black and to write like Whites. This impact may be felt in the shortage of Blacks ranked high in their classes, and the shortage of Blacks on law review.

It is not surprising then to learn that Black students give higher grades to historically Black colleges and universities.⁷⁶ Students at historically Black institutions especially perceived gains in their writing skills.⁷⁷ One could easily assume that these students gain access to teachers and interact with them formally and informally.⁷⁸ Black students writing on predominantly White campuses, thus, may not experience these formal and informal networks to develop their writing skills.

III. SPECIAL PROBLEMS: BARRIERS IN EDUCATION THAT PROFESSORS FACE

Students are not the only ones who are affected by this actual or perceived lack of writing ability.⁷⁹ Studies show that many minority professors and other scholars on college campuses are facing the lockout from scholarship circles and the benefits that are associated with them.⁸⁰ These benefits include mobility along the

⁷³ See e.g., Greenberg, *supra* note 1, at 105-106.

⁷⁴ *Id.*

⁷⁵ *Id.* at 106.

⁷⁶ *UF study: Black students give higher grades to Black colleges*, UNIVERSITY OF FLORIDA NEWS, <http://news.ufl.edu/2003/01/09/black-colleges/> (last visited February 24, 2010).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See generally Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691, 1706 n. 60 (2007) (even established Black writers are scrutinized).

⁸⁰ Antoinette Sedillo Lopez, *Latinas in Legal Education Through the Doors of Opportunity: Assimilation, Marginalization, Cooptation or Transformation?*, 13 AM. U. J. GENDER SOC. POL'Y & L. 109, 115-116 (2005) (Minority writers who write about minority issues not taken as serious participants in legal culture).

tenure track at their respective schools, membership in scholarly circles, and a voice in their respective academic arena.

Tenure for law professors, like at most institutions of higher education, is decided in large part by the professor's scholarship or contribution to their discipline.⁸¹ This scholarship is achieved primarily through publication in law reviews. As discussed earlier, many of these law reviews have all White editorial boards. Therefore, many minority law professors' contributions are screened out by all-White law review committees.⁸² Minority law professors are discouraged from writing about issues of importance to their communities.⁸³ This discouragement may be done explicitly, but also implicitly through rejections by the White law review boards of articles with a different racial perspective or using a different style or voice.

Black law school professors' voices are also removed from the discussion of legal ideas put forth by law reviews across the nation. Many times, these professors' contributions, which are accepted for publication in a law school journal, are often edited in several stages by law review students who are mostly all-White.⁸⁴ These edits can have a great effect on the Black law professor's goal, and manner, of addressing Black experiences and concerns as they relate to our law.⁸⁵

White law students can and should be able to write a thoughtful critique of an article about the Black experience.⁸⁶ However, they may be less likely to produce a critique that reflects the viewpoint of a person who can identify with that Black experience, such as a

⁸¹ Law reviews have great power over ideas expressed in legal scholarship. Consider the power that law review members hold over professors as reflected in the following quote by a scholar:

Since the early 1980s, scholarship has become even more central in the tenure and promotion process. This has meant that law review editors, acting in their capacities as primary gatekeepers and streamers of legal scholarship, have incidentally but inevitably acquired a critical degree of control over law professors' careers and reputations.

Bernard J. Hibbits, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 640-41.

⁸² See generally *Many of the Nation's*, *supra* note 48, at 56.

⁸³ Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382, 2388 (1989) ("As a result, the selection process favors blacks who reject or minimize their blackness, exhibit little empathy for or interest in black students, and express views on racial issues that are far removed from positions held by most blacks").

⁸⁴ Godsey, *supra* note 63, at 71.

⁸⁵ *Id.*

⁸⁶ *Id.*



Black law student.⁸⁷ Furthermore, in choosing articles for publication, a Black student-editor may have more insight in choosing an article that reflects the Black experience.⁸⁸ Hence, this great disparity in the membership of Black students on the nation's law reviews could be a reason why law scholarship is void of more Black voices.⁸⁹

In addition, the voices of Black law professors are often stifled by their academic peers who push them to not concentrate on issues like race and law or civil rights, those areas of the law that deal greatly with the Black experience in America.⁹⁰ Black law professors are encouraged to write on neutral topics; however, this would lead to yet another void—discussion on topics relating to Blacks and the law.⁹¹ Therefore, even highly educated Black academics are stifled by these problems of Writing While Black.

