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Honoring Lutie A. Lytle and John Mercer Langston with our Words

Carliss Chatman*

The recent attacks on critical race theory make one fact very clear: the lack of Black voices in public discourse creates distortion and exploitation.¹ This inaugural Black Scholars Book, the first of its kind published annually,² is not about defining or justifying critical race theory—as some scholars in this book would not deem themselves to be critical race theorists. Instead, it is about righting the wrongs that enable the weaponization of scholarship by and about Black people. The goal of the *W&L Law Review*³ is to hold space for scholarship of

* Associate Professor, W&L School of Law; B.A., Duke University; J.D., University of Texas at Austin School of Law. I would like to thank Corey Hauser, past Editor in Chief of the *W&L Law Review*, and Brandon Hasbrouck, Assistant Professor and a past Editor in Chief of the *W&L Law Review*, for working to make this book possible. I would also like to thank Cindy Moon, the inaugural Managing Inclusion Editor, for her efforts to pull this book together.

1. Critical Race Theory is an academic and legal framework that suggests that the law plays a role in maintaining the significance of race and sustaining social racial hierarchies. See KHIARA BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 7–8 (2019). Racism is more than just a reflection of personal bias. It is systemic, embedded in laws, policies, and institutions. Critical Race Theory was founded by legal scholars and is primarily taught at the law school and graduate school levels. As a result, these attacks, which express concern about the realities of America’s racial history being taught to students in elementary, middle, and high schools, are a coded way to object to any mention of race in the classroom.

2. See, e.g., Angela Onwuachi-Willig, *The Promise of Lutie A. Lytle: An Introduction to the Tenth Annual Commemorative Lutie A. Lytle Black Women Law Faculty Workshop* *Iowa Law Review Issue*, 102 *IOWA L. REV.* 1843 (2017).

3. “It is time for Washington and Lee University to drop *both* George Washington and Robert E. Lee from the University name.” Brandon Hasbrouck, *White Saviors*, 77 *WASH. & LEE. REV. ONLINE* 47, 47 (2020). Recognizing the jarring contrast between this name and *Law Review*’s desire

historically marginalized and silenced voices. This inaugural book contains works from the members of the Lutie A. Lytle Black Women Law Faculty Workshop and Writing Retreat (Lutie) and the John Mercer Langston Black Male Law Faculty Writing Workshop (Langston). These organizations' missions and goals are similar to the goals of this book. Lutie and Langston have created a pipeline of Black law professors and Black law school leadership while providing support for Black law professors at all stages of their careers through the mentorship of prospective and junior law faculty and by providing a safe space for scholars to discuss ideas, workshop articles, and receive the support that is often lacking for scholars of color on law school faculties.⁴

Lutie and Langston were trailblazers in the legal profession, and the organizations named in their honor seek to honor their legacies. Lutie A. Lytle was one of the first Black women in the legal profession and became the first woman to teach at a chartered law school when she joined the faculty of Central Tennessee College of Law in 1898.⁵ As Dean Angela Onwuachi-Willig, one of the founders of Lutie, explains, "Lutie Lytle went to law school because she wanted her voice and her people to be heard, and, more importantly, she knew that those voices needed to be heard."⁶ While Lutie Lytle provides a strong legacy, her early presence did not make the legal profession or legal academia more accommodating for Black women. In recent years, Black women have assumed the leadership of 14 percent of law schools, though few tenured law professors in the United States are Black.⁷

to amplify Black voices, the Volume 79 Upper Board uses the commonly known acronym "W&L" above the line.

4. See Carliss Chatman & Najarian Peters, *The Soft-Shoe and Shuffle of Law School Hiring Committee Practices*, 69 UCLA L. REV. DISC. 2 (2021); Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441 (2015).

5. Taja-Nia Y. Henderson, *I Shall Talk to My Own People: The Intersectional Life and Times of Lutie A. Lytle*, 102 IOWA L. REV. 1983 (2017); *Pioneering Facts About Black Women Lawyers and Law Teachers*, in REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS 277 (J. Clay Smith, Jr. ed., 1998); see J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944, at 57-58 (1993).

6. Onwuachi-Willig, *supra* note 2, at 1845.

7. MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA (2019); Stephanie Francis Ward, *How Many Tenured Law*

John Mercer Langston established the Howard University School of Law in 1868 and served as its founding dean.⁸ Howard Law was the first Black law school in the country.⁹ His contributions do not start or end with legal academia. During 1870, Langston was charged with drafting the civil rights bill that Congress enacted as the Civil Rights Act of 1875.¹⁰ He served as the U.S. Minister to Haiti and the chargé d'affaires to the Dominican Republic.¹¹ After his diplomatic service, he was the first president of the Virginia Normal and Collegiate Institute, now Virginia State University.¹² He was also the first Black person elected to Congress from Virginia and would be the last elected for a century.¹³

What Lutie and Langston have in common is that their stories are outstanding and special, not only in the times in which they lived, but also in modern times.¹⁴ We do not count what we do not care about, and finding the exact number of Black law professors, tenured Black law professors, and Black law professors in leadership positions is a task accomplished by individual interests—not by the organizations with the ability to provide accurate and empirically sound accounts. Similarly uncounted is the number of Black students on law reviews, or Black students who have held leadership positions on law reviews. We do have counts of the number of Black law students and Black lawyers. Only 5 percent of lawyers and 8 percent of law students in the United States are Black, while the Black population of the United States is 13.4 percent.¹⁵ These numbers are totals and do not tell us how many African-Americans have leadership positions in the profession, how many Black law

Professors Are Black? Public Data Does Not Say, ABA (Oct. 28, 2020, 3:25 PM), <https://perma.cc/S6EC-AZ5Q>.

