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RACE EXPECTATIONS: ARKANSAS AFRICAN-AMERICAN ATTORNEYS (1865-1950)

JUDITH KILPATRICK*

In discussing the pro bono lawyering of African-American attorneys in Arkansas between 1865 and 1950, I am using the broad definition of that term provided by Rule 6.1 of the ABA's Rules of Professional Conduct.¹ My research has revealed that many of the sixty-nine lawyers I have identified were active in promoting, protecting, and fighting for the civil rights of their communities in a number of ways. Although some of their work was unpaid and some was compensated, it was all in the public interest. I believe that their activities were a result of "race expectations"—both their personal expectations of citizenship responsibilities and the expectations that others had of them.

This article distinguishes three different periods of civil rights activity that demonstrate the use of different strategies by African-American lawyers to meet changing circumstances.

In the first period, 1865 through 1891, at least thirty African-American men in Arkansas entered the legal profession.² Law "was the ideal training for a gentleman" and a way to "get ahead" in life.³ During these years, African-Americans enjoyed full franchise rights in the state although their ability to exercise those rights often varied

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1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1980) (defining pro bono lawyering as "providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means").

2. See Kilpatrick, *supra* note *, at nn.6-8.

3. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, 21-22 (1983) (identifying the legal profession as "a boom industry" in the years surrounding the Civil War with the number of lawyers increased by 59% from 23,939 in 1850 to 40,376 in 1870, and increasing another 63% between 1870 and 1880 for a total of 64,137).

geographically. The activists among this group were primarily politicians devoted to establishing and protecting civil rights, who did not spend much time in the practice of law.⁴

The second period covers the years 1891 through 1924, when Jim Crow laws effectively eliminated politics as a vehicle for civil rights activity. By this time, the African-American population included a generation born in freedom and educated in the public schools. African-Americans began to use litigation within the court system and mass political protest to assert civil rights, and lawyers helped to lead the way. An additional twenty-seven lawyers practiced during this second period.

In the third period, between 1924 and 1950, civil rights activity shifted again, to an almost total reliance on the use of the courts to regain civil rights—including political ones. Arkansas' attorneys played a role in the national strategies on civil rights that were developed and implemented by African-American organizations. Among them were twelve new lawyers.

Not all of the sixty-nine lawyers were activists. In each period, most did not make headlines. They kept busy handling the mundane legal affairs of ordinary citizens in their everyday lives. Even in this, though, they were participating in the civil rights struggle. A lawyer representing African-American clients (and most of them did so exclusively) during a time when there was great violence and discrimination directed toward their race needed courage and a belief in the ultimate value of the process they were representing.

PERIOD ONE

Eleven men who were, or would become lawyers, participated in the civil rights struggles in the first period. Mifflin Wistar Gibbs, the most prominent of them, obtained much of his education and values through association with African-American abolitionists in Philadelphia, Pennsylvania, prior to the Civil War.⁵ He was convinced to settle in Arkansas by two Arkansas citizens, John H. Johnson and William H. Grey, whom he met at a convention in South Carolina in

4. They derived their livelihood from agricultural or business ventures or from political patronage appointments while they fought for equal treatment. For example, John H. Johnson (who served in the 1866 constitutional convention) was a planter, as was William H. Grey (who served in the 1868 constitutional convention). Mifflin W. Gibbs (who had made a fortune in the California and Vancouver "gold rushes") had almost continuous political appointments; J. Pennoyer Jones (who served in the state legislature) was a businessman; and George N. Perkins (who served in the legislature) was a merchant.

5. See MIFFLIN WISTAR GIBBS, *SHADOW AND LIGHT, AN AUTOBIOGRAPHY WITH REMINISCES OF THE LAST AND PRESENT CENTURY* 11-14 (Univ. Neb. Press 1995) (1902).

1871.⁶ Johnson had become a lawyer in 1865⁷ and Grey in 1869.⁸ Gibbs was admitted to practice in 1871.⁹

William H. Grey was one of eight African-Americans elected to the 1868 Arkansas constitutional convention.¹⁰ Grey and Thomas P. Johnson, a second of the eight representatives, who would be admitted to practice in 1870,¹¹ participated in the adoption of a new constitution that “was perhaps the most liberal constitution in the state’s history, guarantee[ing] the equality of all persons before the law”¹² and granting to African-Americans the franchise and legal rights to full citizenship under the law.¹³

Grey led the African-American representatives.¹⁴ When voting rights for African-Americans were discussed, Grey declared that

“[t]he right of franchise is due the Negroes bought by the blood of forty thousand of their race shed in three wars The government has made a solemn covenant with the Negro to vest him with the right of franchise if he would throw his weight in the balance in favor of the Union and bare his breast to the storm of bullets; and I am convinced that it would not go back on itself.”¹⁵

Grey continued, “there need be no fear of Negro domination Give us the franchise, and if we do not exercise it properly, you have the numbers to take it away from us. It would be impossible for the Negro to get justice in a State whereof he was not a full citizen Justice should be like the Egyptian statue, ‘blind and recognizing no

6. *See id.* at 126.

7. *See* LLEWELLYN W. WILLIAMSON, BLACK FOOTPRINTS AROUND ARKANSAS 62-63 (1979).

8. Grey was admitted on July 6, 1869. *See* Records of the Arkansas Supreme Court (1856-74); Ledger Judge’s Docket, pl 44 (1856-59); Description of Civil and Criminal Precedents, roll 1, 42 (1864) [hereinafter Arkansas Supreme Court Records].

9. *See* GIBBS, *supra* note 5, at 129-30.

10. James H. Fain, Political Disfranchisement of the Negro in Arkansas 4 (1961) (unpublished M.A. thesis, Univ. of Ark.) (“Of the 66,805 registered voters eligible to vote in the election 21,969, or 32.9 per cent, were identified as Negroes.” This was the first time that the bulk of the African-American population had voted.).

