BOOK REVIEW

Faith or Foolishness

*Dorothy A. Brown**

Emancipation: The Making of the Black Lawyer, 1844–1944. By J. Clay Smith, Jr.** Philadelphia: University of Pennsylvania Press, 1993. Pp. xix, 703, plus illustrations. $56.95.

I. INTRODUCTION

> Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary "peaks of progress," short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies.
>
> —Derrick Bell[1]

In a sense, J. Clay Smith's *Emancipation: The Making of the Black Lawyer, 1844–1944*[2] confirms Derrick Bell's thesis that racial injustice is permanent, or put differently, that racial equality is elusive. For Smith's book demonstrates that notwithstanding the "herculean efforts" of the early black lawyers, they never managed to fundamentally change the status of "black America"; their efforts, more often than not, translated into "temporary peaks of progress."

This is not to suggest, of course, that early civil rights litigation was insignificant, or that the efforts of the early black lawyers are not commendable. As Professor Smith's title suggests, the early black lawyers are

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1. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12 (1992).
2. The late Justice Thurgood Marshall wrote the foreword to this book (pp. xi–xii).

to be commended for fighting and not accepting their "proper places,"[3] as defined by the drafters of the Constitution. However, America is (and has always been) fundamentally racist, and this fact necessarily limited the extent to which these lawyers could have significantly transformed the social order.

Smith's book is more than a confirmation of Bell's thesis, however. It places in historical context the accomplishments of the early black lawyers and refutes the assumption "that blacks played no significant role in the evolution of legal education" (p. 33). Additionally, Smith demonstrates the nexus between the careers of individual black lawyers, the litigation in which they were involved, and the evolution of the civil rights movement.

The early black lawyers found themselves in a nation whose Declaration of Independence boldly proclaimed that "all men are created equal," yet excluded blacks, women, and non-property-holding white men from participating in or voting on its governing document—the United States Constitution.[4] That was the basis upon which "democracy" was established in America, and that is the system in which the early black lawyers found themselves fighting. Was it faith or foolishness for them to have believed in a nation's promise of equality when that nation, by a vote of a minority of the population,[5] enacted a Constitution designed to subjugate blacks?[6]

In Part II of this Review, I summarize the barriers that made it difficult for blacks to gain admission to law schools, to enter the legal profession, and to practice law. In the context of this summary, I discuss the extent to which Smith ignores the particular barriers faced by black women, and how his book marginalizes their contributions to the legal profession in general.

In Part III, I focus on the careers of some of the early black lawyers and highlight their successes. In this section, I discuss some of the early civil rights litigation to show the significant roles that black lawyers played in shaping American law. I argue that Smith's focus on black

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3. CARTER G. WOODSON, THE MIS-EDUCATION OF THE NEGRO xiii (1990). "When you control a man's thinking you do not have to worry about his actions . . . . He will find his 'proper place' and will stay in it." *Id.* Needless to say, not all blacks believed in fighting the system. Booker T. Washington, for example, said in September 1895 that "[t]he wisest among my race understand that the agitation of questions of social equality is the extremest [sic] folly." RICHARD KLUGER, SIMPLE JUSTICE 70 (1975).
4. *See* KLUGER, *supra* note 3, at 30. Those excluded and voteless were slaves, indentured servants, and women and men who did not own enough property to qualify as voters under various state regulations. *Id.* No more than 160,000 Americans, out of nearly 4 million, were connected with the process of drafting and ratifying the Constitution. *Id.*
5. *See id.*
6. By 1860, the last year that the census was taken before the Civil War, there were 4.5 million blacks in America. Of that number, 500,000 were free and 4 million were slaves (p. 10). The vast majority of blacks could not freely travel, own property, publicly assemble, own weapons, or receive an education. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 39–40 (1978). Moreover, pursuant to Article IV, Section 2 of the United States Constitution, slaves could not attain the status of being free by escaping their masters. KLUGER, *supra* note 3, at 45–46. After the Civil War, the majority of the southern States enacted "Black Codes," which regulated free blacks as the Slave Codes did during slavery. *Id.*

lawyers as "emancipators" overstates their accomplishments and minimalizes the fact that their ability to transform the social and economic conditions of blacks was circumscribed.

