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# Freedom Comes Only from the Law': The Debate Over Law's Capacity and the Making of Brown v. Board of Education

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“FREEDOM COMES ONLY FROM THE LAW”: THE DEBATE OVER  
LAW’S CAPACITY AND THE MAKING OF *BROWN V. BOARD  
OF EDUCATION*

Christopher W. Schmidt\*

TABLE OF CONTENTS

I. INTRODUCTION .....	1492
II. “FOLKWAYS” AND “STATEWAYS” IN THE JIM CROW ERA .....	1496
A. <i>The Folkways Principle Defined</i> .....	1496
B. <i>Prohibition and the Problem of “Legislating Morality”</i> .....	1503
C. <i>Intergroup Education and Antiprejudice Campaigns</i> .....	1505
III. THE CASE FOR THE LAW .....	1508
A. <i>Myrdal’s Critique of the Folkways Principle</i> .....	1509
B. <i>The Turn to the Law</i> .....	1511
C. <i>The Case for Law’s Capacity</i> .....	1514
D. <i>Faith Confirmed—Early Civil Rights Reforms</i> .....	1519
E. <i>Historians and the Origins of Jim Crow</i> .....	1522
IV. THE TRIUMPH OF FAITH IN THE LAW: THE ROAD TO <i>BROWN</i> .....	1525
A. <i>The Skeptics’ Case</i> .....	1527
B. <i>The Racial Liberals’ Case</i> .....	1530
C. <i>The Brown Court</i> .....	1535
D. <i>The Implementation Decision</i> .....	1542
V. FAITH TESTED: THE ORDEAL OF IMPLEMENTATION AND MASSIVE RESISTANCE .....	1549
A. <i>Massive Resistance</i> .....	1549
B. <i>The Capacity of the Law Reconsidered</i> .....	1553
VI. CONCLUSION .....	1555

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\* © 2008 Christopher W. Schmidt, Visiting Scholar, American Bar Foundation; Visiting Associate Professor, Chicago-Kent College of Law. B.A. 1996, Dartmouth College; M.A. 2000, Ph.D. 2004, Harvard University; J.D. 2007, Harvard Law School. This Article draws on research and writing I have done over the past decade, and I cannot possibly thank everyone who has contributed ideas, insights, and criticisms that have found their way into these pages. Nonetheless, to certain people I am particularly indebted. I would like to thank Lizabeth Cohen, Morton Horwitz, and James Kloppenberg for guiding this project in its earliest incarnations; Michael Klarman for a steady stream of encouragement and advice at various stages; and Felice Batlan, Risa Goluboff, Joanna Grisinger, Dan Hamilton, Alison LaCroix, Kristen Stilt, and Allison Brownell Tirres for their helpful suggestions on drafts of this Article.

*Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.*<sup>1</sup>

*[G]roup relations have been the last fortress of the doctrine of laissez faire. Long after resort to legislation to curb existing evils had been taken for granted, the theory survived that discrimination was not susceptible to this treatment. The past decade has given the death blow to that theory.*<sup>2</sup>

## I. INTRODUCTION

*Brown v. Board of Education*<sup>3</sup> emerged from a constellation of assumptions about race and law, the contours of which have yet to be fully reconstructed. We are familiar with the efforts of the National Association for the Advancement of Colored People (NAACP) and their allies to attack the belief, infamously espoused in *Plessy v. Ferguson*,<sup>4</sup> that segregation imposed no necessary badge of inferiority on African Americans.<sup>5</sup> Familiar, too, is the growing recognition by the middle of the twentieth century of the importance of education to modern American society, a factor Chief Justice Earl Warren highlighted in the *Brown* opinion.<sup>6</sup> And recently scholars have drawn attention to the critical role of Cold War foreign policy in creating pressure for civil rights reform.<sup>7</sup> But there was another issue that permeated the intellectual landscape during the early post–World War II period in which *Brown* was born that has largely been overlooked in the scholarship: whether law even had the power to affect the racial prejudice that motivated the practices and customs of white supremacy in the Jim Crow era. Without a commitment to the belief that the guiding hand of the law had the capacity to weaken racial animosity, much of the nascent civil rights project threatened to dissolve. A critical factor in the emergence of civil rights as a viable national issue was the work of activists, lawyers, and scholars who pressed upon the nation their faith in the *efficacy* of civil rights reform.

As the United States emerged from World War II, the battle over the fundamental wrongness of racial segregation, while far from over, was well on its way toward resolution. The real question for the nation was not whether the nation

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<sup>1</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

<sup>2</sup> Will Maslow & Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality, 1862–1952*, 20 U. CHI. L. REV. 363, 413 (1953).

<sup>3</sup> 347 U.S. 483 (1954).

<sup>4</sup> 163 U.S. 537 (1896).

<sup>5</sup> *Id.* at 551.

<sup>6</sup> 347 U.S. at 492–93.

<sup>7</sup> See, e.g., MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 79–115 (2000).

would be better off, from the perspective of morality, economics, and world opinion, without Jim Crow, but the best way to achieve this desired end. Since the late nineteenth century, most Americans agreed that racial progress would be achieved by education rather than legislation. Improving race relations required attacking prejudicial attitudes rather than discriminatory actions—the logic being that the latter was only the product of the former. In the years leading up to *Brown*, a pervasive, commonplace argument against civil rights legislation and judicial rulings was that beliefs, not laws, dictated behavior. This was the assumption of the *Plessy* Court—that laws were “powerless to eradicate racial instincts” and “social prejudices.”<sup>8</sup> This was the claim captured in the popular dictum put forth by Yale University sociologist William Graham Sumner, which encapsulated the prevalent social-Darwinist assumption of the Jim Crow era, that “stateways” were powerless to change “folkways.”<sup>9</sup> The lessons of history seemed only to confirm these assumptions. Post-Civil War efforts to promote equality for the freed slaves resulted in a “tragic era”<sup>10</sup> of Reconstruction, demonstrating that civil rights laws, even when backed by military force, were ultimately ineffectual in cracking the white South’s deep commitment to racial supremacy. And the embarrassing experience of Prohibition, the “noble experiment” of banning alcohol that the nation abandoned in 1933, fourteen years after it began, only strengthened the claim that laws were powerless, even counterproductive, when placed in opposition to entrenched customs.

