

Quiet Justice

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Melissa Milewski, [Litigating Across the Color Line: Civil Cases Between Black and White Southerners from the End of Slavery to Civil Rights](#) (2017).

One of the key contributions Melissa Milewski makes in her important new book, *Litigating Across the Color Line*, is a novel and rather surprising answer to a central question for historians of race and the law: why, in the period between Reconstruction and the modern civil rights era, did African Americans maintain such faith in the courts?

The standard answer, in one version or another, has been: what else did they have? During decades when the controlling institutions of American society systematically oppressed blacks, the courts, and particularly the federal courts, were the least bad choice available for oppressed racial minorities. This helps explain why the NAACP invested time and resources in litigation campaigns in its early years; it also helps explain why African American attorneys such as Charles Houston and Thurgood Marshall committed themselves to a path that placed lawyers and judges at the vanguard of the battle against Jim Crow.

Kenneth Mack, in his 2012 book *Representing the Race*, offered another answer to this puzzle of black commitment to the courts. He examined the lives of African American lawyers from the 1920s through the 1950s and found that the courtroom itself offered skilled black lawyers unique opportunities to perform in a relatively egalitarian setting. The courtroom, according to Mack, “remained open to the crossing of racial boundaries in a way that most other public places were not.”¹ For some black lawyers, the courts offered a valued space in which to cultivate a professional identity.

Milewski, a historian at the University of Sussex, presents yet another explanation for this resilient faith in the courts among African Americans. Shifting focus from black lawyers to everyday black citizens, she advances a simple and striking claim: for African Americans in the Jim Crow South, the courts generally worked. In the years between Reconstruction and the civil rights movement, a time when southern blacks were excluded from holding office, voting, serving on juries, a time when segregation by custom and law defined public life in the South, African Americans fared surprisingly well in the courtroom.

This important and counterintuitive point, Milewski is careful to note, requires some immediate qualifications. When prosecuted by the state for crimes, especially crimes (or accusations of crimes) with white victims, African Americans received justice that was harsh and unequal. Yet when it came to legal disputes over property, wages, injuries, and various other civil matters—the focus of the book—Milewski demonstrates that the white judges and juries often did in fact provide fair treatment for black Americans.

This is not an easy topic to research, and one of the pleasures of *Litigating Across the Color Line* is Milewski’s discussion of the challenges posed by her research subject and the creative solutions upon which she settled. For the most part, trial court records of this period are either nonexistent or exceedingly difficult to find, and extant records are often incomplete. To navigate these source limitations, Milewski focuses on civil cases between white and black litigants that reached the state supreme courts in eight ex-slave states (Alabama, Arkansas, Georgia, Kentucky, Mississippi, North Carolina, Tennessee, and Virginia) between the end of the Civil War and 1950. Narrowing the scope of her research to this subset of appealed cases allows her to more systematically evaluate her topic; the book includes an appendix of tables breaking down her data. Furthermore, the cases that reached state supreme courts often have case files with which she reconstructed the earlier stages of litigation. In brief form in the body of the book

and at more length in an appendix, Milewski offers wonderful descriptions of the challenges of the archives and, more generally, the work of the historian.

Milewski's impressive archival research led her to identify 1,377 civil appeals that reached these eight state supreme courts between 1865 and 1950 in which she could identify a black litigant. A third of these were disputes between black litigants (most often over wills and estates). The rest were between black and white litigants; these thousand or so cases are the focus of the book. Her headline finding: in appeals of civil cases involving disputes between blacks and whites, state supreme courts held in favor of the black litigant more often than the white. (Blacks won fifty-nine percent of these cases.)

What accounts for this surprising fact? Among Milewski's several explanations, one of the most compelling is a theory of hegemonic preservation: by maintaining a certain level of fairness in the civil litigation process, whites were able to create a more effective system of white supremacy. Blacks tended to win in cases that whites did not see as threatening the racial status quo. In civil cases that directly challenged racial discrimination, black litigants lost far more than they won. In appeals of criminal convictions, black defendants lost more than they won. The average property dispute, personal injury claim, or fraud suit, by contrast, did not appear to challenge white authority. The cases she considers were litigated almost exclusively by white lawyers; they were decided by white judges and, in most cases, all-white juries. Milewski notes that successful black litigants often presented themselves in ways that aligned with white stereotypes—deferential, vulnerable, ignorant, non-threatening. Black legal victories were both an exception to the general rule of white supremacy and a product of it.

Litigating Across the Color Line brims with other interesting findings. Milewski notes, for instance, that forty-one percent of the civil cases she examined had a black woman as one of the litigants. She also locates changes in litigation patterns over time. In the period between 1865 and 1900, a large percentage of cases involved black litigants suing their previous owners, usually over disputes over wills and property. In the early twentieth century, personal injury and fraud suits were the most prevalent form of interracial civil suit; by the middle of the twentieth century, most disputes involved property, contracts, and wills. In these later decades of her study, Milewski also notes an increase in African American litigants advancing broader claims for equal treatment as part of their civil suits, sometimes with the support of racial justice organizations, such as the NAACP.

Milewski's approach has its limitations, as she readily acknowledges. Her data set is not necessarily representative of the universe of civil cases that got to court. Appealed cases often involved black litigants with more knowledge and resources. These litigants likely had, on balance, stronger legal claims than the run-of-the-mill case that never got beyond the trial court. Nonetheless, even taking into account these recognized limitations, *Litigating Across the Color Line* offers fresh insights and much material for further exploration.

Although this book offers powerful insights about dynamics of the black freedom struggle, this is not a book about crusaders. Few of the cases Milewski considers directly involved race or racial discrimination. Her protagonists are regular people with everyday problems—property and wage disputes, contested wills, personal injuries. They wanted solutions. And the courts, in many instances, gave them what they wanted, even when it required a white judge or jury to declare a black person right and a white person wrong. They “made a biased system work for them under enormous constraints.” (P. 3.) And even if the African Americans who took their problems to court did not see themselves as egalitarian crusaders, and even if whites did not recognize interracial civil suits as challenging their racial privileges, Milewski insists that these cases “were just as radical and significant as cases focused on civil rights that gained the nation's attention.” (P. 190.) Former slaves were able to win cases against their former masters; sharecroppers were able to win cases against white landowners. The reconstruction of this remarkable story is a major contribution to legal historical scholarship.

1. Kenneth W. Mack, **Representing the Race: The Creation of the Civil Rights Lawyer** (2012), 62. [?]

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