11. *See* Arkansas Supreme Court Records, *supra* note 8 (indicating that Johnson was admitted on July 25, 1870).

12. *See* Joseph M. St. Hilaire, Negro Delegates in the Arkansas Constitutional Convention of 1868 26 (May 1970) (unpublished B.A. thesis, Washington State Univ.) (noting that “with exceptions in the case of only a few persons who had supported the Confederacy, it also enfranchised all male citizens.”); *see also* Fain, *supra* note 10, at 7 (discussing how Grey was ambivalent about the constitution, believing it “was not strong enough in disfranchising whites, who served the Confederacy, but he voted for it because it did enfranchise the Negro”).

13. *See* Fain, *supra* note 10, at 9 (explaining that African-Americans voted, held office, and had an opportunity for equal education with whites, “although [their] public schools were segregated (apparently with [their] approval)”).

14. *See* Kilpatrick, *supra* note *, at n.98.

15. LIFT EVERY VOICE, AFRICAN AMERICAN ORATORY, 1787-1900 473 (Philip S. Foner & Robert J. Branham eds., 1998).

color.”¹⁶

Reconstruction ended when the Democratic party regained political control in the state in 1874, and another state constitutional convention soon was held. African-Americans were well aware of its significance. Grey, who had served in the state assembly in 1870¹⁷ and would be elected to the State Senate in 1875,¹⁸ “warned Negroes against cooperating with the Democrats in the adoption of a constitution under which they might be disfranchised.”¹⁹

J. Pennoyer Jones, admitted to practice in the early 1870s,²⁰ and George N. Perkins, a merchant and politician at the time but who would be listed as a practicing attorney in 1885,²¹ were among the eight African-American delegates in 1874.²² Perkins “said in no uncertain terms that, ‘the rights we acquired in 1868 we expect to maintain. It is a premeditated plan by this convention to take as many of them away as they can.’”²³ Together with sympathetic white delegates, they fought off a poll tax voting requirement²⁴ and prevented civil rights from being curtailed legislatively.

A third and final occasion for African-American lawyers to speak out publicly on civil rights during this period took place during the 1891 legislative session. John Gray Lucas, admitted in 1887,²⁵ was prominent in a battle against a “separate car” bill that would segregate railway coaches.²⁶

Lucas gave the major speech opposing that bill.²⁷ He “chided the Democracy for deserting the ideals of their party’s founder, Thomas

16. *Id.* at 474-75.

17. See HISTORICAL REPORT OF THE ARKANSAS SECRETARY OF STATE 235 (1998) [hereinafter 1998 HISTORICAL REPORT].

18. *Id.* at 239.

19. Fain, *supra* note 10, at 21-22 (quoting Grey as saying “[t]he republican party is the friend of the black man, not the Democracy”).

20. See Carl H. Moneyhon, *Black Politics in Arkansas During the Gilded Age, 1876-1900*, 44 ARK. HIST. Q. 222, 233 (1985).

21. See LITTLE ROCK CITY DIRECTORY (1885-1886) (on file with the Butler Center, Little Rock Public Library, Little Rock, Arkansas) [hereinafter LRCD].

22. See Fain, *supra* note 10, at 18 n.26.

23. *Id.* at 19.

24. See *id.*

25. See Willard B. Gatewood, Jr., *Negro Legislators in Arkansas, 1891: A Document*, 31 ARK. HIST. Q. 220, 232 (1972) [hereinafter Gatewood, *Negro Legislators*].

26. See John W. Graves, *Jim Crow in Arkansas: A Reconsideration of Urban Race Relations in the Post-Reconstruction South*, 55 J. S. HIST. 421, 437 (1989) [hereinafter Graves, *Jim Crow*] (discussing the black protest effort led by Representative John Gray Lucas against the separate coach proposal); Morgan Kousser, *A Black Protest in the “Era of Accommodation,”* 34 ARK. HIST. Q. 149, 152 (1975).

27. See Gatewood, *Negro Legislators*, *supra* note 25, at 224.

Jefferson,”²⁸ and “noted pointedly, ‘[w]e are opposed to the measure because it seeks to pander, not to the convenience of the people, but to gratify and keep alive a prejudice among our citizens, fast becoming extinct.’”²⁹ His efforts failed to prevent passage of the law.

Between 1868 and 1891, five African-American lawyers served in the Arkansas legislature: William H. Grey in 1870 and 1875;³⁰ Richard A. Dawson in 1873 and 1879;³¹ Daniel Webster Lewis in 1883;³² Samuel H. Scott in 1885;³³ and J. Gray Lucas in 1891.³⁴

Prior to his legislative service, Lucas had served several terms as an assistant prosecuting attorney in Jefferson county between 1887 and 1890.³⁵ Seven other African-American lawyers also served in lesser elective offices. Three—Thomas P. Johnson, George N. Perkins, and Jno. D. Page—were county Justices of the Peace.³⁶ Mifflin Gibbs was elected a municipal judge of Pulaski County in 1873-1874.³⁷ J. Pennoyer Jones was Desha county sheriff, county clerk, and county judge during the years 1874 to 1892.³⁸ C. A. Otley served as city attorney in Phillips County in 1872.³⁹ In 1874, George Perkins was elected to the City Council of Little Rock and served for four years.⁴⁰

African-Americans never constituted more than twenty-seven

28. Kousser, *supra* note 26, at 149.

29. Graves, *Jim Crow*, *supra* note 26, at 437. *But see* Moneyhon, *supra* note 20, at 243 (noting that J. N. Donohoo “urged white members to pass not only the Tillman bill but other such bills as quickly as possible so that blacks would realize there were ‘two races in Arkansas that had nothing in common with each other.’”). Given the evidence to the contrary, it is not clear why Lucas declared that prejudice against African-Americans was “becoming extinct.” Graves, *Jim Crow*, *supra* note 26, at 437. Perhaps it was wishful thinking.

30. *See* 1998 HISTORICAL REPORT, *supra* note 17, at 239; Fain, *supra* note 10, at 21-22.