IV. ANALOGY OF WRITING WHILE BLACK TO DRIVING WHILE BLACK

Here, the contours of this problem will be summarized to illustrate how Writing While Black poses a similar inequity to Driving While Black. If there is a similarity, then ultimately remedies for Writing While Black may be devised by considering successful and unsuccessful attempts at remedying Driving While Black, also known as DWB, is an expression used in reference to race-based profiling of Black motorists.⁹² Experiences likened to Driving While Black can be traced back to the time of slavery, when both slave and free Blacks were subjected to scrutiny because of their race.⁹³

During the Jim Crow era where separate but equal was the call of the day, racial disparities led to a Driving-While-Black phenomenon because Blacks were forced to sleep in their cars as

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See Bell, *supra* note 83, at 2388.

⁹¹ See *Id.*

⁹² Kathryn K. Russell, "Driving While Black": Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717 (1999) (discussing the criminal act of Driving While Black, related phenomena, and how these problems affect criminal justice processing in particular and social policy in general).

⁹³ See generally Tracey Maclin, "Race and the Fourth Amendment," 51 VAND. L. REV. 333, 333-34 (March 1998) (examining evidence that police officers seize minority motorists for arbitrary traffic stops, concluding disparate racial impact is a proper consideration for Fourth Amendment analysis according to prior cases, and criticizing *Whren* because it fails to consider the real world of law enforcement and to reconcile that reality with a meaningful right to be free from unreasonable seizures).

they were not welcome in Whites-only hotels.⁹⁴ This is analogous to the educational disparities resulting from the separate but equal legal system that led to the Court's acknowledgment that this policy did not achieve the Court's intentions in *Plessy v. Ferguson* and the eventual upheaval of that policy.⁹⁵

Today, Driving While Black means that Black motorists who may likely be offenders, and other Blacks who are not offenders, are both targeted by law enforcement officials.⁹⁶ Just as the aforementioned scenario shows how Blacks in the South developed a "historical relationship with their cars,"⁹⁷ history has also shown us that Blacks have a historical relationship with illiteracy.⁹⁸ The same way cars played an important role in displaying racial disparities during the Jim Crow era,⁹⁹ one of writing's important roles has been to display educational disparities, as writing plays an important role in academia, i.e. law review selection, tenure, scholarship.

One of the major concerns with the Driving While Black phenomenon is that it has led to equating Blackness with deviance. Relating Blackness with deviance should be of great societal concern because it leads to racial hoaxes, anti-Black conspiracies, lack of trust between police and Black communities and more general, racial alienation.¹⁰⁰

This "association also leads to a predictable cycle of events: 1) Blacks are increasingly targeted for arrest, 2) Blacks are more likely convicted and incarcerated for crimes, 3) there is an increased likelihood of a felony conviction which increases the likelihood of disenfranchisement, and 4) a felony conviction leads to an increased possibility that the convict will not be rehired and therefore is more prone to re-offend."¹⁰¹

This unfair and unfounded correlation also leads to police contempt for minorities.¹⁰² This contempt, along with actual racial profiling, is the main culprit of police targeting minority motorists because police view minorities as "second-class citizens."¹⁰³

⁹⁴ Russell, *supra* note 92, at 720.

⁹⁵ See generally, Brown, *supra* note 26

⁹⁶ See e.g., Russell, *supra* note 92, at 724 n.29.

⁹⁷ *Id.* at 720.

⁹⁸ See *120 Years of Literacy*, NAT'L. CTR. FOR EDUC. STAT., http://nces.ed.gov/naal/lit_history.asp#illiteracy (last visited April 18, 2010).

⁹⁹ Russell, *supra* note 92, at 720.

¹⁰⁰ Cf. Maclin, *supra* note 93, at 371-72.

¹⁰¹ Russell, *supra* note 92, at 730-31.

¹⁰² Maclin, *supra* note 93, at 390.

¹⁰³ *Id.* at 392.