8. *Langston, John Mercer*, HISTORY, ART & ARCHIVES U.S. HOUSE OF REPRESENTATIVES [hereinafter *John Langston*], <https://perma.cc/JU3L-SVAL>.

9. *See Our History*, HOW. U. SCH. OF L., <https://perma.cc/R3CM-5XFY>.

10. *See John Langston*, *supra* note 8.

11. *Id.*

12. *Id.*

13. *Id.*

14. *70 Years After 'Sweatt,' How Much Progress Have African American Law Students Made?*, ABA (Feb. 16, 2020) [hereinafter ABA Statistics], <https://perma.cc/ZGA5-XEL2>.

15. *See* ABA Statistics, *supra* note 14.

students obtain judicial clerkships and other coveted jobs, or what life is like for African-American students on campuses where they are underrepresented amongst their peers and by their instructors. While the statistics are overall the same or better than a decade ago, African-Americans remain underrepresented, and we have no real insight into the quality of life for the larger quantity of students.

It is in this landscape that Dean Angela Onwuachi-Willig created, organized, and hosted the first Lutie Lytle Workshop at the University of Iowa College of Law in July 2007,¹⁶ and Terry Smith, Frank Rudy Cooper, D. Aaron Lacy, and Aretó Imoukhuaede organized and hosted the first Langston Workshop in 2009 at Southern Methodist University's Dedman School of Law.¹⁷ There are unwritten rules and unspoken barriers to entry in the legal academy, as there are with all positions held in high regard. The rules for Black faculty, while unfair and unwarranted, are more elusive and demanding. Lutie and Langston have not only shed light on the realities of hiring and advancement in legal academia, but through

16. Lutie was founded after a small number of Black women faculty, organized by Professor Imani Perry, collaborated at the Chicago home of Professor Michele Goodwin. The first Workshop, not yet named after Lutie A. Lytle, was entitled the "Summer Writing Workshop for Black Female Faculty." Onwuachi-Willig, *supra* note 2, at 1845. Lutie has grown from just twenty-five women in the first summer to over one hundred women at the most recent Workshops. Dean Angela Onwuachi-Willig will host the fifteenth Lutie at Boston University in the summer of 2022.

17. Terry Smith and DePaul Law School hosted the second Langston Workshop. Frank Rudy Cooper and Elbert Robertson hosted the third Langston at Suffolk University Law School. Catherine Smith and Denver University hosted the fourth Langston, which is memorialized here: <https://perma.cc/4XMP-82D5>. The University of Nevada Las Vegas hosted the sixth Langston. Current University of Washington Dean Mario Barnes and current University of California, Berkeley Professor Jonathan Glater and the University of California, Irvine hosted the seventh Langston, which is memorialized here: <https://perma.cc/378Z-XVD8>. Kevin Woodson and Associate Dean Bret Asbury hosted the eighth Langston at Drexel University Kline School of Law, which is memorialized here: <https://perma.cc/CQ2G-DQYD>. Vice Chancellor Devon Carbado and Professor Russell Robinson hosted the ninth Langston at University of California, Los Angeles. Darin Johnson, Justin Hansford, and Howard University, where Langston was the first Law Dean, hosted the tenth Langston. Professor Russell Robinson has hosted the eleventh and twelfth Langstons virtually at University of California, Berkeley. Fred Smith and Emory University will host the thirteenth Langston in Atlanta in the summer of 2022.

exposure they have also changed the rules of the game. Because of the efforts of the pioneers of Lutie and Langston, scholars of my generation have more freedom, and, most importantly, can see ourselves in the dean suite, provost's office, and president's office—an experience that no Black scholars have had before.

The reach of Lutie and Langston is exponential and limitless. I can say that without the mentoring and support I receive in Lutie, and without the support that my colleague Brandon Hasbrouck receives in Langston, we would not have had the courage or motivation to work with our students on the *W&L Law Review* to establish this annual volume, nor to encourage them to dedicate time and space to diversity, equity, and inclusion on the editorial board through the establishment of a position dedicated to this task. I am immensely proud of the work that our *Law Review* has done in a few short years to diversify the membership and the articles that appear in the journal. Cindy Moon serves as the inaugural Managing Inclusion Editor, primarily responsible for the production of the Black Scholars Book. Thanks, in part, to an initiative to provide rising third-year students with the opportunity to join *Law Review*, there are currently two Black Staffwriters and one Black Lead Online Editor on the journal, including Charisma Hunter, the first Black woman on *Law Review*.¹⁸