31. *See* 1998 HISTORICAL REPORT, *supra* note 17, at 237-38, 243; J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, at 323 (1993) (reporting that Dawson was admitted to practice law around 1870).

32. *See* 1998 HISTORICAL REPORT, *supra* note 17, at 246; SMITH, *supra* note 31, at 324 (noting that Lewis practiced as an attorney in 1880).

33. *See* 1998 HISTORICAL REPORT, *supra* note 17, at 248. *But see* PINE BLUFF CITY DIRECTORY (1983-1884) (on file with the Pine Bluff Public Library) (listing Scott as an attorney in 1883).

34. *See* Gatewood, *Negro Legislators*, *supra* note 25, at 224; Graves, *Jim Crow*, *supra* note 26, at 437; Kousser, *supra* note 26.

35. *See* Gatewood, *Negro Legislators*, *supra* note 25, at 232.

36. *See* Kilpatrick, *supra* note *, at nn. 124 211, & 354.

37. *See* GIBBS, *supra* note 5, at 136.

38. *See* 1998 HISTORICAL REPORT, *supra* note 17, at 548 (identifying J. Pennoyer as sheriff in 1874-1876, county clerk during 1876-1886, and judge from 1890 to 1892).

39. *See* SMITH, *supra* note 31, at 323.

40. *See* 1 WHO'S WHO OF THE COLORED RACE 214 (Frank L. Mather ed., 1915); Willard B. Gatewood, Jr., ed., *Arkansas Negroes in the 1890s: Documents*, 33 ARK. HIST. Q. 293, 302-03 (1974) [hereinafter Gatewood, *Arkansas Negroes*] (stating that Perkins was “a powerful figure in Little Rock’s third ward who figured prominently in state Republican circles and served for a time as a city alderman”).

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percent of the total population in Arkansas⁴¹ and never had the statewide strength to prevail on political issues without outside support. These men probably could not have been elected without the Republican party, even in counties where the majority of citizens were African-American. Their work and visibility, however, were in the public interest, even where they did not make newspaper headlines or change state history.

There are no published Arkansas opinions involving African-American lawyers during this first period. A report on one lower court trial, occurring June 2, 1873, and involving attorneys Lloyd G. Wheeler and Mifflin Gibbs, has survived. The firm of Wheeler & Gibbs represented Richard A. Dawson (while he was a member of the state legislature) and three other African-Americans against a Little Rock barkeeper for violating the 1873 Civil Rights Bill by refusing to serve them.⁴²

This case was the source of the only conviction under the Arkansas Civil Rights Act of 1873,⁴³ which was repealed in 1907.⁴⁴ "In something of a landmark case, nearly one hundred years before the Civil Rights Bill of 1964, the black law partners prosecuted the barkeeper who was assessed fines and court costs of \$46.80."⁴⁵ There is no evidence concerning whether or not this was paid representation. It was certainly in the public interest.

Two lawyers of this period established newspapers that focused on the African-American community and exhorted their leaders and the white establishment to work for more protection of the rights of African-Americans. Tabbs Gross, listed as an attorney in 1871,⁴⁶ published Arkansas' first African-American newspaper, the *Freeman*, for a short period in Little Rock in 1869-1870.⁴⁷ Julian Talbot Bailey, who would become an attorney in 1888,⁴⁸ began publishing the Little

41. See Kilpatrick, *supra* note *, at nn.80, 344, 633 & 635.

42. See Tom W. Dillard, "Golden Prospects and Fraternal Amenities": Mifflin W. Gibbs's Arkansas Years, 35 ARK. HIST. Q. 307, 323 (1976) [hereinafter Dillard, *Golden Prospects*] (recounting trial documents reprinted in 5 PULASKI COUNTY HIST. REV. 47-48 (1957)).

43. See 1873 Ark. Acts 15-19; Graves, *Jim Crow*, *supra* note 26, at 424-25.

44. See 1907 Ark. Acts 728; Graves, *Jim Crow*, *supra* note 26, at 425.

45. Dillard, *Golden Prospects*, *supra* note 42, at 323.

46. See LRCD, *supra* note 21.

47. See generally Diane Neal, *Seduction, Accommodation, or Realism?*, 48 ARK. HIST. Q. 57 (1989). See also Tom Dillard, *To the Back of the Elephant: Racial Conflict in the Arkansas Republican Party*, 33 ARK. HIST. Q. 4, 4 (1974) [hereinafter Dillard, *Back of the Elephant*] (explaining that Gross' editorials criticized the Republican Party's treatment of its African-American supporters and pushed for more access for African-Americans to power within the party). Gross' goading helped convince Republicans to cede more political power to African-Americans. See Neal *supra* at 60.

48. See 1 Ark. Sup. Ct. Enrollment Book 10 (Nov. 3, 1865) (on file with the Office of the

Rock *Sun* in 1885.⁴⁹ Later, he would add two other *Sun* newspapers, in Hot Springs and Texarcana, that, with the Little Rock paper, had a “combined weekly [circulation] . . . of . . . over six thousand.”⁵⁰

As Register of the Little Rock Land Office from 1877 to 1886,⁵¹ Mifflin Gibbs advertised the availability of land to African-American communities and spoke at conferences urging them to become landowners.⁵² While Gibbs was Receiver of Public Moneys at Little Rock from 1889 to 1897,⁵³ he sold thousands of acres of land at auction to African-Americans and helped them in “establishing schools for their children.”⁵⁴ While these were patronage positions for which he received compensation, Gibbs went beyond his private interests to improve conditions for the African-American community.

Toward the end of this first period, a phenomenon new in Arkansas was seen. African-Americans began to engage in focused, thoughtful, *independent* mass political protest. During the legislative battle over the separate coach bill,⁵⁵ J. Gray Lucas and George Perkins were instrumental in two mass meetings held in Little Rock to protest the coach bill.⁵⁶ J. A. Hibbler⁵⁷ and Scipio Jones also were in attendance and participating.⁵⁸

By aligning with the Republican party, which was the only source of political power issuing any welcome to them, African-American

Court Clerk, Little Rock, Arkansas).