In an effort to overcome these pessimistic assumptions toward the law, in the 1940s and 1950s a generation of liberal social scientists, historians, and lawyers rallied around a new approach. Change the laws, racial liberals argued, and attitudes and customs will follow. The prejudices that pulled the races apart were not particularly deep-seated; indeed, they were themselves the product of laws that required the separation of the races. Remove legal barriers preventing blacks and whites from living and working together, and they will begin to understand each other; proximity encouraged by legal compulsion can lead to tolerance. Law, they emphasized, involved more than enforcement, more than the raw application of power; it also involved moral leadership and education. As the nation emerged from the war years, racial liberals optimistically saw the country as poised to squarely address its increasingly embarrassing and anachronistic racial practices, and, in such a climate, legal reform would prove to be the critical next step. In short, prohibit discrimination, and race relations will improve. Guided by carefully considered legal reform, postwar racial liberals envisioned a new era in race relations, driven by the nation’s basic commitment to the principle of equality, now released from the shackles of Jim Crow laws. “Freedom comes only from the law,”

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<sup>8</sup> 163 U.S. at 551.

<sup>9</sup> WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* 77–78 (Ginn & Company 1940) (1906).

<sup>10</sup> See CLAUDE G. BOWERS, *THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN* (1929).

proclaimed legal scholar and civil rights activist Milton Konvitz,<sup>11</sup> thus summarizing an essential tenet of postwar racial liberalism.

This vision of the capacity of the law—a mixture of insight and inspiration, analysis and hopeful thinking—was remarkably compelling for many Americans at midcentury. In one form or another, the belief that civil rights law could eradicate prejudice, and do so in relatively short order, would be internalized by a growing number of reformers and policymakers. Yet, as the principle of civil rights gained strength, considerable skepticism remained about whether *judicial* leadership in the area of civil rights could be effective. When the judiciary served its paradigmatic role of protecting minority rights against majority interests—a role the Supreme Court embraced with increasing seriousness during these years—it necessarily tested the power of the law to uproot entrenched customs. For the Supreme Court to strike down Jim Crow laws would be the most direct test of the racial liberal claims about the efficacy of civil rights law. The newly emergent confidence in law played a prominent role in swaying several members of the Supreme Court, in 1954, to refute the assumptions on which *Plessy* was based and hold racial segregation in schools unconstitutional.<sup>12</sup>

This Article makes several contributions to legal scholarship. Most importantly, it brings to light a factor in the emergence of the civil rights revolution of the 1950s and 1960s that has largely been forgotten. The widespread acceptance of the legalist arguments was a necessary step in the creation of the modern concept of civil rights, which is based on the faith that legal institutions—particularly the federal courts—should be at the center of the struggle for racial equality. The allure of this distinctly modern faith in civil rights law was an important factor in the decline of alternative approaches to dealing with racial inequality, including reform efforts that put more emphasis on economic and structural inequality.<sup>13</sup> Furthermore, a deeper appreciation for the importance of the debate over the capacity of the law in the early postwar period highlights the interrelations between the efforts to create support for federal civil rights law and the previous achievements of the New Deal, as well as the significant civil rights efforts taking place on the state and local level during these years. Postwar racial liberals looked to all these sources in making their case for the law.

My analysis also adds to our understanding of historical developments since *Brown*. For example, by appreciating the effort that went into the pre-*Brown* campaign to make a case for the power of law, we can better understand the remarkable optimism that accompanied the Supreme Court's decision. After spending years trying to convince policymakers and judges that civil rights law was the key to moving beyond Jim Crow, and that the South was ready to accept

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<sup>11</sup> MILTON R. KONVITZ, *THE CONSTITUTION AND CIVIL RIGHTS* viii (1947).

<sup>12</sup> *See Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

<sup>13</sup> *See, e.g.,* RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786 (1988); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005).

legal change, there was a sense among civil rights lawyers, activists, and many government officials (including a majority of Supreme Court Justices) that with *Brown* the major battle had been won. Even when the Court issued its 1955 implementation decision (*Brown II*),<sup>14</sup> with its instruction to desegregate “with all deliberate speed,”<sup>15</sup> true believers in the racial liberal position were undeterred. “I think it’s a damned good decision!” Thurgood Marshall pronounced after *Brown II*.<sup>16</sup> “[T]he laws have got to yield! They’ve got to yield to the Constitution.”<sup>17</sup> But Marshall (along with many other racial liberals) was overly optimistic, as the rise of massive resistance in the wake of *Brown II* would attest. This was the double-edged sword of the deep faith in the capacity of the law: it was an essential part of the civil rights reform efforts of the 1945–1955 period, but it also risked pulling attention away from the grassroots struggles that would be necessary to translate legal mandates into social reality.

Finally, this Article provides a missing element in the history of the ongoing debate over the role of the courts in social change. The prevalent faith in the courts as the leading edge of reform—what Laura Kalman has termed “legal liberalism”<sup>18</sup>—has too often been attributed to *Brown* itself.<sup>19</sup> But I argue that legal liberalism was not the product of *Brown*; rather, *Brown* was the product of legal liberalism. It took at least a decade of activism, scholarship, and litigation to construct and promulgate racial liberal ideology, and it was the persuasive power of this ideology that made *Brown* possible. In illuminating the lost history of the postwar debate over the capacity of the law to affect race relations, this Article provides a more complete lineage of legal liberalism.

