The FORGOTTEN ERA

by David S. Bogen

The black lawyers' struggles to establish themselves in the Maryland legal community is a little known and untold chapter in the state's history. But more information is coming to light due to the attention focused last year by the 100th anniversary celebration on the admission of the first black attorney to the Maryland bar.

Prior to the civil war, Maryland statutes restricted the practice of law to white males. Nevertheless, in 1857, Judge Zachias Collins Lee of the Baltimore Superior Court examined Edward Garrison Draper, a black graduate of Dartmouth College who had studied law in the offices of a retired Baltimore lawyer. Judge Lee furnished Draper with a certificate attesting that he was "qualified in all respects to be admitted to the bar in Maryland, if he was a free white citizen."

Two decades after Drapers' certification, the federal courts were open to black lawyers, but, despite the adoption of the thirteenth and fourteenth amendments, the state courts were still closed. James Harris Wolfe became the first black attorney admitted to practice in the Maryland federal courts when he came to Washington, D.C. for a short period after his graduation from Harvard Law School in 1875. Soon afterwards, Charles S. Taylor, another black lawyer from Massachusetts who had been admitted to the federal bar, applied for admission to the bar of the Maryland Court of Appeals. The Court of Appeals, however, had a different view of the impact of the civil war amendments on the statutory racial barrier to the practice of law. "The 14th amendment has no application," it held. *In Re Taylor,* 48 Md. 28, 33 (1877).

Though several previous attempts to repeal the offending statute failed, in 1885, Rev. Harvey Johnson spearheaded another drive to overturn the racial restriction. He convinced Charles Wilson, a Massachusetts lawyer who had moved to Maryland to teach school, to act as the plaintiff. On March 19, 1885, in *In Re Wilson,* the Supreme Bench of Baltimore unanimously held that the racial restriction was unconstitutional. The Court reasoned that the decisions of the Supreme Court of the United States forbidding racial discrimination in jury selection overruled the *Taylor* case. Wilson, however, was never admitted to the bar. Instead, Johnson and his fellow ministers, banded together as the Mutual United Brotherhood of Liberty, persuaded Everett J. Waring, a recent graduate of Howard Law School, to come to Maryland. Waring became the first black attorney admitted to the bar of the Baltimore Supreme Bench on October 10, 1885.

Waring and Joseph Seldon Davis, a fellow Howard graduate who had been admitted to the Baltimore Supreme Bench in March 1886, became counsel to the Brotherhood of Liberty which supported litigation attacking racial discrimination. Waring made his first appearance before the Baltimore Supreme Bench in 1886. He represented Lucinda Moxely in a suit to compel the father of her illegitimate child to pay for the child's support. The Maryland statute applied only to fathers of illegitimate children born of white women. Waring argued that the limitation to illegitimate children of white women was an unconstitutional denial of the equal protection of the laws, but the court denied his client relief. The suit was significant, however, both as the first appearance of a black lawyer before a state court in Maryland and as a method of drawing attention to the unfairness of the law. In 1888, the legislature passed a codification of Maryland laws drafted by Dean John Prentiss Poe of the University of Maryland Law School that omitted the references to race in the statutes on fathering illegitimate children and on admission to the bar.

The following year, George M. Lane, another Howard graduate, was admitted to practice before the Baltimore Supreme Bench. Harry Sythe Cummings and Charles W. Johnson, the first black students to attend the Maryland Law School, were also admitted to the bar in 1889. Both completed their legal studies in only two years: Johnson ranked third and Cummings stood tenth in a class of thirty-three. Cummings and Johnson had their first success in litigation that year when they obtained a not guilty verdict for a black man accused of assaulting a white woman.

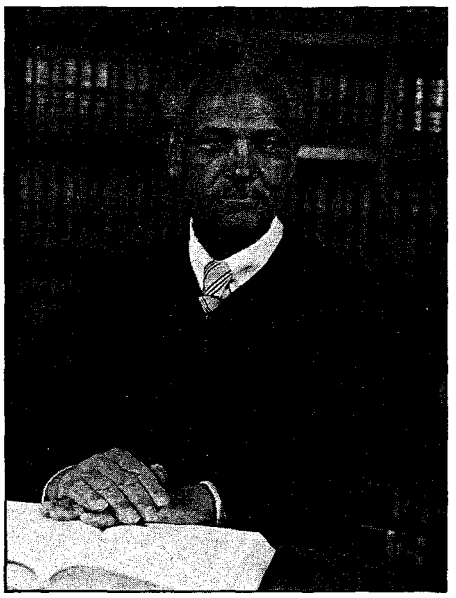
David S. Bogen is a professor with the University of Maryland School of Law.