This book advances the *Law Review*'s mission of publishing exceptional scholarship that contributes to academic discussions across all areas of law, while giving priority to scholars traditionally foreclosed from legal academia. In addition to this foreword, it includes the following articles:

Tammi Etheridge's *What's the Beef? The FDA, USDA, and Cell-Cultured Meat* is the lead article of this volume and a groundbreaking piece on the cellular agriculture industry with a focus on a technological advancement that many are unaware of—cell-cultured meat. Although not approved for sale in the United States, the federal government has decided that two agencies, the FDA and USDA, will share regulation of the industry. Professor Etheridge, a leading administrative law scholar and Assistant Professor at Elon University School of Law, claims that the FDA should not

18. The current and former Black members of the *W&L Law Review* include Leslie Devan Smith, Jr., Professor Brandon Hasbrouck, and Kobie Crosley, Charisma Hunter, and Russel Wade.

have ceded its authority to the USDA, due to the latter agency's mixed mandate problem.

Whiteness as Contract, the next article in this volume, is written by the most junior scholar, Marissa Jackson Sow. An Assistant Professor at St. John's University School of Law, Professor Jackson Sow sheds light on the human and civil rights abuses suffered by Black and Indigenous people that are camouflaged as private commercial matters. These less visible abuses are outside of the reach of the state, and, therefore, also outside of the scope of antidiscrimination law. Professor Jackson Sow posits that this leaves Black and Indigenous people with rights, but no remedies, *as they are forced to navigate a degraded existence suspended somewhere between citizen and foreigner, and more importantly, between life and death.*

John Valery White is the Ralph Denton Professor of Law at the University of Nevada, Las Vegas (UNLV) William S. Boyd School of Law, and previously served as Dean of the Boyd School of Law, Executive Vice President and Provost of UNLV, and Acting Chancellor of the Nevada System of Higher Education. His article, *Civil Rights Law Equity: An Introduction to a Theory of What Civil Rights Has Become* is the next article in this volume. Professor White contends that the four-decade-long project of restricting civil rights litigation has shaped civil rights jurisprudence into a contemporary version of traditional equity. Because equity is available in limited circumstances to address extraordinary violations of rights, civil rights litigation is made a limited tool—inappropriate for driving social change, less than reliable for litigants involved in everyday disputes, and mostly incapable of articulating and developing rights through precedent. Under an equity analysis, what emerges is a vision of the courts as protectors of the status quo in social and political relationships.

The final article in this volume is Najarian Peters's *The Golem in the Machine: FERPA, Dirty Data, and Digital Distortion in the Education Record*. Professor Peters, a leading privacy scholar and Associate Professor at the University of Kansas School of Law, explores the "dirty data" in K-12 educational records that creates and catalyzes catastrophic life events. In addition to explaining the harm caused by these failures to comply with the data integrity requirements embedded in the Family Educational Rights and Privacy Act (FERPA), Professor Peters's work

introduces a two-step process of substantive content and input validation and reasonable inference review.

It is particularly important in this time to make this space available.¹⁹ The work of Black scholars, as exhibited by the works in this book alone, is as wide-ranging and diverse as Black people. These scholars and their pieces exhibit the high quality, deliberate, and innovative thinking that is the foundation of exceptional scholarship and among the best that academia has to offer. Black scholars and their scholarship accomplish the goal Lutie Lytle expressed so many years ago—it gives a voice to the people.²⁰ Through our increasing numbers in the profession and the increasing number of articles by Black scholars in print, we can ensure that the world can finally hear all the voices on a wide range of issues.

I am fortunate to be a beneficiary of what Lutie and Langston provide for junior scholars. As a Lutie attendee since the tenth anniversary gathering at the University of Iowa College of Law in 2016, and the inaugural chair of the New Lutie Committee, I am proud to be a part of what Lutie gives and what we receive as a part of the collective. At Lutie we often say, “we are Lutie,” and to fulfill that proclamation, the legacies of Lutie and Langston demand that we use our voices and provide the space for others to use their voices. This inaugural Black Scholars’ Book is just one step towards furthering this legacy. By simply increasing the number of publications and promoting the scholarship of Black scholars, we can begin to effectuate the change necessary to produce more Lutie Lytles and John Mercer Langstons.

19. For example, three professors at the University of Florida, Daniel Smith, Michael McDonald, and Sharon Austin, have sued the University to reverse the denial of their request to serve as expert witnesses testifying against Senate Bill 90, which places restrictions on voting rights. The professors asserted their First Amendment rights in response to the University’s claim that “outside activities that may pose a conflict of interest to the executive branch of the State of Florida create a conflict for the University of Florida.” On Friday, January 22, 2022, U.S. District Judge Mark Walker issued an injunction until further notice forbidding the University of Florida from enacting its conflict-of-interest policy. Preliminary Injunction, *Austin v. Univ. Fla., Bd. Trs.*, No. 1:21-cv-184-MW-GRJ (N.D. Fla. Jan. 21, 2022), <https://perma.cc/KA7U-UY7P> (PDF).

20. Onwuachi-Willig, *supra* note 2, at 1845.