49. I. GARLAND PENN, *THE AMERICAN NEGRO: HIS HISTORY AND LITERATURE* 244 (1969) (remarking that Bailey was highly independent politically and a strong proponent of civil rights for African-Americans).

50. *Id.* at 244.

51. See GIBBS, *supra* note 5, at 224 (explaining that he was appointed to the post in 1877); LRCD, *supra* note 21 (listing his continuance in that position in the 1878, 1880, 1881-1882, 1883-1884, 1884-1885, and 1885-1886 editions).

52. See Dillard, *Golden Prospects*, *supra* note 42, at 325; see also GIBBS, *supra* note 5, at 186.

53. See GIBBS, *supra* note 5, at 222; see also LRCD, *supra* note 21 (1983-94 edition).

54. See GIBBS, *supra* note 5, at 222.

55. See John William Graves, *The Arkansas Separate Coach Law of 1891*, 7 J. WEST 531, 535 (1968) (“In 1890, the Democratic Party called for the institution of segregation on the railroads, and the following year the general assembly responded to this appeal by enacting a separate coach law.”).

56. See *id.*; Kousser, *supra* note 26, at 157-59 (reporting that the first meeting, held at the First Baptist Church in Little Rock, gathered about 600 people and resulted in a set of resolutions opposing the bill to be presented to the legislature and publicized in newspapers); Gatewood, *Arkansas Negroes*, *supra* note 40, at 302-03 (explaining that J. Gray Lucas was a member of the committee that drafted them and George N. Perkins was one of the signatories); see also JOHN WILLIAM GRAVES, *TOWN AND COUNTRY, RACE RELATIONS IN AN URBAN-RURAL CONTEXT, ARKANSAS, 1865-1905*, at 154 (1990) (discussing a second protest meeting that took place in the Representatives’ Hall of the Legislature, and had about 400 in attendance. Perkins was chair of that second meeting.).

57. See discussion, *infra* note 84, at 12.

58. See SMITH, *supra* note 31, at 325.

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leaders had been able to obtain free education, legal protection of their civil rights, and the time for greater numbers of their race to improve their economic lot. An independent mass protest of the kind seen in 1891, without the direction of white politicians, was not possible in earlier years.

PERIOD TWO

By 1891, a second generation of African-American lawyers was coming into being. Its most prominent member was attorney Scipio Africanus Jones who, although admitted to practice in 1889,⁵⁹ was sufficiently different from the earlier attorneys of that period to warrant placing him here. Although he was an active Republican, he was not a recipient of political patronage and not a part of that first group of African-Americans who allied themselves with white Republicans.⁶⁰

This second period provides the first documented evidence of pure unpaid pro bono work. The first instance occurred in 1895, when African-American attorney J. D. Royce, noted as a criminal defense lawyer in Hot Springs, Arkansas,⁶¹ was appointed by the circuit court to represent a white man charged with murder.⁶² Although it is not explicitly stated in the report, this appointment was unlikely to have been a paid appointment. Nothing else has been discovered about Royce or his practice.

A second example is provided by Scipio Jones, who was the first African-American attorney to appear in the published Reports.⁶³ He is said to have learned his craft through criminal defense appointments that usually did not produce fees.⁶⁴ Throughout his

59. See Tom Dillard, *Scipio A. Jones*, 31 ARK. HIST. Q. 201, 204 (1972) [hereinafter Dillard, *Scipio A. Jones*]; see also 1 Ark. Sup. Ct. Enrollment Book, *supra* note 48, at 144 (listing his admission to the state supreme court in 1900).

60. See Tom W. Dillard, *The Black Moses of the West: A Biography of Mifflin Wistar Gibbs, 1823-1915*, at 94 (1975) (unpublished thesis, Univ. of Arkansas).

61. See SMITH, *supra* note 31, at 327.

62. See Gatewood, *Arkansas Negroes*, *supra* note 40, at 319 (reprinting a letter from a Hot Springs resident published in the Indianapolis *Freeman*, May 11, 1895, which comments on Royce's appointment).

63. See *Eastling v. State*, 62 S.W. 584 (Ark. 1901) (Jones's first published case).

64. See MARY WHITE OVINGTON, *PORTRAITS IN COLOR* 93 (1927) (explaining that "[m]uch of [Jones's criminal] work was without compensation, but it was valuable experience"); Dillard, *Scipio A. Jones*, *supra* note 59, at 209 (explaining that a friend, Will Sheppard, described Jones as having "no great desire for money. Often his clients were indigent blacks who could not spare money for attorneys' fees."). The official Arkansas Supreme Court Reports reveal eighteen criminal law cases in which Jones is counsel of record between 1901 and 1943, and there is no record of payment in any of these cases, with one exception. The exception involves criminal defense representation following the 1919 Elaine, Arkansas, race riot. See discussion *infra* notes 74-83 and accompanying text.

career, Jones took extensive time from a successful business law practice to continue such representations.⁶⁵

The criminal law cases gave Jones an opportunity to develop defenses that preceded later efforts by the National Association for the Advancement of Colored People ("NAACP"). His earliest documented efforts occurred in two separate cases in 1901, *Eastling v. State*⁶⁶ and *Castleberry v. State*,⁶⁷ when Jones first argued to the state supreme court that convictions of the African-American defendants were discriminatory, unconstitutional, and should be overturned because African-Americans had been barred from serving on the juries that issued the convictions.⁶⁸

In *Eastling*, the court found no intentional discrimination against African-Americans in the way jurors were selected⁶⁹—ignoring evidence that no African-Americans had been “selected to serve as jurymen in the county for eighteen years,”⁷⁰ as well as the testimony of a jury commissioner who said he would not select a qualified African-American “as I knew a white man was as well or better qualified.”⁷¹