II. EXCLUSIONS: THE STORY OF THE EARLY BLACK LAWYERS

A. Barriers to Entry

One of the most difficult barriers blacks faced as they embarked upon a legal career was educational, and it operated on two levels. First, blacks were denied the right to an education.[7] Second, even when blacks had the requisite educational background, they were denied access to apprenticeships (clerkships with white male judges and lawyers) and law schools. Apprenticeships were particularly important to blacks during the entire nineteenth century because there were very few American law schools,[8] and fewer still that admitted blacks (p. 33). Whether or not blacks received apprenticeships turned less on their ability and more on the racial sensibilities of the individual lawyers and judges (p. 33).

Even for those blacks who were offered apprenticeships, there were financial issues with which to contend. Apprenticeships were not free. This meant that few blacks were able to acquire apprenticeships without the financial support of a white benefactor. However, such support was aberrational rather than normal (pp. 34–35).

With respect to law schools, racially exclusionary admissions policies were the norm.[9] It was not until 1868 that the first black person was admitted to law school (p. 33).[10] Moreover, gender-based exclusionary policies worked to exclude women from law schools. The first black woman to receive a law degree and the first black woman to be admitted to the bar was Charlotte E. Ray. Ray, the daughter of an abolitionist,[11] was accepted at Howard School of Law because the admissions committee did not realize that she was a woman; she applied for admission by submitting her name as "C.E. Ray" (pp. 175–76 n.136). She graduated from Howard in 1872 and was admitted to the bar of the District of Columbia (p. 55). She also became the fourth woman in the United States to graduate from law school (p. 55).[12]

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7. In the mid-19th century, it was illegal in most of the southern states to educate blacks, and very few blacks from the North were educated (p. 5). This latter fact is particularly alarming since after the Civil War, a person with a grade school education would have been sufficiently educated to enter the legal profession (p. 6).
8. In 1844, there were nine university-affiliated law schools in the United States (p. 33). In 1860, there were 21. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 21 (1983). By 1870, there was a total of 31 law schools. RICHARD ABEL, AMERICAN LAWYERS 277 (1989).
9. In 1850, for example, John Mercer Langston, who would later become the first black law professor (p. 43) and the first dean of Howard Law School (p. 42), was denied admission to two law schools because of his race (p. 34).
10. After 1878, law school admissions policies became increasingly important in determining the number of black attorneys, because the ABA required law school education as a prerequisite to taking the bar (p. 41).
11. Avis Marie Russell, *Black Women Attorneys in the Legal Profession*, 40 LA. BAR J. 463, 464 (1993).
12. The other three women are Ada Kepley (1870), Phoebe Couzins (1871), and Sara

In discussing the careers of Charlotte E. Ray and other black women lawyers, Smith does not explore the particular struggles they faced and does not address the extent to which predominantly black law schools discriminated on the basis of sex. By placing the accounts of black women lawyers at the end of some of his chapters, moreover, Smith marginalizes their contributions.[13] Although he makes passing references to their complaints, he presents at best an abbreviated discussion of the treatment of black women, oftentimes in footnotes, rather than in the text.[14] Given that there were only fifty-eight black women lawyers in 1941 and 1013 black male lawyers, Smith should have explored the sexism that was undoubtedly at the core of this disparity.[15]

Although the black women and men who were admitted to predominantly white law schools excelled (p. 39) and obtained graduate law degrees (p. 40), they continued to be the victims of racism on an institutional as well as on a personal level (p. 36). This reality was the impetus for the creation of predominantly black schools such as Howard,[16] which opened with a racially integrated faculty and student body in 1869 (p. 43).[17]

With the establishment of predominantly black law schools and inexpensive part-time law schools, neither of which discriminated on the basis

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Kilgore (1871) (p. 84 n.222). Despite her exceptional abilities, Charlotte E. Ray failed in her law practice in the District of Columbia because of racism and sexism (p. 141).