This Article is divided into four main sections. Part II examines the belief, prevalent in the late nineteenth century, that laws were of limited efficacy in challenging racial hierarchies, and the continued vitality of this concept in the first half of the twentieth century. Part III describes the efforts of social scientists and historians in the early postwar period to refute the legal skeptics and construct a new vision of the law as uniquely effective at reforming entrenched social patterns and racial prejudices. Part IV turns to *Brown*, describing the application of these new arguments for the capacity of the law by NAACP lawyers, the efforts to refute these arguments by their opponents, and the Supreme Court Justices’ receptivity to the legalist arguments. Part V examines the resurgence, in the wake of widespread resistance to *Brown* in the South, of a more circumspect vision of civil rights law. Disappointment at *Brown*’s failure to move the South to abandon segregation was

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<sup>14</sup> *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955).

<sup>15</sup> *Id.* at 301.

<sup>16</sup> RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 746 (1976) (quoting Marshall in transcribed conversation with Carl Murphy).

<sup>17</sup> *Id.* at 747.

<sup>18</sup> LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 2 (1996).

<sup>19</sup> *Id.*; see also Mack, *supra* note 13, at 265 (“The legal liberal interpretation of civil rights lawyering and politics emerged only after the apparent success of a particular mode of civil rights lawyering in the *Brown* litigation.”).

a critical contributing factor in the emergence of a movement of direct-action protest against Jim Crow, a movement driven by the belief that legal proclamations alone would not change society.

## II. "FOLKWAYS" AND "STATEWAYS" IN THE JIM CROW ERA

### A. *The Folkways Principle Defined*

Civil rights advocates in the middle decades of the twentieth century who looked back at the late-nineteenth-century birth moment of Jim Crow America were invariably drawn to two statements that seemed to encapsulate that era's pessimistic, fatalistic vision toward civil rights reform. One was a dictum put forth by Yale University professor William Graham Sumner, which captured the prevalent social-Darwinist assumptions of the day: "Stateways," he declared, were powerless to change "folkways."<sup>20</sup> The other was the language found in the majority opinion in *Plessy v. Ferguson*, in which the Court expressed skepticism toward civil rights laws that conflicted with society's natural racial prejudices.<sup>21</sup>

The *Plessy* decision of 1896 offered one of the most famous articulations of the principle against which mid-twentieth-century racial liberals fought. "Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences," the Court explained in upholding a Louisiana railroad segregation statute, "and the attempt to do so can only result in accentuating the difficulties of the present situation."<sup>22</sup> The Court further stated that the belief "that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by enforced commingling of the two races" was deeply misguided.<sup>23</sup>

The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either . . . .

. . . .  
 . . . If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.<sup>24</sup>

This skepticism toward improving race relations through the force of law reinforced the Court's narrow vision of the Fourteenth Amendment that allowed

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<sup>20</sup> See SUMNER, *supra* note 9.

<sup>21</sup> 163 U.S. 537, 551 (1896).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 544, 552.

states broad discretion in aligning racially discriminatory laws with local customs. Under the Fourteenth Amendment, the only relevant concern for the Court was whether the law was reasonable, and “[i]n determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.”<sup>25</sup> Social change, if it were to arrive, would do so through pressures other than legal compulsion. “If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals.”<sup>26</sup> *Plessy* is pervaded with a general skepticism toward the power of the law to effect change in the “social” sphere.<sup>27</sup>

In many ways, *Plessy* was unexceptional for its day, both in the legal standard established and in the ideological commitments on which the Court relied.<sup>28</sup> In dismissing civil rights policy as ill-advised intervention into relationships that were best regulated by prevailing local norms and customs, the Court drew upon a widely held assumption of the period. The majority opinion quoted from a decision of the New York Court of Appeals, *People ex rel. King v. Gallagher* (1883), which concluded that social equality “can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate.”<sup>29</sup> New York’s highest court argued (in a section not quoted in *Plessy*):

In the nature of things there must be many social distinctions and privileges remaining unregulated by law and left within the control of the individual citizens, as being beyond the reach of the legislative functions of government to organize or control. The attempt to enforce social intimacy and intercourse between the races, by legal enactments, would probably tend only to embitter the prejudices, if any such there are, which exist between them, and produce an evil instead of a good result.<sup>30</sup>

If interracial “intercourse” were to develop, it would only be because of “the operation of natural laws and the merits of individuals, and [could] exist and be

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<sup>25</sup> *Id.* at 550.

<sup>26</sup> *Id.* at 551.

<sup>27</sup> *See, e.g., id.* at 551 (referring to segregation law as creating “*merely* a legal distinction” (emphasis added)).

<sup>28</sup> *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 8–60 (2004); CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 174–75 (1987). *See generally* GEORGE M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914, at 275–82 (1971) (describing surge in racist thought and violence at the turn of the twentieth century).

<sup>29</sup> *Plessy*, 163 U.S. at 551 (quoting *People ex rel. King v. Gallagher*, 93 N.Y. 438, 448 (1883)).