In *Castleberry*, the court specifically held that the trial court had erred in refusing to hear Jones’ motion challenging the exclusion of blacks from the grand jury and remanded the matter for a new trial.⁷² There is no indication of the result of the retrial, but given the *Eastling* result, it is likely that a hearing on the issue was all Jones obtained. Still, this was the first time the issue had been raised in

65. Jones appears as counsel of record in twenty-seven civil cases between 1909 and 1944. Most involved the African-American fraternal organizations that Jones represented and by whom he was paid. See also J.L. NICHOLS & W. H. CROGMAN, *THE AMERICAN NEGRO: HIS HISTORY AND LITERATURE* 395 (Arno Press & N.Y. Times 1969) (1920) (reporting that Jones was appointed as national attorney general for the Mosaic Templars of America about 1895); Dillard, *Scriptio A. Jones*, *supra* note 59, at 205-06 (reporting that Jones acted as counsel to the Knights of Pythias, “the International Order of Twelve, the Knights and Daughters of Tabor, the Royal Circle of Friends of the World, the Order of Eastern Star, the Household of Ruth, and the Grand Court of Calanthe”). See generally H.F. KLETZING & W.H. CROGMAN, *THE AMERICAN NEGRO: HIS HISTORY AND LITERATURE* (Negro Univ. Press 1969) (1887) (including a more complete revision of the original works).

66. See 62 S.W. 584 (Ark. 1901).

67. See 63 S.W. 670 (Ark. 1901).

68. See J. H. CARMICHAEL, *SCRAPBOOK OF ARKANSAS LITERATURE* 313 (Octavius Coke ed., 1939) (indicating that Jones argued this point prior to its presentation before the U.S. Supreme Court).

69. *Eastling*, 62 S.W. at 587 (noting that a similar argument was made in a Texas case, *Smith v. State*, 58 S.W. 97 (Tex. Crim. App. 1900), but distinguishing the facts of that case from *Eastling*).

70. *Eastling*, 62 S.W. at 586.

71. *Id.* at 195 (reporting that the statement came in response to the question: “Would you select a negro on the jury, if he possessed the qualifications of a juror?”).

72. *Castleberry*, 63 S.W. 670, 671.

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Arkansas.⁷³

The case that made Scipio Jones a national figure arose out of the so-called riots of 1919 near Elaine, Arkansas,⁷⁴ and it was one for which he was paid something.⁷⁵ However, since his legal efforts went well beyond the main interest of the two funding groups,⁷⁶ those efforts were most likely largely unpaid.

Today, publicity about the Elaine cases focuses primarily on the convictions of twelve African-American farmers for the murders of five white men,⁷⁷ which resulted in the United States Supreme Court decision of *Moore v. Dempsey*.⁷⁸ The twelve men were finally released in 1924.⁷⁹ However, of 122 men arrested, seventy-three were indicted,⁸⁰ and a number of them were sentenced to lengthy prison terms.⁸¹ Jones was heavily involved in seeking freedom for those imprisoned, as well as those convicted of murder.⁸² It took him six years to complete the work.⁸³

Another Arkansas attorney active in civil rights cases during this

73. See *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding that discrimination against African-Americans in jury selection was a violation of the Equal Protection Clause of the Fourteenth Amendment).

74. See RICHARD C. CORTNER, A MOB INTENT ON DEATH, THE NAACP AND THE ARKANSAS RIOT CASES 28, 45-46 (1988). The facts surrounding the matter are confused and confusing. Although initial reports stated that the riot had been precipitated by the actions of African-American "false agitators and propagandists," other information indicates that white planters attempted to prevent organizing efforts by a tenant farmers' union and the farmers resisted. Extensive accounts of the events appear in CORTNER, *supra*, and ARTHUR I. WASKOW, FROM RACE RIOT TO SIT-IN, 1919 AND THE 1960s 12, 128 (1966). See also OVINGTON, *supra* note 64, at 97; Ralph H. Desmarais, *Military Intelligence Reports on Arkansas Riots: 1919-1920*, 33 ARK. HIST. Q. 175 (1973); Tom W. Dillard, *Perseverance: Black History in Pulaski County, Arkansas, an Excerpt*, 31 PULASKI COUNTY HIST. REV. 62, 68 (1983); Dillard, *Scipio A. Jones*, *supra* note 59, at 206-09. This event was one of a series of black-white confrontations across the country after World War I. See RACIAL VIOLENCE IN THE UNITED STATES 60 (Allen D. Grimshaw ed., 1969) (describing other riots).

75. See CORTNER, *supra* note 74, at 49-50.

76. *Id.* at 51-54 (explaining the interests of the NAACP and the Citizens Defense Fund Commission).

77. See WASKOW, *supra* note 74, at 137-39 (explaining that local white attorneys were appointed for the defendants. Six were tried and convicted of first-degree murder in two trials on the first day and six more (in three trials) were convicted on the second.).

78. 261 U.S. 86, 91-92 (1923) (remanding the cases for retrial based on the inability of the defendants to obtain a fair trial in the first instance, given the public passion and mob domination exhibited at the time, and the failure of the state to provide a corrective machinery to avoid the wrong).