13. Smith does not articulate a reason for his cursory treatment of black women lawyers or for separating them from their male counterparts.
14. For example, there is only one sentence—in a footnote—about the ridicule that women students faced by their professors in law school (p. 55). In addition, Smith notes, without discussing, the fact that Ollie May Cooper, unlike her male counterparts, taught at Howard Law School "without pay or recognition" (p. 86).
15. Books about black lawyers and about women have generally devoted little space to the unique experiences and achievements of black women. *See, e.g.*, ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA (1965); CYNTHIA EPSTEIN, WOMEN IN LAW (1993) (failing to mention that the first woman law professor was an African American woman); FITZHUGH LEE STYLES, NEGROES AND THE LAW (1937) (including 24 biographies of black lawyers, none of which are biographies of women).
16. In addition to Howard School of Law, 18 black law schools were founded between 1870 and 1944: Shaw University (Miss.), Central Tennessee College, Lincoln University School of Law, Wilberforce University, Allen University, Shaw University (N.C.), Harper Law School, Morris Brown College, Simmons University (later renamed Central Law School), Straight University College of Law, Lane College of Law, John Mercer Langston School of Law, Terrell Law School, Virginia Union University, Kent College of Law, Keyston College of Technology School of Law, North Carolina Central School of Law, and Lincoln University (pp. 56–63). Of the 19 black law schools, two survived and are in operation today: Howard University School of Law and North Carolina Central University School of Law. In addition, between 1935 and 1950, two more predominantly black law schools were founded that are currently in operation: Texas Southern University Law School and Southern University Law School. GERALDINE SEGAL, BLACKS IN THE LAW 2 (1983) (citing Kellis Parker & Betty Stebman, *Legal Education for Blacks*, ANNALS AM. ACAD. POL. & SOC. SCI., Vol. 407, May 1973, at 146).
17. In 1898, Howard conferred the first American law degree upon a person of Asian descent, Tamatsu Fuwa of Kurami, Japan (p. 56). Between 1903 and 1927, at least seven persons of Hispanic descent graduated from Howard Law School. And between 1882 and 1904, at least seven white women received law degrees from Howard (p. 56).

of race,[18] the number of blacks entering the legal profession increased (pp. 615–37).[19] This increase was short-lived, however, for reasons having mostly to do with the American Bar Association (ABA) (pp. 615–37).[20] Between 1920 and 1960, the ABA promulgated rules that mandated attendance at ABA-approved law schools (p. 8).[21] During the same period, the ABA made bar examinations more difficult to pass (p. 6).[22] Additionally, the ABA began closing down many of the inexpensive part-time schools, arguing that they did not meet the ABA's accreditation requirements (p. 42). Black lawyers, precluded from becoming ABA members, were powerless to challenge these policies (p. 42).

Largely because of the effort and vision of Charles Hamilton Houston, Howard University School of Law was able to meet the increased accreditation standards (p. 49). This allowed Howard to become the source of the largest number of black graduates between 1871 and 1944 (p. 64).[23]

B. Barriers to Practice

Notwithstanding the aforementioned barriers, blacks did graduate from law schools, pass the bar and become lawyers. For these lawyers

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18. ABEL, *supra* note 8, at 6.
19. Between 1871 and 1944, Howard University Law School graduated more than 1000 students (p. 54).

    The table set forth below, which was prepared from Appendix 2 (pp. 615–37), provides an overview of the estimated numbers of lawyers in the United States beginning in 1890, the first year the census categorized the legal profession by race (p. 623). In 1870, the census began categorizing the legal profession by gender (p. 618).