<sup>30</sup> *People ex rel. King*, 93 N.Y. at 448.



enjoyed only by the voluntary consent of the persons between whom such relations [might] arise.”<sup>31</sup> Five years later, the same New York court reiterated its skeptical view of the law when placed in opposition to entrenched racial custom. In the process of upholding a state public accommodation law, it emphasized the point, which the *Plessy* Court would reiterate, that “[i]t is, of course, impossible to enforce social equality by law.”<sup>32</sup>

Such assumptions were most rigorously theorized and starkly voiced by proponents of “social Darwinism.” Social Darwinists argued that cultures tend to conform to patterns of behavior that have a settled, even “natural” quality to them, being the end product of generations of testing and experimentation. To attack the cultural commitments on which social relations rely through ambitious legal reform, adherents to this conservative ideology concluded, was sheer folly. English philosopher Herbert Spencer, the originator of the term “survival of the fittest,” went so far as to argue that state regulation risked disrupting the beneficial pathways of natural selection.<sup>33</sup> Social welfare programs “put a stop to that natural process of elimination by which society continually purifies itself.”<sup>34</sup>

Even if one preferred not to embrace the brutal, amoral consequences of Spencer’s extreme defense of laissez faire policy, the basic premise of social Darwinist theorists, that social patterns and customs derived from a complex selection process that should not be disturbed precipitously, became a powerful bulwark of the status quo against all forms of social welfare legislation, particularly in the area of race relations.<sup>35</sup> William Graham Sumner, the most influential advocate of social Darwinism in the United States, argued that “folkways”—the customs, mores, and traditions that made up a culture—were the product of evolutionary “natural forces,” and were therefore largely immune from legal constraints that attempted to drastically reshape them.<sup>36</sup> The best laws could do was reinforce already established majority customs and beliefs. For generations of southern proponents of Jim Crow, Sumner’s dictum that “stateways” were

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<sup>31</sup> *Id.*

<sup>32</sup> *People v. King*, 110 N.Y. 418, 427 (1888).

<sup>33</sup> CARL N. DEGLER, *IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT* 11 (1991).

<sup>34</sup> *Id.*

<sup>35</sup> Social Darwinism was a basis for theories of scientific racism. If existing social patterns were the product a natural selection process, then the fact of white supremacy reflects innate superiority of the white race. In this way, social Darwinists supported the naturalization of socially constructed racial hierarchies. Scientific racism was a key intellectual prop for the development and perpetuation of the Jim Crow regime in the South as well as its general acceptance among whites outside the South. *See, e.g., id.*; Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 634–35 (1985).

<sup>36</sup> SUMNER, *supra* note 9, at 55–57, 77–78, 87.

powerless to change “folkways” became, according to Gunnar Myrdal, “a general formula of mystical significance.”<sup>37</sup>

A skepticism that the guiding hand of the law could improve race relations pervaded American society by the early twentieth century. The idealistic post-Civil War moment in which the Thirteenth, Fourteenth, and Fifteenth Amendments were ratified had faded into the past. Congress's last effort in the field of civil rights, the ambitious public accommodations legislation in the Civil Rights Act of 1875, had been struck down by the Supreme Court in 1883.<sup>38</sup> After Reconstruction, northern attention turned from the South, and the federal government largely left the white South to itself as its leaders reconstituted their society around the principle of white supremacy. If there was any recognition of the deep irony that a central tool for building the Jim Crow South was, in fact, Jim Crow law,<sup>39</sup> it was generally explained away by emphasizing that these laws were simply reflecting already existent social commitments. Laws were following customs. Laws were not telling the people (or at least whites) to do anything they were not already disposed to do anyway.<sup>40</sup>

Even social scientists who did not accept the deep conservatism of the Sumnerian folkways school often accepted its basic skepticism toward the capacity of law. One of the leading social scientists of the early twentieth century was Robert E. Park, who, like Sumner, had little faith that social reform could work when it opposed established, “natural,” dynamics of behavior and custom. In a 1935 essay, Park wrote:

the political process can only proceed in a relatively orderly way in so far as it generates political power and authority capable of enforcing a certain degree of order and discipline until a new equilibrium has been achieved and the changes which the new programs initiated have been assimilated, digested and incorporated with the folkways of the original and historic society.<sup>41</sup>

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<sup>37</sup> GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 1049 (1944). Segregationists who rejected the anti-religious connotations of Social Darwinism could replicate its status-quo enforcing benefits by substituting the hand of God for the mechanism of natural selection. As the *Richmond Times* declared in 1900: “God Almighty drew the color line and it cannot be obliterated.” C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 81 (1955).

<sup>38</sup> *The Civil Rights Cases*, 109 U.S. 3, 25–26 (1883).

<sup>39</sup> “What is particularly ironic is that while Northern opinion was rejecting legislation as an instrument of social change, Southern legislators were busy enacting one Jim Crow law after another, all consciously designed to buttress the white-supremacy system and to perpetuate regional attitudes of prejudice and hostility toward the Negro.” Will Maslow, *The Uses of Law in the Struggle for Equality*, 22 *SOC. RESEARCH* 297, 297–98 (1955).

<sup>40</sup> See generally GILBERT T. STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 348–53 (1910) (describing segregation laws as reinforcing customary practices).

<sup>41</sup> MYRDAL, *supra* note 37, at 1050 (quoting Robert E. Park, *Social Planning and Human Nature*, *PUBLICATIONS OF THE AM. SOC. SOC'Y*, Aug. 1935, at 28).

Such observations held with particular force when it came to race relations. The racial status quo, he suggested, “might comprise . . . all those situations in which some relatively stable equilibrium between competing races has been achieved and in which the resulting social order has become fixed in custom and tradition.”<sup>42</sup> Racial prejudice, in this model, served a necessary role in “preserv[ing] the social order and the social distances upon which that order rests.”<sup>43</sup> To introduce laws interfering with these natural and necessary prejudices would be foolhardy.