Despite this progress, prejudice remained high. Everett Waring represented the plaintiff in a damage suit for steamship segregation, but the federal circuit court dismissed the case. In *McGuinn v. Forbes*, 37 F 639 (1889), the judge stated, "When public sentiment demands a separation of the passengers, it must be gratified to some extent." *McGuinn* was one of the cases cited by the majority in *Plessy v. Ferguson*, 163 U.S. 537 (1896) to show the propriety of segregation, although *McGuinn* involved the decision of the carrier to segregate while *Plessy* involved the decision of the state to require carriers to segregate.

Calls for segregation became more pronounced in 1890. William Cabell Bruce, who later became a senator from Maryland, authored a widely discussed pamphlet attacking the mingling of the races. Students at the law school petitioned the administration to exclude black students. Fearing tuition losses, the law school closed its door to black students. It excluded W. Ashbie Hawkins and James L. Dozier after completion of their first year on the grounds that "a number of students had left the school and others refused to enter because of the presence of the two colored men, and the school was continually liable to those losses so long as that state of affairs lasted." The black community was outraged, but it was unable to reopen the school doors. [They were reopened almost half a century later when Thurgood Marshall and Charles Houston successfully represented Donald Murray in his suit for admission to the law school. *University v. Murray*, 169 Md. 478 (1936).]

Another issue which engaged the black community in 1890 was the trial of laborers from the island of Navassa, an American possession in the Caribbean near Haiti. The workers had revolted against brutal and inhuman conditions there, killing several men in the resulting riots. The Brotherhood of Liberty financed their defense, with Waring and Davis among their counsel. Waring became one of the first black attorneys to appear before the United States Supreme Court when he unsuccessfully argued that the federal court in Baltimore had no jurisdiction to hear criminal cases involving alleged criminal actions on the island of Navassa. *Jones v. U.S.* 137 U.S. 202 (1890).

One success for black attorneys in 1890 was the election of Harry S. Cummings, the first black to serve on the Baltimore City Council. Harry Cummings worked diligently on the city council for the interests of his constituents. The city granted a large sum of money to the Maryland Institute of Art and Design, and the institute agreed to take as scholarship students a limited number of individuals appointed by city council members. One of Cumming's most controversial acts was his decision in 1891 to appoint Harry T. Pratt as the first black student in the Maryland Institute. The uproar surrounding the appointment may have been one of the factors in Cumming's reelection defeat in 1892.



David Mason

William Daniels, Malachi Gibson and James L. Dozier were admitted to the bar in 1891. In 1892, two more black lawyers were added to the bar of the Baltimore Supreme Bench, David Dickson and W. Ashbie Hawkins. Hawkins, like Dozier, attended Howard Law School after his expulsion from the University of Maryland. He rode the train to the District of Columbia every day to attend school after his work as a teacher was finished. The determination which he showed in attaining his legal education was displayed throughout his legal career. Hawkins was the leading civil rights lawyer in the state until Thurgood Marshall began his practice here.

Civil rights was hardly the staple fare of the small group of Maryland black lawyers in the nineteenth century. Indeed, law itself was often not remunerative enough to pursue full time. With rare exceptions, white clients did not hire black lawyers and black clients were not wealthy enough to pay substantial fees. The early lawyers recognized this, and devoted a great deal of time and attention to strengthening the economic structure of the black community. For example, in 1890 Cummings, Hawkins and Joseph Seldon Davis along with two other businessmen founded the Economics Association to encourage black businesses. Another example was the establishment of the Lexington Savings Bank in 1895 with Everett Waring its president, and George M. Lane one of the founders.

Political fortune again smiled momentarily in 1895 when the Republican Party gained statewide office for the first time since the early 1870s. The party distributed patronage to blacks only sparingly, but McGuinn, former city councilman Cummings' law partner, was made clerk to the State Liquor Board and Malachi Gibson became clerk to the Judiciary Committee.

Both politics and business proved to be weak supports for the economic hopes of the new attorneys. Although Cummings was elected to the city council again in 1897, the Republicans lost their statewide position in the elections of 1899 and politics became more racially polarized. In business, the Lexington Savings Bank failed in 1897 and Waring was indicted on charges of embezzlement. A jury found him not guilty at his trial in 1898, but Waring left Baltimore with a bitter taste in his mouth, eventually settling in Philadelphia.

The wedge that Cummings had opened in 1891 for black students to receive an education at the Maryland Institute was closed in 1897-8. Black city council member Marcus Cargill nominated another black student to attend the Institute, but the directors refused to admit him. Ashbie Hawkins and white attorney John Phelps brought suit against the Institute, but in 1898 the Court of Appeals held that the Institute was not bound by contract to admit black students and that the Institute was not an arm of the state for purposes of the application of the fourteenth amendment. *Clark v. Maryland Institute*, 87 Md. 643 (1898).