LAWYERS

	Black		*White*		
YEAR	Male	Female	Male	Female	*Total*
1890	431	0	88,982	208	90,061
1900	718	10	112,140	N/A	112,949
1910	777	2	106,479	556	107,888
1920	946	4	119,767	1,734	122,519
1930	1,223	24	155,431	3,360	160,605
1940	1,013	39	172,329	4,146	177,643

20. In 1878, the ABA established the Committee on Legal Education and Admission to the Bar, to reform legal education (pp 8–9).
21. Entering students were required to have at least two years of college and two years of law school to qualify to take the bar (p. 42).
22. Additionally, there was evidence to suggest that the bar examinations of blacks were marked so that blacks would fail (p. 141).
23. According to Houston, Howard University School of Law was responsible for making its lawyers social engineers (p. 50). Houston saw this as the proper role of black law schools:

    > If a Negro law school is to make its full contribution to the social system it must train its students and send them [into situations to apply pressure]. This does not necessarily mean a different course of instruction from that in other standard law schools. But it does mean a difference in emphasis with more concentration on the subjects having direct application to the economics, political and social problems of the Negro. (P. 50).

    (citing Houston, *Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49, 51 (1935)).

there were new challenges. First, black lawyers had to contend with the discriminatory practices of local bar associations. Before the ABA came into being, local regulations determined who could practice law (p. 7).[24] These regulations were invoked discriminatorily against black lawyers. For example, in 1920, the Evansville, Indiana Bar Association filed a court action to block a black lawyer from becoming a member of its bar (p. 389). The claim alleged that the prospective black attorney had an "unsavory character" (p. 389). Although the claim was ultimately rejected by an Indiana court (p. 390), the example demonstrates the extent to which local bar associations would invoke vague regulatory language to preclude blacks from practicing law.

The impact of these regulations was significant. A lawyer could be licensed to practice in one county, but not the adjoining one (p. 8). This sometimes meant that blacks could not practice before the supreme court of a particular state, if the court was located in the county whose regulation excluded blacks from the bar (p. 8).

Moreover, in 1900, the Association of American Law Schools (AALS), founded as an auxiliary organization of the ABA, was moving to increase entrance requirements to the bar in various jurisdictions in order to make them more uniform (pp. 6–8). Black law schools could not effectively challenge these policies because they were prohibited from joining the AALS (p. 41). This problem was compounded by the fact that it was not until 1943 that blacks were granted membership in the ABA (p. 545).[25]

Second, blacks had to contend with courtroom bigotry. Black attorneys were commonly referred to as "niggers" and "darkies" (p. 100). Moreover, they were considered incompetent by judges, were ignored in the courtroom (p. 200), and were oftentimes required to argue their cases from the balcony instead of the first floor where the prosecutor and jury were located (p. 297). In short, legal proceedings involving black lawyers were often perfunctory and their ability to represent their clients was necessarily circumscribed. Because of this, many black litigants sought white, rather than black legal representation (pp. 243, 341).[26]

Third, there was the threat of physical violence. Black lawyers were often denied entrance to courtrooms and physically assaulted once inside (p. 275). It was also commonplace for black attorneys to be assaulted outside the courtroom.[27] Black lawyers were beaten up, shot at, and in many instances, killed for doing nothing more than advocating civil rights for black people (p. 225). So pervasive was this violence that many lawyers left the profession to become clerks, barbers, and government workers (p. 5).

Moreover, blacks who spoke out against the judicial system were not admitted to the bar, while blacks "in the good graces of white folks" were

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24. In many jurisdictions, a person could be admitted to the bar upon merely showing "good moral character [and] being a voter" (p. 7). However, the American Bar Association was founded in 1878, and it pushed the States for more centralized and uniform admissions standards (p.8).
25. However, the ABA admitted four black members because it was unaware of their race at the time of their application (pp. 543–44).
26. In 1910, the National Baptist Convention was strongly criticized by the black press for hiring a white lawyer instead of a black lawyer (p. 341).
27. This was particularly so for lawyers who represented alleged rape offenders (p. 206).

admitted to the bar (p. 9). For those who were admitted, there was the constant threat of disbarment (p. 275).[28] It was particularly "dangerous" for blacks to openly associate with the National Association for the Advancement of Colored People (NAACP) (p. 274), or other civil rights organizations (p. 275).[29]

Finally, black lawyers assumed the lead in civil rights litigation without significant financial support from the black community (p. 15). Indeed, the black community often expected black lawyers to finance the litigation themselves (p. 41), which they sometimes did (p. 16). For the most part, however, black lawyers were dependent on the funds they raised from door-to-door solicitation to finance the early civil rights litigation (p. 15). Unfortunately, this method of fund-raising was largely unreliable (p. 41).