The courts and the legal academy were dominated by a sense of fatalism toward the entire concept of civil rights law—or any law that attempted to remake existing social arrangements by regulating interpersonal relations directly. British jurist James Bryce, a close observer of American society and governance, embraced the Sumnerian line when he proclaimed in a 1902 lecture: “As regards social relations, law can do but little in the way of expressing the view the State takes of how its members should behave to one another. Good feeling and good manners cannot be imposed by statute.”<sup>44</sup> Indeed, a fatalism toward the force of law was evident in practically all the great American legal figures of the day. Justice Oliver Wendell Holmes, Jr., in the words of one biographer, “did not believe that law could change the attitudes and practices of a culture. He believed the reverse, that law was a product of those attitudes and practices.”<sup>45</sup> Holmes’s tendency toward fatalism at times echoed the sentiments of social Darwinists.<sup>46</sup> In *Giles v. Harris*,<sup>47</sup> a 1903 case involving the denial of voting rights to African Americans in Alabama, Holmes explained that a holding on behalf of the petitioner would be futile—it would risk being nothing more than an “empty form.”<sup>48</sup> The *Giles* decision and a follow-up decision denying money damages to the petitioner<sup>49</sup>

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<sup>42</sup> *Id.* (quoting Robert E. Park, *The Nature of Race Relations*, in RACE RELATIONS AND THE RACE PROBLEM 3–4 (Edgar T. Thompson, ed., Greenwood Press 1969) (1939)).

<sup>43</sup> Robert E. Park, *The Concept of Social Distance*, in 1 RACE AND CULTURE: THE COLLECTED PAPERS OF ROBERT EZRA PARK 260 (1950); see also Philip Gleason, *Americans All: World War II and the Shaping of American Identity*, 43 REV. POL. 483, 495–98 (1981) (summarizing Park’s benign view of prejudice).

<sup>44</sup> MYRDAL, *supra* note 37, at 574 (quoting JAMES BRYCE, THE RELATIONS OF THE ADVANCED AND THE BACKWARD RACES OF MANKIND 43 (1902)).

<sup>45</sup> G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 342–43 (1993).

<sup>46</sup> Holmes’ private writings included observations such as “I see the inevitable everywhere,” 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916–1935, at 230 (Mark DeWolfe Howe ed., 1953) [hereinafter HOLMES-LASKI], “I do accept a ‘rough equation between isness and oughtness,’” *id.* at 948, and his famous proclamation: “if my fellow citizens want to go to Hell I will help them,” 1 HOLMES-LASKI, *supra* at 249. See generally Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 243–56 (1964) (describing and criticizing Holmes’ detachment from popular affairs).

<sup>47</sup> 189 U.S. 475 (1903).

<sup>48</sup> *Id.* at 488.

<sup>49</sup> *Giles v. Teasley*, 193 U.S. 146, 166 (1904).

were “among the Court’s most candid confessions of limited power,” according to legal historian Michael Klarman.<sup>50</sup> These decisions “suggest that even plain constitutional violations during peacetime may go unredressed in the face of hostile public opinion.”<sup>51</sup>

A classic articulation of this chastened vision of the law came in an address Harvard Law School Dean Roscoe Pound delivered to the Pennsylvania Bar Association in 1916, titled “The Limits of Effective Legal Action.”<sup>52</sup> Pound delivered a warning to those Progressive reformers who would ask too much of the law. There were considerable risks to “over-ambitious plans to regulate every phase of human action by law” pressed by those who argue for “continual resort to law to supply the deficiencies of other agencies of social control” and who “attempt[] to govern by means of law things which in their nature do not admit of objective treatment and external coercion.”<sup>53</sup> Pound cautioned, “In the wake of ambitious social programs calling for more and more interference with every relation of life, dissatisfaction with law, criticism of legal and judicial institutions, and suspicion as to the purposes of the lawyer become universal.”<sup>54</sup> The end result is pervasive nonenforcement of the law—what Pound famously labeled as “the divergence between the law in the books and the law in action”<sup>55</sup>—which “is in reality a problem of the intrinsic limitations upon effective legal action.”<sup>56</sup> “The life of the law is in its enforcement,”<sup>57</sup> Pound declared, and the law should not be used “to register the protest of society against wrong.”<sup>58</sup> For laws to be properly enforced, people must be motivated to follow the law by something more than “the abstract content of the rule and its conformity to an ideal justice of an ideal of social interest.”<sup>59</sup>

The primary targets of Dean Pound’s criticism were Progressives who sought to repudiate the conservative ideology of the social Darwinists. The era was marked by legislative efforts to alleviate some of the harsh consequences of unfettered capitalism as well as to regulate the social behavior of the lower classes, particularly the newly arrived immigrants. Although Pound worried that these efforts went too far, reformers were energized in their battle against Sumner’s dismissal of efforts to remake society as dangerous pipe dreams. One of the major goals of the Progressives was to use the law to further their efforts to help the downtrodden. Progressive-era legal reforms often began relatively small, with municipal-level reforms, but in the first two decades of the twentieth century

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<sup>50</sup> KLARMAN, *supra* note 28, at 36.

<sup>51</sup> *Id.* at 37.

<sup>52</sup> Roscoe Pound, *The Limits of Effective Legal Action*, 3 A.B.A. J. 55 (1917).

<sup>53</sup> *Id.* at 56.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 63; *see also* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

<sup>56</sup> Pound, *supra* note 52, at 57.

<sup>57</sup> *Id.* at 70.

<sup>58</sup> *Id.* at 69.

<sup>59</sup> *Id.*

reformers mobilized a national campaign that culminated in federal legislation and several constitutional amendments.