79. See Kilpatrick, *supra* note *, n.510.

80. See CORTNER, *supra* note 74, at 15.

81. See *id.* at 166 (noting that eight defendants were sentenced to twenty-one years in prison).

82. See *id.*

83. See *id.* at 182 (noting that "[o]n January 13 [1925] the governor granted indefinite furloughs to the six men in the *Moore* cases").

period was J. A. Hibbler, who began practicing in 1916.⁸⁴ Overall, Hibbler appealed trial verdicts in eight criminal cases. In *Logan v. State*,⁸⁵ he argued that the defendant had been coerced into making a confession by a promise of leniency, rendering the confession involuntary and inadmissible. At the time, the defendant was without counsel and, although there was no *Miranda* law⁸⁶ at the time, Hibbler noted that he was not cautioned about his right to remain silent or that his statements might be used against him.⁸⁷ The argument was unsuccessful.⁸⁸

Even after the Jim Crow era began and office-holding was denied them, between 1895 and 1920 African-American lawyers fought alongside white dissenters against increasing discrimination within the Republican party.⁸⁹ When the party scheduled its 1920 convention in a segregated hotel,⁹⁰ a number of African-Americans, including Scipio Jones and J.A. Hibbler, took direct action.⁹¹ They “boldly marched in the hotel where they stayed until someone turned out the lights.”⁹² Attorney W. A. Singfield also became involved in the struggle.⁹³ Although the African-Americans ultimately managed to obtain a greater voice in the internal councils of the Republican party, their efforts did not yield much influence in state politics, which remained under the control of a Democratic party that had

84. See LRCD, *supra* note 21 (listing Hibbler as a practicing attorney in the 1916 edition); Ark. Sup. Ct. Enrollment Book, *supra* note 48, at 126 (listing his admission to the state supreme court in 1919).

85. 234 S.W. 493, 488-89 (Ark. 1921).

86. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that defendants have a right to be warned of their Fifth Amendment rights prior to interrogation).

87. *Logan*, 234 S.W. at 493.

88. *Id.* (indicating that the law did not require that defendants be notified of their rights before their confessions could be admitted).

89. See Dillard, *Golden Prospects*, *supra* note 42, at 320 (noting that J. Pennoyer Jones, Mifflin Gibbs, and Scipio Jones began their fight in 1895); John William Graves, *The Arkansas Negro and Segregation 1890-1903*, at 85-86 (1967) [hereinafter Graves, *Arkansas Negro*] (unpublished thesis, Univ. of Ark.) (explaining that the “Black-and-Tans” held separate conventions and proposed their own slates of candidates from 1900 to 1920. In 1900 and 1902, Scipio Jones worked with dissident white Republicans.); Marvin Frank Russell, *The Republican Party of Arkansas, 1874-1913*, at 272, 284 (1985) (unpublished doctoral dissertation, Univ. of Ark.) (describing similar efforts made in 1908 and 1912); PERSISTENCE OF THE SPIRIT DESCRIPTIVE GUIDE: THE BLACK EXPERIENCE IN ARKANSAS 34 (Tom Baskett, Jr. ed. 1986) (noting that they continued in 1914 and 1916, and in 1918 and 1920); see also Tom W. Dillard, *Fighting the Lily Whites: Racial Confrontation in the Arkansas Republican Party, 1920-1924 Documents*, 4 RED RIVER VALLEY HIST. REV. 63, 65-68 (1979).

90. See Dillard, *Back of the Elephant*, *supra* note 47, at 12.

91. See *id.* (“[T]hey planned to force their way into the [hotel].”).

92. See *id.*

93. See Dillard, *Scipio A. Jones*, *supra* note 59, at 217 (indicating Singfield was “elected as [an] office[r] in the black Republican organization.”).

restricted its primaries to white voters in 1906.⁹⁴

Mass protests by the African-American community against segregationist laws and actions also continued—with lawyers playing a prominent role.⁹⁵ In 1903, a law was passed by the Arkansas legislature to “requir[e] separation of white and black passengers on the state’s urban streetcar systems.”⁹⁶ As they had in 1891, African-Americans generated public protest and “boycotts of the car lines . . . in Little Rock, Pine Bluff, and Hot Springs.”⁹⁷ Mifflin Gibbs, representing the lawyers, spoke at one of the meetings.⁹⁸ The boycotts continued for several weeks, with ridership dropping by over ninety percent in Little Rock, and “precipitously” in Pine Bluff and Hot Springs.⁹⁹ As in 1891, however, there was little white opposition to the law and African-Americans were unable to force its rescission.¹⁰⁰

Mifflin Gibbs and Scipio Jones were active in the National Negro Bar Association, formed in 1909 as a lawyers’ auxiliary to Booker T. Washington’s National Negro Business League.¹⁰¹ The bar association’s goal was to “make ourselves valuable . . . to members of our race who have rights, liberties, and properties to protect . . .”¹⁰² The auxiliary pursued civil rights work more aggressively than the Business League was willing to support.¹⁰³ In 1925, the lawyers split off to become the National Bar Association.¹⁰⁴

Two more attorneys published weekly newspapers to educate the African-American citizenry about issues during this period. William Augustus Singfield founded the *Little Rock Reporter* in 1901,¹⁰⁵ and Thomas J. Price was editor and publisher of the *Arkansas Times* in 1927.¹⁰⁶

94. See Kilpatrick, *supra* note *, at n. 420 and accompanying text.

95. See LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 427 (1980).

96. Graves, *Arkansas Negro*, *supra* note 89, at 135.

97. Graves, *Jim Crow*, *supra* note 26, at 439.

98. See Graves, *Arkansas Negro*, *supra* note 89, at 135.

99. See *id.*

100. See Graves, *Jim Crow*, *supra* note 26, at 434-44 (remarking that transit managements were able to wait out the boycott); Graves, *Arkansas Negro*, *supra* note 89, at 136-38 (offering examples of white protest).

101. See SMITH, *supra* note 31, at 321-22, 351 (Gibbs) & 552 (Jones).

102. *Id.* at 554.

103. See *id.* at 555.

104. See *id.* at 557.

105. See E. M. WOODS, *BLUE BOOK OF LITTLE ROCK AND ARGENTA* 101-02 (1907).

106. See WHO’S WHO IN COLORED AMERICA 162 (Thomas Yenser ed., 1927).

PERIOD THREE

The third period saw additional adaptation to meet circumstances. Building on changes in case law during the second period and the development by the NAACP of its national litigation strategy, Arkansas lawyers began to push for political rights through litigation.