Notwithstanding these self-help methods, the successes of the early black lawyers were constrained by two broader issues—namely, the lack of economic resources available to the black community and the fear of economic reprisals against those few blacks with economic resources for being associated with civil rights litigation. Blacks feared economic reprisals not only from their white employers but from white mortgage holders and credit-extending store owners as well (p. 15). The end result of this was that the black civil rights lawyers were forced to seek financial support from sympathetic out-of-state sources (p. 16).

III. SUCCESSES AND ACHIEVEMENTS DESPITE THE BARRIERS

A. Some Individual Success Stories

Notwithstanding the multiple barriers faced by black lawyers—most notably, the exclusionary policies of the apprenticeship system and local bars—they did not give up. Rather, they began to develop a mentoring system to assist other blacks in gaining entry into the legal profession.[30] Additionally, black lawyers began to file lawsuits and speak out publicly for civil rights. As a result, they were able to persuade black people to trust and hire them (p. 22) and contribute financially to civil rights litigation (p. 15).

With this support, the early black lawyers helped to create the Niagara Movement, as well as its successor organization, the National Association for the Advancement of Colored People (NAACP) in 1905 (p. 16). In addition to these successes, Smith documents the successful careers of numerous early black lawyers, who paved the way for the late Justice Thurgood Marshall and others. In describing their careers, Smith overstates the extent to which their individual "successes" impacted the black

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28. For example, Arthur Madison, an Alabama lawyer, was disbarred on July 24, 1945 for trying to help register blacks to vote (p. 275). He was forced to relocate to New York City (p. 275).
29. For example, due to his public support of the NAACP, Nathan Young, a Yale Law graduate who was admitted to practice law in Birmingham, Alabama in 1918, was forced to relocate to St. Louis, Missouri (p. 274).
30. Macon Bolling Allen's law firm trained and hired many black lawyers (p. 244); Robert Morris, Sr. sponsored his son, Robert Morris, Jr., who was admitted to the Massachusetts bar on September 8, 1874 (p. 99).

community. The stories he describes convey the limitations of individual resistance and self-help methods, as well as the "temporary peaks of progress" the lawyers managed to achieve. Moreover, the black community's limited economic resources and its lack of meaningful input into policy decisions limited the extent to which the lawyers were successful at the practice of law. In this section, I will elaborate on these points in the context of discussing the careers of a few of the lawyers Smith presents in *Emancipation*.

When Macon Bolling Allen was admitted to the Maine bar in 1844, he became the first black lawyer to be admitted to the U.S. bar (p. 8).[31] Faced with the difficulties of building a solid client base, Allen moved to Boston (p. 95), and then to South Carolina in the late 1860s (p. 215). It was there that he founded the first black law firm in 1868 with William J. Whipper and Robert Brown Elliot (p. 244).[32] Their law firm was very successful due to the "legal talents and political skills of its three principals" (p. 244).

Allen was elected as a criminal court judge in Charleston in 1874 and served in that capacity until 1875. The following year he was elected to Charleston's probate court, where he served as judge until 1878 (p. 215).[33]

Another successful black lawyer is Daisy Perkins, who was the only black woman who entered the legal profession through an apprenticeship. After completing an apprenticeship, Perkins became the first black woman admitted to the Ohio bar in 1919 (p. 417). She worked at the Columbus prosecutor's office and won a significant number of criminal convictions.[34] Perkins also had a successful part-time private practice representing both black and white clients (pp. 417–418, 422).[35] In 1924, she became the first black woman to run for elective office in the Ohio General Assembly. In spite of these successes, or perhaps because of them, she was brought before the Ohio Grievance Committee on a charge of suborning perjury (p. 418). The charge was subsequently dropped (p. 418).

