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CRITICAL RACE THEORY/CRITICAL RACE PRACTICE
(The John Patterson Sampson Memorial Panel)

J. Clay Smith, Jr.*

In 1841, three years before the first African American lawyer was admitted to the bar in the United States, Ralph Waldo Emerson asked: "What is a man born for but to be a Reformer, a Re-maker of what man has made; a renouncer of lies; a restorer of truth and good, imitating that great Nature which embosoms us all, and which sleeps no moment on an old past, but every hour repairs herself, yielding us every morning a new day, and with every pulsation a new life?" Emerson answered his inquiry as follows: "Let him renounce everything which is not true to him, and put all his practices back on their first thoughts, and do nothing for which he has not the whole world for his reason."¹

In 1844, Macon Bolling Allen became the first black American to complete a course of study in law, and the first black lawyer formally introduced to jurisprudence, the study of the science of

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These remarks were presented before the Critical Race Theory Panel during the 150th Anniversary celebration of the Black Lawyer in America held at the George Washington University School of Law on February 10, 1994.

¹ Ralph Waldo Emerson, *Man the Reformer*, in 5 THE WORLD'S BEST ORATIONS: FROM THE EARLIEST PERIOD TO THE PRESENT TIME 2008 (David J. Brewer ed. 1899) (from Emerson's peroration of the Address before the Mechanics' Apprentices' Library Association, Boston, Jan. 25, 1841).

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law,² at a time when black people in the nation were considered "far less esteemed than the veriest stranger and sojourner."³ Allen's study of law and his admission to the bar must have rocked the ages past as well as the American experiment of law and equality. Although no record has been found listing the books or subjects that Allen's private instructor used to teach him, he must have studied from classical sources to satisfy his white examiners that he was qualified to be admitted to the bar in the State of Maine.⁴ One can only imagine the questions that were put to Allen during his oral bar examination. Perhaps he was questioned on the premises undergirding the Declaration of Independence, Federal Constitution, elements of the debates between the Federalist and the Antifederalist, the definition of a slave or the meaning of citizenship, and his views on the slave provisions of the Constitution. He may have been asked why he wanted to be a lawyer, or how he planned to function as a lawyer in a nation half free and half slave? Could the wrong answer to these questions have influenced the decision to grant or to deny him admission to the bar? Might Allen boldly have declared his intention to use the law to help emancipate his people from slavery, "to be a Reformer, a

² J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944*, at 93 (1993).

³ Frederick Douglass, *The Present Condition and Future Prospects of the Negro People*, 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE, 1850-1860*, at 244 (Philip S. Foner ed. 1950).

⁴ J. CLAY SMITH, JR. *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944*, at 95 (1993), stating, "*The Liberator* [1845]...reported that Allen had 'received a classical education'...."

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Re-maker of what man has made [and] a renouncer of lies...?"⁵

Drawing on Emerson's words, what may have been difficult for Macon Bolling Allen to foresee in 1844, is clear to his legal progenies in 1994, the sesquicentennial anniversary of black lawyer in America: The black lawyer was determined "to see to it that the world [was] the better for [himself and his people] and to find [his] reward in the act."⁶

This panel, named in memory of John Patterson Sampson, an 1873 graduate of National University School of Law (now George Washington National Law Center), treats Critical Race theory. Thanks to Professors Richard Delgado and Jean Stefanic of the University of Colorado School of Law, whose Bibliographic Essay in the Vol. 79 of the VIRGINIA LAW REVIEW, reveals the various themes of CRT, we are better able to discern the rich scope of this topic.