But the effect of the Progressives' commitment to legal reform on race relations was limited. When laws were passed that were intended to affect racial practices, they were generally in line with the prevalent racist attitudes of the day. Jim Crow laws were part of the Progressive agenda in the South.<sup>60</sup> There was not sufficient public support for civil rights legislation. Even among those who might have held some sympathy for the principle of civil rights, many assumed that race relations were simply different from other social practices—they were more emotional, more entrenched, and thus less amendable to legal reform. In terms of social policy, there arose the idea of racial exceptionalism: general rules guiding the relationship between law and society did not apply in the same way when racial relations were at issue. Even as Progressives enthusiastically called upon the law, in Pound's words, "ambitiously to cover the whole field of social control,"<sup>61</sup> social Darwinism remained a powerful presumption in the area of racial policy.<sup>62</sup>

This is not to say that liberals of the period were universally skeptical of the capacity of law to ameliorate the harshest elements of life for African Americans during the ignominious heyday of Jim Crow America. The NAACP, formed in 1909, was explicitly dedicated to using the force of the law to protect the interests of black Americans. Efforts to pass federal antilynching legislation were periodically made in the interwar years. Yet even among those who recognized that government could do far more to help African Americans, many emphasized an important qualification regarding the kind of legal reform that could be effective in this area. As leaders of the NAACP and other civil rights advocates pressed for increased judicial intervention, other liberals argued that court decisions were limited in what they could accomplish in this area—an argument that dovetailed nicely with the Progressive presumption in favor of judicial deference to legislative action that coalesced with the liberal attacks on the *Lochner* Court. This preference for legislation over court order was most frequently justified on the grounds of democratic principles—allowing the elected branches to take the lead in reform efforts made government more accountable and responsive to the people. But it

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<sup>60</sup> See, e.g., WOODWARD, *supra* note 37, at 75 (“[T]he typical progressive reformer rode to power in the South on a disfranchising or white-supremacy movement . . . Racism was conceived of by some as the very foundation of Southern progressivism.”).

<sup>61</sup> Pound, *supra* note 52, at 65.

<sup>62</sup> Even rare civil rights victories during this period could be framed as doing nothing to challenge skepticism toward the efficacy of civil rights law. For example, in ruling residential segregation laws unconstitutional, the Supreme Court explained:

That there exists a serious and difficult problem arising from a feeling of race hostility *which the law is powerless to control*, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

Buchanan v. Warley, 245 U.S. 60, 80–81 (1917) (emphasis added).

also recognized the particular efficacy of statutes as opposed to judicial rulings. For example, even as he questioned the wisdom of issuing a decision in *Giles* that would be nothing more than an “empty form,” Holmes emphasized that “relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.”<sup>63</sup> Holmes’s protégé and future Supreme Court Justice Felix Frankfurter questioned the social effects of judicial decrees in an essay entitled, “Can the Supreme Court Guarantee Toleration?”<sup>64</sup> “The real battles of liberalism are not won in the Supreme Court,” Frankfurter contended.<sup>65</sup> “Only a persistent, positive translation of the liberal faith into the thoughts and acts of the community is the real reliance against the unabated temptation to straitjacket the human mind.”<sup>66</sup> From this conception, law, to be effective, must derive from and reinforce culture, “the thoughts and acts of the community.” The closer the connection between law and society, the stronger and more effective the law is. In this vision of law, which still contained a generous dose of Sumnerian folkways ideology, legislative action could be effective because it necessarily reflected popular attitudes. Federal courts on the other hand were the most detached from immediate circumstances, and therefore had to be the most circumspect with their intervention into social relations.

#### *B. Prohibition and the Problem of “Legislating Morality”*

In the years following World War II, as racial liberals fought to mobilize support for legal reform, they found themselves battling against not only the traditional obstacles for civil rights—entrenched racism, intransigent apathy, and stubborn ignorance—but also the ghost of the failed crusade to rid the nation of alcohol. No event of the twentieth century gave greater comfort to skeptics of the power of the law to shape social norms than the ignominious failure of Prohibition. Here was the perfect example of an idealistic movement for social change that turned to the law to force the entire nation to conform to a certain ideal of the good—and it backfired in glorious fashion. In its wake was left a generation of liberals who were forced to reconsider the problems of enforcing positive law that ran contrary to the deeply felt commitments of a large segment of the population.<sup>67</sup> Prohibition, lamented James Truslow Adams, was just the latest and most egregious example of a disturbing pattern of American history in which reformers “believe[] that their ideals should be expressed in the form of law, regardless of the

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<sup>63</sup> *Giles v. Harris*, 189 U.S. 475, 488 (1903).

<sup>64</sup> Felix Frankfurter, *Can the Supreme Court Guarantee Toleration?*, NEW REPUBLIC, June 17, 1925, at 89.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1 (2006). Much of this section is indebted to Professor Post’s comprehensive and incisive article.

practical question of whether such laws could be enforced . . . . Because we have ceased to have any respect for law we allow any sort of law to be passed.”<sup>68</sup>

One of the more remarkable facts of the failure of Prohibition was that the temperance movement had secured not just the majorities necessary to pass local and eventually national regulations, but the supermajorities across the nation necessary to amend the Constitution.<sup>69</sup> Yet this support proved transitory. Prohibition, almost from the day it became the law of the land, began losing support. Not only did it face the self-evident obstacle to trying to force a populace to stop doing something that many, many people were not about to give up, Prohibition also posed a dilemma for Progressives who sought to portray the regulatory state as a beneficial and benign part of modern society. But the increasingly unpopularity of Prohibition was giving social regulation a bad name—it risked turning the nascent administrative state into a police state.<sup>70</sup> Prohibition also forced upon Progressives the stubborn persistence of custom on defining the limits of the enforceable law.<sup>71</sup>