Another successful lawyer was Lutie Lytle. America's fourth black woman lawyer, she became the first female law professor in 1897 (p. 58). Lytle was also the first black woman licensed to practice law in the South (p. 501),[36] and the first black female member of a national bar group (p. 344). She was twenty-three years old, when on September 8, 1897, she was admitted to the Criminal Court in Memphis, Tennessee (p. 344). Uncertain about her ability as a woman to earn a living in private practice, she accepted an offer to teach at the Central Tennessee Law School (pp.

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31. Allen was sponsored for admission to the bar by General Samuel Fessenden, a white liberal in 1844 (p. 93). One year later, Allen was admitted to the Suffolk County Bar on May 3, 1845, and became the first black lawyer admitted to the Massachusetts bar (p. 94). He was also the first black lawyer appointed to a judicial post as a Justice of the Peace, an appointment that was renewed in 1854 (p. 96).
32. Whipper and Elliot were both admitted to the South Carolina bar on September 23, 1868 (p. 244).
33. The white press persuaded the state legislature to eliminate this court (p. 215).
34. The vast majority of the early black lawyers were criminal lawyers because it was believed that "the police system was primarily for Negroes" (p. 12).
35. For a discussion of whites hiring black criminal lawyers, see KENNETH L. KUSMER, A GHETTO TAKES SHAPE: BLACK CLEVELAND, 1870–1930 (1976).
36. In 1897, Lytle was admitted to the Kansas bar (p. 501) and to the Tennessee bar (p. 344).

501–02), where she taught Domestic Relations, Evidence, and Criminal Procedure (p. 344).[37]

B. Early Civil Rights Litigation

More than one hundred years before *Brown v. Board of Education*,[38] the battle for equal educational opportunity began with Robert Morris, Sr., America's second black lawyer.[39] On February 2, 1847, Morris was admitted to the Superior Civil Court of Suffolk County, Massachusetts and began to practice law (p. 96).

In 1847, in what may have been the nation's first lawsuit filed by a black lawyer on behalf of a white client, a white Boston jury ruled in favor of Morris' client (pp. 96, 112). A few months later, Morris was hired by a group of citizens led by Benjamin F. Roberts to file a lawsuit to desegregate the Boston public school system (p. 97). The local court ruled in favor of the school board and required Morris to pay court costs.[40] Morris appealed to the highest court in Massachusetts with the help of Charles Sumner, a white abolitionist lawyer.[41] Affirming the lower court's decision, the appellate court held that it was reasonable and "practical" to require black Boston school children to travel further distances to attend "colored schools" (p. 97).[42]

In addition to the desegregation case, Morris was retained in 1851 to represent a black waiter accused of violating the Fugitive Slave Act of 1850 (p. 98). When the court announced its decision that the waiter be returned to his owner, Morris allegedly opened the courtroom door and signalled to the crowd the court's decision. The crowd rushed into the courthouse, surrounded the waiter and led him to freedom (p. 98).

Morris and several other black Bostonians were convicted for treason and conspiracy to violate federal law (p. 98). Their convictions were reversed on appeal on technical grounds and Morris was acquitted (p. 99). He continued to urge blacks to resist, by force if necessary, the Fugitive Slave Act of 1850, and subsequently became one of the busiest criminal lawyers in Boston representing blacks and Irish immigrants alike (p. 99).[43]