Delgado and Stefanic's grouping of CRT falls into nine separate categories--such as

⁵ Ralph Waldo Emerson, *Man the Reformer*, in 5 THE WORLD'S BEST ORATIONS: FROM THE EARLIEST PERIOD TO THE PRESENT TIME 2008 (David J. Brewer ed. 1899). The pioneer black lawyer, no doubt trained under the classical commentaries of Blackstone, Kent, Wheaton and other scholars of the day, had to be aware of the ongoing debate on the question of whether natural law, as a fundamental source of law, have "any meaning independent of the 'public acts' in which it appeared?" G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 679 (abridged ed. 1991). I believe that the only response to this inquiry that the pioneer black lawyer could have made was that a civilized nation had embodied natural right and natural law themes into the written Constitution to no less degree for black people than it had for white people.

⁶ *Ibid* (Man and the Reformer). The above paragraphs were excerpts of from a lecture delivered at Notre Dame Law School on February 9, 1994, entitled, "Justice and Jurisprudence and the Black Lawyer."

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1. Critique of liberalism
2. Storytelling / counterstorytelling and "naming one's own reality"
3. Revisionist interpretations of American civil rights law and progress
4. A greater understanding of the underpinnings of race and racism
5. Structural determinism
6. Race sex, class, and their intersections
7. Essentialism and anti-essentialism
8. Cultural nationalism/separatism
9. Legal institutions, Critical pedagogy, and minorities in the bar
10. Criticism and self-criticism responses

It has been suggested that CRT as a theme in the legal academy was ushered in during the 1970s. This may be an accurate date. However, I submit that most of the themes identified by Delgado and Stefancic and the scholars cited in their invaluable bibliography are the products of black lawyers, and white lawyers who laid the foundation in Critical Race Theory and Critical Race Practice(CRP). One such lawyer was Robert Morris, Sr., of Boston, who in 1847, was the first black lawyer to file a civil rights case in the history of the nation. In Roberts v. City of Boston, Morris, file a suit to desegregate the public school system in Boston to admit a little black female child by the name of Sarah Roberts. This law suit, though ultimately lost, set in motion, I believe, what CRT's have

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defined as Critical Race Theory. Robert Morris, Sr., was the Thurgood Marshall of 1847; in 1954, Thurgood Marshall carried out the dream and aspirations of Robert Morris, Sr.

Last night, several of the Conference participants mentioned other pioneer lawyers, whose early litigative activities more than established a critical race theory. One person identified the work of Charles Hamilton Houston, the architect of the modern civil rights movement. I have privately, now publicly ask: How can critical race theorist justify their themes without drawing on and crediting the work of the black fathers and mothers of the bar that gave birth to criticism of racial classifications, and strategic legal methodologies which embraced both formalism and realism leading to the emancipation of the underperson? I submit that there is no fundamental difference between many of the themes of critical race theorist chronicled in Professor Delgado and Stefanic's comprehensive and valuable annotation of CRT, than have been advanced in other language by the pioneer black lawyers, and other jurisprudents, such as Frederick Douglass, Dean W. Haywood Burns, the late Professor Herbert O. Reid, Sr., and Sojourner Truth.

There are, however, some exceptional differences presented. The Critical Race Theorist, and the group that has been formed, which continues to grow, have staked out a new language which, I think, is not too far difference from the more common language of their black and white legal forepersons. Secondly, to their

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credit, the CRTs, by virtue of their place in the academy, have the envious opportunity to classify and to develop, for the first time in American law, a systematic jurisprudential study of their views on race, law, will, and judgement. This welcomed intrusion into the jurisprudential matrix is significant, and its members seemed to be growing, and diversifying the heretofore segregated matrix of jurisprudential thought.

Thanks to Associate Dean Alfreda Robinson of the George Washington National Law Center, and the planning committee, we have a distinguished panel who will address in their own way the subject of Critical Race Theory. Their backgrounds appear in your program booklet.

Now, I am pleased to introduce the panel in order of their presentations: Professor Robin Barnes, of the University of Connecticut School of Law; Professor Lani Guinier, of the University of Pennsylvania School of Law, and Professor Ralph Steinhardt of the George Washington National Law Center. I am Professor J. Clay Smith, Jr., of the Howard University School of Law, and the moderator of this Panel. Questions will be entertained after the presentations.

GeorgeW