Similarly, it is this second-class citizenship that has resulted in Blacks historically waning behind their White counterparts in matters of literacy and, as discussed here, writing more generally. As discussed earlier, Blackness has been equated with lack of writing ability. Equating Blackness to a lack of writing skills should be of great societal concern because it leads to the misconception that Blacks are not as capable of scholarly writings, does not allow Blacks to have a legitimate voice in the world of academia, and leaves Black voices largely absent from policy-making and influencing scholarships that would promote justice.

This association can lead to a predictable cycle of events for Black law professors: 1) these professors are increasingly not engaged in scholarship or their writings are considered suspect; 2) they are more likely not to be accepted for publication in law reviews; and 3) they are then denied tenure or promotion for failing to publish. This association can also lead to a predictable cycle of events for students.

Professor Russell mentions a story of a young Black male who was shopping in an Eddie Bauer store and accused of being in possession of a stolen piece of clothing.¹⁰⁴ The boy was instructed to remove the shirt that he had on or he would not be able to leave the store. Later it was determined that the boy did in fact own the shirt after having purchased it from that same store earlier that day.¹⁰⁵

This occurs in the world of academics as well. Many times Black professors are asked to remove certain “well-earned” ideals, expertise from their writings in order to advance in their careers. They may be urged to resist writing about race, gender, or class. They may be urged to shun writing in nontraditional styles. They may be questioned for using non-law sources and for citing other scholars of color, or for doing interdisciplinary work. Black professors who write about their own experiences, with narrative or prose, may also be criticized for not writing traditional, lengthy law journal articles. Black professors who publish with secondary journals or with law reviews at historically black law schools may be criticized for not publishing in elite journals.

Even though all of these criticisms could affect a law professor’s ability to be promoted or to receive tenure, it is most critical for Black law professors to not willingly remove these ideals, as the young man above removed his shirt. Black scholars are necessary because of their pertinent research related to the

¹⁰⁴ Russell, *supra* note 92, at 723.

¹⁰⁵ *Id.*

concerns of the Black community. Without these voices, issues that affect the Black community would probably not be considered of great enough importance to be examined and discussed.

Russell discusses a number of articles in the popular literature that have focused on the fact that African American motorists are stopped and prosecuted for traffic stops, more than other citizens.¹⁰⁶ Just as Driving While Black leads to Blacks not trusting law enforcement officials, Writing While Black causes some scholars to not trust some publications or their own ability to be chosen for publication. Black authors become wary of a publication's ability to adequately portray their writing and scholarship as they intend. Furthermore, Black authors do not trust that their scholarly writings will be accepted. This creates a snowball effect of authors who do not send their work in for publication and publications that do not receive articles for consideration to publish. Therefore there is a void of Black voices in academia and scholarship.

Driving While Black affects Blacks as a group and alters their response to the criminal justice system. Similarly, among law students, Writing While Black affects Black law students. A Black law student may not even attempt to get on law review because he may not believe that he will be successful or he does not trust the process of being selected. Similarly, Black attorneys may be discouraged from seeking careers as law professors because they are concerned that their ideas may be scrutinized in the legal educational community causing them to not move naturally through the professorial ranks.

Also, just as racial profiling might be the result of an individual officer's practices, based on stereotypes and prior experiences, the same may be the result of the views of a student on law review or a professor. This may lead to an article submission by a Black professor being rejected by a law review editor because of the content of the article and/or the racial profile of the professor. Similarly, a White professor may grade a Black student's writing harder because of the view that the student's writing was not up to par simply because of the student's racial profile. Racial profiling is an unfortunate reality in the academic world.

V. THE ROLE OF THE LAW IN RECTIFYING THIS INEQUITY

As indicated above, then, Driving While Black is analogous to Writing While Black. Hence some of the possible remedies for the former may be used to address the latter.

¹⁰⁶ See generally, Russell, *supra* note 92.



Our country's history attests that the system of laws in this country not only created this inequity from our early conception, but also has played a vital role throughout our history in the propulsion of laws having the purpose of keeping Black Americans at a grave disadvantage in reading and writing of English.