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37. The second black woman law professor was Ollie May Cooper, a 1921 Howard Law School graduate (p. 55). The third black woman to teach law in the United States was Helen Elsie Austin, a 1939 graduate of the University of Cincinnati Law School (p. 61). And the first black professor hired by a white law school was Clarence M. Maloney at Buffalo School of Law in 1925 (p. 41).
38. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 3 (1983). .
39. Robert Morris began the study of law in 1837 at age 15. He studied in Boston under the tutelage of Ellis Gray Loring, a white Harvard Law School graduate (p. 96). Morris was Loring's house servant (p. 96).
40. Roberts v. City of Boston, Case No. 976, 115 n.27, Court of Common Pleas, Suffolk County, Boston, Massachusetts, October 1848.
41. It is believed that the brief they filed in 1848 was the first civil rights appellate brief ever co-signed by black and white lawyers in the United States (p. 97).
42. Roberts v. City of Boston, 5 Cush. 198, 59 Mass. 198 (1849) (p. 115 n.29). Although *Roberts* was decided before the enactment of the Fourteenth Amendment, it was cited in Plessy v. Ferguson, 163 U.S. 537, 544–45 (1896), as precedent for the "separate but equal" doctrine it propounded.
43. About half of Morris's client base was Irish (p. 99). Robert Morris, Sr. died in 1883 (p. 100).

Oliver Hill, a 1933 Howard Law graduate and classmate of Thurgood Marshall, was retained in the late 1930s by the Norfolk Teacher's Association, an all-black organization, to challenge the constitutionality of the local school board's policies, which fixed the salaries of black teachers lower than those of white teachers (pp. 234–36). The federal district court dismissed the suit, which Hill then appealed to the Fourth Circuit (p. 236). On appeal, Hill was joined by Thurgood Marshall,[44] William Henry Hastie[45] and Leon Andrew Ransom[46] and prevailed on the principle that "the fixing of salary schedules for the teachers is action by the State which is subject to the limitations prescribed by the Fourteenth Amendment."[47]

The first significant voting rights cases appealed to the United States Supreme Court were brought in 1903 and 1904 by Wilford Smith, an 1883 black graduate of Boston University's School of Law (p. 273). Smith's suit challenged a new provision of the Alabama Constitution prohibiting black citizens from voting (p. 273). Although the United States Supreme Court refused to interfere with the racial disenfranchisement of black voters in Alabama, there were three dissenting opinions in support of Smith's view that the Court had jurisdiction to decide whether state constitutional provisions were discriminatory under the Fourteenth and Fifteenth Amendments to the United States Constitution (p. 273).[48]

Three black lawyers, Isaac Purcell, Samuel McGill and Judson Wetmore, successfully advocated against the "separate but equal" provision relating to streetcar accommodations in both Jacksonville and Pensacola, Florida (p. 279). Chester Gillespie, a 1920 graduate of the Ohio State University Law School built a successful practice and won several cases under Ohio's Public Accommodations Law, which prohibited racial discrimination (p. 415).[49]

Black lawyers continued to litigate civil rights cases when the NAACP took over in 1909 (p. 16). However, the black leaders of the NAACP insisted on using "prominent white attorneys" to lead the civil rights litigation (p. 16). The use of white lawyers was a strategic decision, given the judicial system's hostility to black lawyers and to civil rights litigation in general. Black leaders such as W.E.B. DuBois criticized black lawyers

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44. Thurgood Marshall graduated from Howard School of Law and subsequently took a seat on the United States Supreme Court. MICHAEL DAVIS AND HUNTER CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 47–48, 266, 275 (1992).
45. Hastie was a graduate of Harvard Law School who joined the Howard Law School faculty after his graduation (p. 51). He was later appointed to the U.S. District Court in the Virgin Islands by President Roosevelt. He was the first black federal judge and served on the bench in the late 1930s when he was appointed as the dean of Howard School of Law (pp. 51–52).
46. Ransom joined the Howard Law School faculty in 1930 (p. 53). He was a 1927 honors graduate of Ohio State University Law School and earned his Doctorate of Juridical Science degree at Harvard Law School in 1935 (p. 53).
47. Alton v. School Board of City of Norfolk, 112 F.2d 992, 994 (4th Cir. 1940).
48. Giles v. Harris, 189 US 475, 488 (1903) (Justices David Josiah Brewer and Henry Billings Brown, dissenting); (John Marshall Harlan, J., dissenting) *Id.* at 493. In 1904, Smith successfully argued that a state violated the Equal Protection Clause of the Fourteenth Amendment by excluding blacks from grand jury service (p. 273).
49. "Gillespie got so many court orders against [one establishment] that the manager threw up his hands and put a man on the sidewalk to welcome Negroes inside." (p. 415).