The “noble experiment” in legalized morality led to a whole new array of problems. “The question is frequently asked,” wrote James Truslow Adams in 1928, “Is the Eighteenth Amendment making us a nation of lawbreakers?”<sup>72</sup> Few would take issue with Adams’s conclusion that “the Amendment is helping to break down respect for law itself.”<sup>73</sup> As outlined in the report of the National Commission on Law Observance and Enforcement (commonly known as the Wickersham Commission), Prohibition encouraged political corruption, created a thriving bootlegging economy, strained the criminal justice system, and often failed to receive necessary state enforcement. Not only did the report find increased consumption of alcohol after 1920, but it warned that the current situation encouraged a general disrespect for the law.<sup>74</sup> President Warren Harding declared the inability to enforce the Eighteenth Amendment “the most demoralizing factor in our public life.”<sup>75</sup>

Prohibition’s failure left its mark on future projects of social reform. Historian David E. Kyvig explains that Prohibition “helped discredit the view that society could be reformed and uplifted simply through passage of the proper statutes.”<sup>76</sup> Making new laws was quite different than actually enforcing new laws, ex-

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<sup>68</sup> James Truslow Adams, *Our Lawless Heritage*, ATLANTIC, Dec. 1928, at 740.

<sup>69</sup> The striking success of the prohibition movement, culminating in the Eighteenth Amendment, can be attributed in large part to its ability to capitalize on the reformist enthusiasms unleashed by World War I. See Post, *supra* note 67, at 11–18.

<sup>70</sup> See, *id.* at 19–20.

<sup>71</sup> *Id.* at 20–21.

<sup>72</sup> Adams, *supra* note 68, at 732.

<sup>73</sup> *Id.* at 732.

<sup>74</sup> United States National Commission on Law Observance and Enforcement, No. 71, H.R. Doc. No. 722, at 7, 21, 155 (1931).

<sup>75</sup> Warren G. Harding, President of the United States, Second Annual Message (Dec. 8, 1922), available at <http://www.presidency.ucsb.edu/ws/?pid=29563>.

<sup>76</sup> DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 200 (2000).

president of Yale Arthur Twining Hadley explained in 1925. "Conscience and public opinion enforce the laws; the police suppress the exceptions."<sup>77</sup> Therefore, "government authorities must be careful not to go beyond what public opinion demands in the laws which it makes or the acts which it requires."<sup>78</sup> Supreme Court Justice Harlan F. Stone warned of the

child-like and implicit faith in the efficacy of legislation to bring about social Utopia. . . . Forgetting that social custom and the average moral standards of the community are more potent in the control of human conduct than formal law, we nevertheless seem to regard statute making as the chief and only ultimate agency of social reform and the never failing means for the minute regulation and control of all human activities.<sup>79</sup>

Just as Prohibition was doomed to failure in the cities and within certain immigrant communities, so might civil rights legislation be doomed to failure in the South. The experience of Prohibition reinforced the measured skepticism toward salvation through legal reform that characterized the writings of legal scholars and social scientists. Its echoes would be heard in the emerging civil rights debate of the coming decades.

### C. Intergroup Education and Antiprejudice Campaigns

One reason for the longevity of the "folkways" assumptions about the relation between law and race relations was the way they were adapted to fit various agendas and political ideologies. These assumptions were, of course, a central element in the *laissez faire* ideology of conservative social Darwinists who saw all legal efforts to promote social welfare as dangerous meddling in the natural course of social development (which inevitably included social divisions). "[I]n the folkways," Sumner wrote, "whatever is, is right."<sup>80</sup> But the folkways premise did not necessarily lead to conservative, pessimistic conclusions. By the early decades of the twentieth century, a far more moderate version of the folkways school of thought emerged, promoted by groups that hoped to improve relations between racial, ethnic, and religious groups. Skeptical of legal reform as a path toward intergroup harmony, proponents of folkways liberalism believed progress would come from directly addressing destructive customs and beliefs through education. By the 1920s and 1930s, campaigns to promote intergroup understanding and

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<sup>77</sup> Arthur Twining Hadley, *Law Making and Law Enforcement*, HARPERS Nov. 1925, at 641.

<sup>78</sup> *Id.* at 642.

<sup>79</sup> Post, *supra* note 67, at 76 n.269 (quoting Harlan F. Stone, Annual Address of the Bar Association of the State of New Hampshire: Obedience to Law and Social Change, in 5 PROCEEDINGS OF THE BAR ASSOCIATION OF THE STATE OF NEW HAMPSHIRE 27, 37 (1925)).

<sup>80</sup> SUMNER, *supra* note 9, at 28.



lessen prejudice would become the centerpiece of the liberal campaign to improve American race relations.

Racial reformers in the interwar period, working within an ideological environment in which it was widely accepted that bold civil rights measures would be counterproductive, created one of the most important movements for racial progress of the day. The “intergroup” or “tolerance” movement was a loose coalition of like-minded reform efforts found in both the North and the South from the 1920s into the 1940s when it was at the forefront of interracial progressive reform.<sup>81</sup> The movement achieved its greatest institutional success in organizations such as the Commission on Interracial Cooperation, formed in 1919 and reorganized in 1944 as the Southern Regional Council, and the Southern Conference for Human Welfare, formed in 1938.<sup>82</sup> By the early postwar period, the intergroup movement had expanded to include hundreds of national agencies and thousands of local ones.<sup>83</sup> The goal of these efforts was to reduce prejudice through educating individuals to appreciate difference and also to learn that many suspected differences between groups had no basis in reality.<sup>84</sup> By better understanding others, whether through direct contact with other groups or through education, tolerationists hoped that stereotypes would be undermined, and a new generation of tolerant American citizens created. While the predominant focus of this movement during its formative years in the 1920s was on reducing tensions based on ethnicity and religion (where they had their greatest successes), by the 1940s it was increasingly addressing racial antagonism.<sup>85</sup>

Among African American lawyers, the interwar years saw a commitment to volunteerism and intraracial self-help, which was often accompanied by a skeptical—or at least wary—attitude toward legal reform.<sup>86</sup> “The voluntarist impulse,” writes legal historian Kenneth Mack, was a reaction to the legalization of

the social mores of the majority of the population that did not support equal citizenship for blacks. If public opinion was opposed to granting legal equality to blacks, and if law followed public opinion, then one solution was the voluntarist one—simply to be let alone to concentrate on intraracial development.<sup>87</sup>

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<sup>81</sup> See GOODWIN WATSON, ACTION FOR UNITY 5–24 (1947).