A third (partial) example of pro bono work involved Scipio Jones and attorneys J.A. Hibbler and J.R. Booker.¹⁰⁷ This event also represents the melding of litigation and politics. In 1930, these men pursued a suit against the Democratic Party of Arkansas, *Robinson v. Holman*,¹⁰⁸ on behalf of the Arkansas Negro Democratic Association ("ANDA"), formed in 1928, to pursue access to Democratic primary voting for African-Americans.¹⁰⁹ Plaintiffs lost at trial, and Hibbler and Booker are known to have contributed the out-of-pocket costs of an unsuccessful appeal to the U.S. Supreme Court.¹¹⁰ They were probably paid something for the work at trial.¹¹¹

In 1939, in *Bone v. State*,¹¹² Scipio Jones and Wallace L. Purifoy, Jr., admitted to the bar in 1938,¹¹³ raised the jury selection discrimination argument in a first-degree murder case. The trial court had overruled Jones' motion to quash the jury panel,¹¹⁴ but the state supreme court found that the trial court had "confessed" its error by attempting to correct it when it dismissed three white jurors and replaced them with three African-Americans just before trial began. The case was reversed and remanded for a new trial,¹¹⁵ and the court took this opportunity to lecture trial courts on the applicable law.¹¹⁶

107. J.R. Booker began practicing in 1913. See *Knights of Pythias of North Am. v. Bond*, 109 Ark. 543 (1913) (listing Jones as the attorney of record), and was admitted to the state supreme court in 1919, see 1 Ark. Sup. Ct. Enrollment Book, *supra* note 48, at 20.

108. 26 S.W.2d 66, 68 (Ark. 1930) (noting that the Democratic Party is a voluntary political organization and not an agency of the state with the right to prescribe the rules and regulations defining the qualifications of membership and to provide that only white people could become members, without coming within the prohibitions of either the Fourteenth or Fifteenth Amendment).

109. C. Calvin Smith, *From "Separate but Equal to Desegregation: The Changing Philosophy of L.C. Bates*, 42 ARK. HIST. Q. 254, 259 (1983).

110. See *J. M. Robinson v. L. C. Holman*, 282 U.S. 804 (1930) (refusing to hear an appeal because "it failed to raise a constitutional question"); see also C. Calvin Smith, *The Politics of Evasion: Arkansas' Reaction to Smith v. Allwright, 1944*, 67 J. NEGRO HIST. 40, 43 (1982) (noting that attorneys "Booker and Hibbler were forced to spend their own funds to get the case docketed before the Supreme Court and pay the costs of printing records and briefs").

111. See John Kirk, *Dr. J. M. Robinson, the Arkansas Negro Democratic Association and Black Politics in Little Rock, Arkansas, 1928-1952*, 41 PULASKI COUNTY HIST. REV. 2 (1993).

112. 129 S.W.2d 240 (1939).

113. See 1 Ark. Sup. Ct. Enrollment Book, *supra* note 48, at 2.

114. 129 S.W.2d at 242.

115. *Id.* at 245.

116. *Id.* at 243-44.

The defendants ultimately were convicted but only for second-degree murder.¹¹⁷

Attorney W. Harold Flowers, who was admitted to practice in 1935,¹¹⁸ created the Conference on Negro Organizations ("CNO") in 1940.¹¹⁹ It differed from earlier group efforts by having as its goal the "widespread, organized political participation" of ordinary citizens.¹²⁰

The CNO investigated discrimination in public works employment, acted to remove a ban on black participation in the National Youth Administration, obtained the appointment of a Negro census enumerator in St. Francis County, and held sixteen meetings "with a total attendance of over four thousand people" all during its first year.¹²¹ It is not known whether Flowers was paid for most of this work, although he probably was paid something for some of it. In 1941, both ANDA and the CNO began coordinating poll-tax drives to make more African-Americans eligible to vote. The number of African-American voters grew from 1.5% of those eligible in 1941 to 17.3% by 1947.¹²²

The CNO encouraged African-American school teachers to sue for equal pay in 1942.¹²³ In 1943, *Morris v. Williams*¹²⁴ was filed in the United States District Court by Scipio Jones, J. R. Booker, Myles Hibbler, and the NAACP (through Thurgood Marshall). The district court dismissed the complaint, ignoring plaintiff's proffered evidence of discrimination.¹²⁵ On appeal, the case was argued by Thurgood Marshall and J. R. Booker.¹²⁶ Scipio Jones had died in 1943.

The Eighth Circuit reviewed the district court's findings of fact and

117. See *Bone v. State*, 140 S.W.2d 140, 142 (Ark. 1940) (remarking that only one issue on appeal from the second trial relates to the jury selection issue. Jones argued error in the trial court's refusal "to call negroes for service on the by-standers list of jurors after the regular panel had been exhausted." The deputy sheriff who had placed telephone calls to obtain more panel members testified that he had not known until they arrived whether they were African-American or white and that "he had no prejudice against calling a negro." The court emphasized that the constitutional test did not require that African-Americans be selected for the jury, but that "the vice is in an omission by administrative officers . . . in the systematic exclusion of negroes from the regular jury panel.").

118. See 1 Ark. Sup. Ct. Enrollment Book, *supra* note 48, at 2.

119. See John Kirk, *He Founded a Movement: W.H. Flowers, the Committee on Negro Organizations and the Origins of Black Activism in Arkansas, 1940-57*, in *THE MAKING OF MARTIN LUTHER KING AND THE CIVIL RIGHTS MOVEMENT* 29 (Brian Ward & Tony Badger eds., 1996).

120. See *id.* at 34.

121. *Id.* at 34-35.

122. See *id.* at 36-37.

123. See *id.*

124. 59 F. Supp. 508 (D. Ark. 1944).

125. *Id.* at 517.

126. *Morris v. Williams*, 149 F.2d 703, 704 (1945).

the evidence on which they were based and held that “the record compels the conclusion that such discrimination did exist.”¹²⁷ It is not known whether attorneys’ fees were paid in the case.