Where there is a legal injury, there should be a remedy. Therefore, this writer asks if the legal system should have a role in providing a remedy to the racial inequity caused by its laws, like those discussed above that instituted measures to keep Blacks from bridging the language gap, If the legal system does have a role in correcting this situation, what measures should the legal system take in order to rectify the results of its influence? Has the legal system already attempted to rectify the racial inequities it has caused?

One possibility is that education could be declared a fundamental right, insuring equally funded education for all school children. However, it would be hard to determine if students would be receiving an equal education. And, education being a fundamental right would not assure exactly equal education. Moreover, a declaration that education is a fundamental right would not assure that affirmative action, under the law, could be legitimately used to make up for all of the educational slights that have perpetuated and continue to perpetuate Writing While Black inequities.

This educational disparity could benefit greatly from a national spotlight of attention. Since the media and other groups such as The American Civil Liberties Union have begun to highlight Driving While Black, there has been more of a social outcry for stepped-up measures to address DWB.¹⁰⁷ One could imagine an increased focus on eliminating educational disparities if there was more dialogue and emphasis put on this issue. This is one of the purposes of this paper.

Another legal remedy employed in the fight against Driving While Black that could be beneficial in the efforts to rectify issues of Writing While Black is the use of the justice system through litigation both on the federal and state levels with challenges to the respective state constitution, if possible. The legal system has made three remarkable changes on this country's educational system through its backing of legislative measures: desegregation and integration; the emergence of standardized curriculum; and most recently the No Child Left Behind Act. There is continuous debate about whether these measures were beneficial or

¹⁰⁷ See generally Russell, *supra* note 92, at 720.

detrimental toward their intended purpose(s)—to correct wrongs and address ills. The legal system should remove standardized education and return back to a more traditional form of education. This would produce an educational environment more favorable not just for Black students, but for students in general.

VI. OTHER NON-LEGAL REMEDIES

To breathe this new life, this section will make several recommendations for what Black communities can do to help correct the problem of Writing While Black. At the heart of any communal action is the Black family. It must take more initiative to seek out viable opportunities for instruction of its youth in writing, coupled with the students' already prescribed education. Also, personal and/or family diligence is essential for when the system does not function for Black students.

Generally, students should seek out mentors who have accomplished what they intend to accomplish. Whether it is to practice, clerk, teach, or pursue a non-traditional career, all of these aspirations are enhanced or determined by the student's ability to write. Therefore, the chief recommendation is to develop a mentoring relationship that fosters the writing experience. Mentoring can be a great way for a student to address his or her own issues with Writing While Black, as well as achieving career goals.

Mentoring strategies are needed when Black students are young and before they enter into college. Before college, there are even more problems that impact an even larger group of young people who are Writing While Black, which includes academic achievement throughout each respective grade level and success on grade-promotion as well as college-entrance exams. Even though there are a larger number of students who are at risk, more mentors are also available. If the community takes a proactive approach, the pool of potential mentors will be great. It can include college students, professional school students, retired teachers, college professors, and anyone with writing skills greater than the student who is Writing While Black.

Once in college, where there are disciplines, such as the sciences, that may not have many Black or other professors available for a mentoring relationship, students can seek mentors outside their academic programs and/or institutions. In the case of graduate or professional academic study, it may be necessary to have mentors who are more closely associated with a student's career aspirations. In either instance, with the internet and electronic communication so readily available, this strategy is



workable. It would only require diligence in setting up a structure and arranging access.

If a law student doesn't make it on to the law review at their respective school, mentoring can provide the experience associated with law review membership. Besides the obvious benefits of being labeled as a student ranked high in the law class, law review's real benefit is the extended or enhanced legal education it provides to its members. Finding a writing mentor can provide the supportive, fostering environment necessary for the growth of an aspiring Black scholar. This type of mentoring relationship can also provide a type of law review experience where it otherwise might be unavailable to a Black law student.

A student who finds a mentor who is well-published can gain the same advantages of being on law review. A mentor who is well-written can provide opportunities for the student to display and hone his or her writing skills. While taking advantage of these writing opportunities, the student can be taught the ins and outs of writing and publishing. Ultimately, a successful mentor/mentee relationship that focuses on improving the student's writing will provide that student with an invaluable legal education.