who refused to turn their cases over to white lawyers at the appellate level (p. 16). DuBois and other black NAACP leaders believed that civil rights cases would be lost if argued before the United States Supreme Court by black lawyers. However, such deference to the status quo was perceived by some as perpetuating the view of black lawyers as "bungling and ill-trained" (p. 16).[50]

The NAACP's policy of using all-white legal teams to make appellate arguments ended in 1934, when Charles Hamilton Houston, a former professor and dean of Howard School of Law, was hired to head the NAACP's legal arm (p. 17).[51] Houston was one of the best-trained lawyers in the nation.[52] His tenure began a new era in which the black community was assured that its own lawyers would be central to the strategy devised and implemented by the NAACP (p. 17). It is in this context that Houston drew on his former students, including Thurgood Marshall, to work for the NAACP.

In 1934, a group of NAACP lawyers in Oklahoma, with the assistance of Charles Hamilton Houston and his father William Houston, filed an appeal to the United States Supreme Court on behalf of a black man who had been convicted by an all-white jury of raping a white woman (p. 510). The lawyers argued that the conviction was based on the unconstitutional exclusion of blacks from juries, a position that the Supreme Court adopted (p. 510).[53]

The above-mentioned civil rights litigation provides proof that individual successes do not translate into widespread opportunities for blacks. Many of the victories were achieved piecemeal through county by county litigation. For example, although the "separate but equal" provisions relating to streetcar accommodations were struck down in Jacksonville and Pensacola, Florida, those victories were local (p. 279). And although the mandatory exclusion of blacks from juries was held unconstitutional, black jurors were "invariably" disqualified by white prosecutors in criminal cases (p. 17). In addition, fear and intimidation kept blacks off juries and deterred lawyers from pursuing their cases.

Finally, there were important civil rights defeats. Alabama could legally prevent blacks from voting. Because blacks, for the most part, had hardly any economic resources, they were unable to move to more "liberal" states. Most blacks were thus trapped in a discriminatory system with no means of effectively challenging it.

In the end, then, the careers of many outstanding lawyers discussed in Smith's book represented "temporary peaks of progress." That is, each of their successes was immediately met with hostile responses intended to minimize the extent of the success. Smith's focus on individual success stories obscures this and the degree to which the "emancipation" for

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50. This policy was later criticized by the National Bar Association (NBA), a black bar group founded in 1925 in Iowa (p. 555).
51. For an excellent history of Charles Hamilton Houston's involvement in the NAACP's legal strategy, see MCNEIL, *supra* note 38.
52. Houston, a graduate of Amherst College and Harvard Law School, was the first black elected to an editorial position at the Harvard Law Review, and the first black to obtain a Doctor of Juridical Science. *Id.* at 31, 49, 51.
53. Hollins v. Oklahoma, 295 U.S. 394 (1935).

blacks as a whole remained elusive. The pioneer black lawyers could never have anticipated the multiplicity of ways in which the judicial system would dilute the effects of their successes. However, they "were never deterred from their central objective—the emancipation of their people" (p. 114).

IV. CONCLUSION

J. Clay Smith's book is remarkable as "the first definitive effort to identify and to portray collectively all that is available about black lawyers" (p. xiv). This is an exceedingly difficult task given the scarcity of written references on black lawyers.[54] Smith correctly observes that "[t]he history of blacks in legal education has been generally ignored" (p. 33). Although most books discussing civil rights litigation mention the late Justice Thurgood Marshall, and some mention Charles Hamilton Houston, most do not mention Macon B. Allen, Robert S. Morris, Sr., or Charlotte E. Ray. *Emancipation*, therefore, fills a significant void in American history—a void that is "as much about the role that white lawyers and judges played in the history of black lawyers as it is . . . about black lawyers themselves" (p. xiii).

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54. *See, e.g.*, MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876, 302 (1976) ("[A]merican legal history . . . has too long been viewed merely as a white man's story.").