Harold Flowers was just as focused on civil rights cases in his own law practice. He believed that “aggressive Negro attorneys can render a vitally needed service to Negroes in the South and at the same time build a profitable practice.”¹²⁸ Before 1950, Flowers had appeared before the state supreme court in eight cases. In several criminal cases and in one civil case, Flowers raised civil rights issues on behalf of his clients.

The civil case, *Pitts v. Board of Trustees of De Witt Special School Dist.*,¹²⁹ was the first African-American school support case in the state of Arkansas. In 1949, the district court found that the facilities of the local African-American grade school and the rating of the local high school were unequal to those available to white students and ordered the school district to upgrade both.¹³⁰

Also in 1949, Flowers handled *Branton v. State*,¹³¹ in which Wiley Austin Branton was convicted of violating a state law that prohibited the distribution of unofficial ballots. The arguments on appeal were that the documents in question were not technically ballots within the terms of the statute and that the statute itself was a violation of free speech under the Constitution.¹³² The judgment was affirmed by the state supreme court and a petition for *certiorari* was denied by the

127. *Id.* at 707 (noting that “very substantial inequalities have existed between the salaries paid to colored teachers and those paid to white teachers and that such inequalities have continued over a period of years are undisputed”).

128. “Southern Lawyer,” 1949 *EBONY* 67, 69 (noting that he created a “virtual one-man campaign” with “an assembly-line succession of law suits to force [authorities] to provide better schools for Negroes.”). See also Kirk, *supra* note 119, at 33 (observing that Flowers “proposed the creation of an independent mass black political organization, representative of the whole of the black population, as a way of tackling the common problems which they all faced”).

129. 84 F. Supp. 975 (1949).

130. *Id.* at 984-85. Unfortunately, the defendant district was in the final stages of construction on a new white grade school and, although the court ordered that no new monies could be devoted entirely to the white school, it allowed the district to complete construction, merely restraining the district from making capital improvements to the white school facilities until it had “brought [the African-American elementary school physical plant] up to a state of substantial equality with the white system . . .” *Id.* at 985. With regard to complaints about the busing of high school students to another town, the court did not find refusal to construct an African-American high school in the town of De Witt inappropriate, given the number of eligible students, and the fact that the only real deficiency of the existing high school was its “state rating.” *Id.* at 987. The court gave the district a “reasonable time . . . within which the facilities of [the African-American high school] may be improved and its rating increased.” *Id.* at 987.

131. 218 S.W.2d 690 (Ark. 1949).

132. *Id.*

U.S. Supreme Court.¹³³ Years later, Wiley Branton explained that he had been attempting to educate African-American voters on how to exercise their franchise.¹³⁴ Branton was the only person ever prosecuted under the statute.¹³⁵

In 1950, Flowers adopted Scipio Jones' jury argument in *Maxwell v. State*,¹³⁶ a murder case, and "mov[ed] to quash the entire jury on the grounds that there had been no black jurors" in the county for more than twenty-five years.¹³⁷ The motion was granted on that ground and a new trial ordered.¹³⁸

The CNO¹³⁹ and Scipio Jones¹⁴⁰ put pressure on state authorities in 1941 to provide tuition assistance for African-American students who could not obtain graduate education in the state. Their efforts were partly successful.¹⁴¹ Funding was provided, but it was deducted from the budget of the Arkansas Mechanical & Normal College, which provided the only state-supported higher education for African-Americans in Arkansas. In 1948, Harold Flowers shepherded African-American student Silas H. Hunt in a successful effort to integrate the law school of the University of Arkansas in Fayetteville, Arkansas.¹⁴²

133. *Branton v. State of Ark.*, 338 U.S. 878 (1949).

134. See Kenneth L. Adelman, *You Can Change Their Hearts*, THE WASHINGTONIAN 107 (Mar. 1988).

135. See generally *id.* (reporting that in 1950, Wiley Branton was the third African-American admitted to the University of Arkansas School of Law and noting that he devoted his legal career to civil rights).

136. 232 S.W.2d 982 (Ark. 1950).

137. See *Obituary: W. Harold Flowers Lawyer and Minister*, WASH. POST, Apr. 9, 1990, at B4.

138. See 232 S.W.2d at 983.

139. See Kirk, *supra* note 119, at 36.

140. See Dillard, *Scipio A. Jones*, *supra* note 59, at 213 (noting that "[i]n 1943 Jones's plan was given legislative approval in Act 345."). See also CORTNER, *supra* note 74, at 51 (reporting that Scipio Jones earlier had attempted to obtain his own legal education from the University, but had been rejected); Guerdon D. Nichols, *Breaking the Color Barrier at the University of Arkansas*, 27 ARK. HIST. Q. 3, 5-6 (1968) (remarking that this approach was on behalf of a client "inquiring as to the possibility that the university might pay tuition fees for Hilburn to attend law school at Howard University, adding that he thought that would be the best way of handling the matter and then apologizing for hinting that there might be other possibilities." Initially, the university rejected the idea on grounds of budget. "But after a visit by Jones to the university for a conference, and further deliberation which took into account the Gaines decision, the university administration furnished \$134.50 for paying Hilburn's tuition fees." A month later, the legislature acted.).

141. See 1943 Ark. Acts 345; Kirk, *supra* note 119, at 36 (reporting that fourteen awards of \$100 were given to students that year, among them Flowers' brother, who was attending medical school in Tennessee).

142. See Kirk, *supra* note 119, at 38.

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RACE EXPECTATIONS

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CONCLUSION

African-American lawyers in Arkansas were active in providing a wide variety of pro bono work between 1865 and 1950. That this occurred in an era of discrimination and oppression leads to the conclusion that they felt a responsibility to push for the destruction of barriers to full citizenship for themselves and for others. Their small numbers and relative powerlessness compared with the forces against them decreed that they would almost always fail to achieve great change, but they managed to force small changes that would accumulate over the years to provide a foundation for more momentous results. Whether or not they were compensated for their efforts seems irrelevant.