The closing of the Institute to black students exposed a rift in tactics within the black community. Inspired by Booker T. Washington, the Colored Citizens League led by Harry T. Pratt proposed at a convention of black citizens that a resolution be adopted to urge the establishment of an industrial school. Hawkins opposed the proposal, and offered an amendment for the establishment of a school that would provide courses in manual training *and* academic or classical subjects. He also proposed a state civil rights law to forbid discrimination in public accomodations. The convention sided with Hawkins, but its resolutions had little effect on the state legislature.

At the turn of the century, there was a small cadre of black attorneys in Baltimore. In addition to those already mentioned, five other attorneys including Cornelius C. Fitzgerald and William L. Fitzgerald had been admitted to the bar. These men faced a rapidly building force of segregationist sentiment. For example, in 1899, the Democratic Party regained control of Baltimore using the slogan, "This is a white man's city."

When the Democratic Party regained control of the state, it began a decade long program to disenfranchise black voters. Consequently, blacks provided a substantial measure of support for the Republican Party. In 1901 a new election law was passed prohibiting the use of symbols for political parties, prohibiting the grouping of candidates by political parties, and prohibiting assistance in voting except to physically handicapped individuals. One aim of the law was to prevent illiterate persons, disproportionately black under the existing educational system, from voting. The tactic backfired when Republicans opened schools in every precinct and taught voters to recognize the word "Republican" on the ballot. Black supporters of the Republican Party flocked to the schools and were able to continue to vote, but illiterate white supporters of the Democratic Party did not learn how to support their party and effectively lost the vote.

In 1904 the Democratic legislature passed two new measures which further disenfranchised the black population. The first was a statute removing all political designations from the ballot in those counties that had large black populations or regularly voted for the Republican Party. Republicans responded with intensive educational campaigns to recognize the names of individual candidates. The next decade saw a great deal of tricky maneuvering as Democrats sought to confuse the ballot by offering slates of candidates for trumped up parties with names similar to the Republican candidates. The second measure was a proposed constitutional amendment drafted by Dean John Prentiss Poe. The Poe Amendment required a literacy test of all voters, but a "grandfather" clause would permit voting by anyone who voted or who had an ancestor eligible to vote prior to 1870, when the fifteenth amendment was adopted.

Riding the crest of a wave of racial prejudice, the legislature also enacted a law that required segregated cars in the railroads.

Led by a coalition of lawyers and ministers, the black community responded to these threats in a variety of ways. At the call of W.E.B. DuBois, Ashbie Hawkins and Rev. Harvey Johnson attended the Niagara Conference which led to the founding of the NAACP. (Hawkins later became president of the local branch and was the editor of its local journal *The Lancet.)* Hawkins and Cummings joined with Rev. Johnson and other ministers in establishing the Maryland Suffrage League to mobilize black opposition to the Poe Amendment. The League received secret support from Booker T. Washington, who feared exposure would weaken his political effectiveness. Cummings assured Washington, "I shall guard with the greatest precaution your suggestion that no reference be made to you in the communications." In the white community, Republicans and new immigrants joined together against the proposed law. With the combined efforts of blacks, Republicans and immigrants, the amendment was defeated in 1905.

To fight the railroad segregation law, the black community, with the editorial support of the black newspapers, organized a boycott of railroads. And Professor H. H. Hart of Howard Law School decided to test the law. First, he was arrested for refusing to occupy the car assigned to

colored passengers. Then, Hart and a black lawyer from Maryland did the preparation for the case, although it was presented by a white attorney, Henry McCulloch. In *Hart v. State,* 100 Md. 595 (1905), the court held that the statute was unconstitutional as applied to passengers like Hart who were traveling interstate. But dicta in the opinion, citing *Plessy v. Ferguson,* stated that the law could be constitutionally applied to intrastate passengers. Thus, the railroads as a practical matter continued to operate segregated trains. After eight months, the boycott collapsed, and segregation in railroad trains became entrenched in the state.

In 1908 the segregation laws were extended to steamships, and the provisions dealing with railroads were strengthened. Isaac Lobe Straus proposed another constitutional amendment aimed at disenfranchising black voters. Even the Republican Party supported segregation. Harry Sythe Cummings, who had delivered a speech seconding the nomination of Theodore Roosevelt at the Republican convention in Chicago in 1904 and who had been elected once more to the city council in 1907, was forced to sit in a segregated balcony at a Republican party reception held for Charles Evans Hughes in 1908.