Remember, the real benefit of membership on law review is not just to be noted as such, but it is the presumed intensive training in legal writing that future employers find impressive. A student who does not gain membership on law review, but finds a good mentor to hone his or her legal research and writing skills, can market his or her skills alongside peers who are members of the law review.

While there may be eager Black law school students who are quite interested in taking their law school education to a higher level, there may be a lack of available academic scholars to assist. Due to the cycle of possibilities that surrounds the Writing-While-Black phenomenon, there is a lack of potential mentors. Unfortunately, their scholastic peers often hold Black writers suspect, regardless of their writing abilities. This suspicion of Black talent has resulted in too few accomplished Black writers to serve as mentors for aspiring writers. This suspicion has also resulted in a disparate number of Black professors who are hired and subsequently retained because of a perceived lack of scholarship.

This perceived lack of scholarship is likely not the result of the particular law professor not attempting to write articles to be published, but of their submitted work not being considered scholarly writing and worthy of publication by entities deemed the flagship sources of legal publications and discussion. However,

one must ask what makes a work scholarly: is it the substance or the title of the publication that showcases the substance? This writer submits that it is the substance that makes or breaks the work. Therefore, law professors, as well as college professors, who face the same general type of struggles in the world of academia, should seek alternative publishing sources for their work. While the staples of legal scholarship remain pillars of our community, there are other sources of publishing that are sources of legal discussion, such as blogs or specialty magazines. In today's world driven by technology and entertainment, one cannot totally discount the large amount of online publishing avenues available.

Nevertheless, even if there are Black or other well-published professors available to mentor, these professors may in fact be unavailable to serve as mentors for aspiring student-writers due to a demanding workload or fear of professional ostracizing. Minority professors especially, unlike their White colleagues, may find themselves already overloaded with expectations of service, teaching, and their own issues of Writing While Black imposed by their respective institutions. Moreover, Black law professors at White schools who seek out and welcome Black law students as mentees may then be singled out as only helping Black students and ostracized by their fellow faculty members.

The possibility of a professor being ostracized by fellow faculty is a serious matter, especially in tenure determinations. Whether a professor is promoted or tenured may depend to a great extent on whether other professors see that professor as collegial or friendly or similar to them. Black professors who call attention to their connection to a community of Black student scholars may do so at their own career risk. Black professors in this predicament, Writing While Black and Mentoring While Black, should similarly seek out their own mentors to aide them through their development.

Another recommendation is the intentional construction of systems comparable to the systems that have operated historically and continuously for White advancement. This can include the establishment of appropriate law and other academic journals to provide an outlet for the scholarly endeavors of those who are Writing While Black. Even if these journals are regarded as subpar, they still provide a vehicle for Black students and faculty to display, advance, and hone their scholarly work.

Perhaps Black legal professionals could design programs to provide the additional training and legal educations that White students may receive formally and informally at predominantly White law schools. This suggestion would address part of the problem. It would not provide Black law students, necessarily,



with the prestige and other intangible benefits they may garner if they were an editor of the law review—benefits unfortunately predominantly relegated to those Writing While White, not those Writing While Black.

Always present to forge positive change in the Black community has been the Black church. Historically, the Black church is known for its integral involvement in the education of Black people. Even during and after slavery, Black people gathered at worship sites to learn to read and write, sometimes surreptitiously. Black churches have had a tradition of encouraging reading in church and the development of its people. Therefore, it is not a farfetched idea to call up on the Black church in these troubling times. The church can provide writing programs for students of all ages and interests. It is common today for churches to have after school programs and vacation bible schools. Addressing Writing While Black can be incorporated in these religious endeavors, just as it was when the slaves learned and prayed in secret.

Other non-legal remedies involve legislative actions. Just as legislative measures have been introduced to address the Driving-While-Black issue, legislative measures can be taken to address the Writing-While-Black issue. Such acts would require academic institutions to provide a collection of data regarding how race plays into decisions of awarding of tenure, publishing, and overall advancement of Black and other minority students and professors that are greatly predicated on their academic writings. Perhaps schools could take the initiative to collect their own data without waiting on legislative action to enforce such measures. This data could then be used to revamp or restructure current enforcement or support of racially motivated methods by academic institutions towards Black writers.

Most law schools claim today to be racially neutral. Most law reviews claim to not keep race identifying records of applicants and, therefore, do not have any statistical information about minorities that apply and are denied acceptance to the review. Perhaps one remedy could include law reviews having to keep records of their applicants. Numbers can paint a picture, a picture that many may not want to see. However, the picture may enlighten those concerned about the realities of educational disparity and its effect.

Let us revisit the correlation discussion in Part IV to show how statistics could be used in remedying the educational disparities. Some state troopers were mandated to keep records of all their

traffic stops in order to shed light on the racial disparities of the motorists who were stopped.¹⁰⁸ From these records, it was determined that Black motorists, who comprised only 17% of motorists who were violators, comprised more than 70% of the people stopped by the police.¹⁰⁹

These statistics paint a somber picture because they suggest that racial profiling can lead to Blacks who are acting lawfully being subjected to greater scrutiny and that police may be instructed to be on the lookout for offenders “who are predominantly black males and black females.”¹¹⁰ Just as this example evidences the singling out of minority motorists and how harmful the results of this can be, we know all too well the harmful effects of singling out minority writers. Despite the evidence presented, Courts today dismiss subjective police racial bias as irrelevant and ignore racial impact as a factor in analyzing the reasonableness of police conduct.¹¹¹ Until the legal and/or educational system begins to see this monumental part that race plays in education, progress will not be made.

In her look at *Driving While Black*, Russell points out that this label can have wide-ranging—even deadly consequences.¹¹² Similarly, being a Black writer in the world of academics sometimes has wide-ranging, even deadly consequences. Writing *While Black* can mean the death of a student’s aspirations or a professor’s career. The point of this paper, however, is not to signal the death of aspirations, but to breathe new life into them.

The necessity of these recommendations is troubling. In the year 2010, and with a Black President of the United States of America, it is unsettling that any of these recommendations are even necessary. They are necessary, however, because issues of racism in this country have not yet been settled. Specifically, the issue of *Writing While Black* is evident in the performance of Black students in academic institutions ranging from kindergarten to professional school.

CONCLUSION

This paper came as a result of a discussion with my mentor Professor Angela Mae Kupenda about concerns I had about my ability to write as a law student. Although before law school, I was considered by others to be a pretty proficient writer—I am a

¹⁰⁸ Maclin, *supra* note 93, at 345-46.

¹⁰⁹ *Id.* at 350.

¹¹⁰ *Id.* at 349.

¹¹¹ *Id.* at 338-40.

¹¹² *See generally* Russell, *supra* note 92, at 720.



songwriter, poet, and public speaker—and I came to agree with that conclusion. I entered the conversation with Professor Kupenda with an attitude that my writing ability apparently was not up to par when it came to legal writing and that I just could not write. I left the conversation with an assignment to explore Writing While Black.

Although this paper tends to deal with legal or general academic scholarship writing more than legal document writing, Black students and professors who pursue either kind of writing share a common experience—White institutions and White academic decision-makers treating Black writers' works as being subpar. My attempt is to highlight racist motivations for stereotypical assumptions of the incompetence of the Black scholar writer today, as well as, admit that there is a level of ineptness that affects Black writers and its source has deep roots in this country's history. This ineptness is a result of systematic racism that has permeated our legal and educational infrastructures. So it still all comes back to racism.

All of this analysis is with the assumption that the Western-style of writing is the normal, accepted, and indeed correct way of writing in this country. This belief could lend itself to extended discussion here, but that sole point is not the focus of this paper. The focus of this paper is to take a look at the plight of Black students and professors alike who face the challenge of having their African-American style of writing accepted by institutions that employ the Western-style philosophy of writing with no allowances for any other writing style. The disadvantages of Writing While Black has led to an academic crisis much like the economic crisis of Earning While Black or the racial profiling crisis of Driving While Black. The suggestions given here for rectification range from fairly doable to probably impossible. Either of those two extremes still share one commonality—a chance that the harsh consequences of Writing While Black in this country will fade to black.