Once more Cummings, Hawkins and others organized to defeat the disenfranchisement movement. Again Cummings appealed to Booker T. Washington for support. "I know what you did in our last fight and it was confidential," he wrote. "Can you in any way help us in this struggle? Whatever you do will be as you know 'within the Lodge.' " The combined forces of suspicious immigrants, black voters and white Republicans managed once more to repel the disenfranchisement measure.

On a local level, the city of Annapolis enacted a version of the rejected Straus amendment to govern voting for city offices. This was struck down in *Myers v. Anderson,* 238 U.S. 368 (1915), when black plaintiffs John Anderson, William Howard and Robert Brown were awarded damages for the refusal of the registrars to allow them to vote. Although their case was presented by white attorneys, Howard was a lawyer and presumably aided in the preparation of the case.

The next battlefront was housing. George F. McMechen, a graduate of Yale Law School who was admitted to the Maryland bar in 1904 and became a partner of Ashbie Hawkins, purchased a home on 1834 McCulloch Street in a white neighborhood. One reaction to this move was the passage by the city council of an ordinance requiring residential segregation. At the urging of Hawkins and Warner T. McGuinn, the Baltimore Supreme Bench held the sloppily drafted ordinance invalid in 1911, but a more carefully crafted measure was immediately passed to fill the gap. When John Gurry was indicted for moving into a block in which white residents lived, he was defended by Hawkins and McMechen. The Court of Appeals held the law unconstitutional on the grounds that it interfered with vested property rights and failed to provide a means to distinguish white and black blocks when members of both races were living in the block at the time the ordinance was passed. *State v. Gurry,* 121 Md. 534 (1913). The city council promptly passed still another ordinance to meet the objections of the Court of Appeals.

Meanwhile, Hawkins and McMechen were busy on another front. In 1914 they represented James Jenkins who was prosecuted for refusing to occupy a seat designated for colored passengers on the railway. The court upheld the statute as amended in 1908, construing it to apply only to intrastate passengers. *State v. Jenkins,* 124 Md. 376 (1914).

The residential segregation ordinance came under fire again in 1915 when Hawkins defended another criminal prosecution for its violation. The decision was postponed, however, until the Supreme Court decided a case from Kentucky based on a similar ordinance. Hawkins filed an amicus brief for the NAACP in the Kentucky case, *Buchanan v. Warley,* 245 U.S. 60 (1917), in which the United States Supreme Court held residential segregation ordinances were unconstitutional. Armed with the *Buchanan* opinion, Hawkins and Cornelius C. Fitzgerald returned to the Maryland courts where the Baltimore ordinance was ruled unconstitutional. *Jackson v. State,* 132 Md. 311 (1918).

In 1920 W. Ashbie Hawkins ran for the United States Senate. He knew he had no chance of winning. He ran to obtain a platform for his views on racial issues and to extract concessions from the Republican party to secure the support of blacks. But no concessions were offered. Although blacks continued to vote in the city of Baltimore, electing to the city council in 1919 Warner T. McGuinn (replacing his former law partner Harry Cummings who died in 1917) and William L. Fitzgerald, segregation and discrimination pervaded the state.

Hawkins and McMechen joined with William McCard and Clarke Smith to purchase a building on 14 Pleasant Street which they named the Banneker Law Building, renting space to other black lawyers. According to a contemporary, "This is the first and only instance in the United States where four colored lawyers own and occupy their own office building." Nevertheless, rewards from practice were still meager. Almost half the lawyers listed in Coleman's directory of colored professionals in 1920-21 (W. Norman Bishop, J. Stewart Davis, William L. Fitzgerald, Cornelius C. Fitzgerald, Smith and McCard) were listed under real estate and insurance as well as law.

Carter Woodson in 1934 discussed the problems of black lawyers of this early era. "There is a very decided and general feeling among Negro lawyers, especially in the border states such as Maryland and the District of Columbia, that certain judges will not give a Negro lawyer an impartial hearing where opposing counsel is white," said Woodson. Black lawyers had very few clients in commercial matters and were confined "chiefly to criminal law, then domestic relations, personal injuries, small claims and matters growing out of the conduct and management of churches and fraternal organizations," he continued.

Measured by the forces arrayed against them, the achievements of the black lawyers in Maryland in these first four decades were substantial. Their economic survival was itself a triumph. By 1935 there were thirty-two black lawyers in Baltimore alone. *Plessy v. Ferguson* and virulent racism blocked their attempts to halt segregation in transportation, but joint action with ministers, other leaders in the black community, Republicans and white immigrants staved off the worst attempts at disenfranchisement. And litigation brought by black lawyers defeated the most blatant residential segregation laws. The legacy of these early black lawyers should not be forgotten.■