<sup>82</sup> *Id.* at 62.

<sup>83</sup> *Id.* at 1–24.

<sup>84</sup> *Id.* at 25.

<sup>85</sup> See, e.g., *id.*; ROBIN M. WILLIAMS, JR., THE REDUCTION OF INTERGROUP TENSIONS: A SURVEY OF RESEARCH ON PROBLEMS OF ETHNIC, RACIAL, AND RELIGIOUS GROUP RELATIONS 51–66 (1947); Frank W. Baldau, *Intergroup Relations and Action Programs*, 2 J. SOC. ISSUES 27, 30 (1946). See generally NICHOLAS V. MONTALTO, A HISTORY OF THE INTERCULTURAL EDUCATION MOVEMENT, 1924–1941 (1982); DIANA SELIG, AMERICANS ALL: THE CULTURAL GIFTS MOVEMENT (2008); STUART SVONKIN, JEWS AGAINST PREJUDICE: AMERICAN JEWS AND THE FIGHT FOR CIVIL LIBERTIES (1997).

<sup>86</sup> See Mack, *supra* note 13, at 277–81.

<sup>87</sup> *Id.* at 297.

Some leading black lawyers accepted a basic tenet of Sumner's folkways analysis—that, “the causal arrow ran from social change to legal change rather than the other way around.”<sup>88</sup> Yet the fight to change the law was sometimes still important. Civil rights lawyers recognized litigation and lobbying efforts as offering benefits above and beyond any courtroom victories that might result, as they could help mobilize and educate the black community.<sup>89</sup>

Intergroup educational efforts accelerated during the war years. “[B]y making the need for national unity more compelling,” one historian noted, World War II “intensified efforts that were already under way to cut down prejudice, improve intergroup relations, and promote greater toleration of diversity.”<sup>90</sup> “The solution of our race problem,” noted historian John Hope Franklin in 1944, “is education: education of the whites that they may understand that the denial of rights to minorities is just as dangerous to democracy in the United States as it is in Europe.”<sup>91</sup>

Southern liberals were particularly committed to the idea that racial progress would come through education rather than legal reform. They held onto this commitment after northern racial liberals had largely accepted legal reform as a necessary and proper tool for breaking the back of Jim Crow.<sup>92</sup> The educationalist approach suited the more moderate temperament of southern liberals. It allowed for a gradual transition away from Jim Crow, taking into account the high psychic costs such a transition would have for white southerners and avoiding any sudden breaks that might lead to violent backlash. It also addressed a key concern for southern liberals, the preservation of states' rights. Intergroup cooperation groups could be effective without challenging state autonomy—without resorting to “outside interference”—something that all southerners hoped to avoid. This approach bypassed the difficult choice between supporting racial progress and standing up against federal encroachment on state power. Of course, the educationalist approach also held a pragmatic element for southern liberals. They recognized that southern states and localities were unlikely to pass legal reform, and that their greatest opportunity came through community educational programs—which, they believed, would eventually lead to local and state civil rights reform.

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<sup>88</sup> *Id.* at 298.

<sup>89</sup> See *id.*; MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 105–36 (1987).

<sup>90</sup> Gleason, *supra* note 43, at 500–01.

<sup>91</sup> John Hope Franklin, Book Review, 29 *J. NEGRO HIST.* 373, 373 (1944) (reviewing JOHN G. VAN DEUSEN, *THE BLACK MAN IN WHITE AMERICA* (1944)).

<sup>92</sup> See generally PATRICIA SULLIVAN, *DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA* (1996); JOHN EGERTON, *SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH* (1994); RICHARD KING, *A SOUTHERN RENAISSANCE: THE CULTURAL AWAKENING OF THE AMERICAN SOUTH, 1930–1955* (1980); MORTON SOSNA, *IN SEARCH OF THE SILENT SOUTH: SOUTHERN LIBERALS AND THE RACE ISSUE* (1977).

Into the post–World War II period, even as the legalist approach gained prominence in national discussions of racial reform, antilegalist sentiment remained strong among those who professed themselves interested in promoting the cause of racial equality, in the South and elsewhere. When the New York state legislature was debating landmark employment discrimination legislation in 1945, Oswald Garrison Villard, a leading liberal voice in discussions of race relations, attacked the new law, declaring it “far wiser to rely on the force of slow but steadily growing public opinion” rather than legislation.<sup>93</sup> A poll taken in 1948 found that four out of every ten people surveyed believed that “people can’t be forced to change deep-rooted prejudices by passing laws.”<sup>94</sup> As late as 1955, in the period immediately following *Brown*, Will Maslow, the director of the American Jewish Congress’s Commission on Law and Social Action, summarized the skepticism toward the capacity of the law found in *Plessy* and the writing of Sumner and warned: “The doctrine persists.”<sup>95</sup>

So when the postwar generation of racial liberals launched their campaign to elevate the place of the law in the debate over how to deal with America’s racial problem, they were taking on not only segregationists who saw “racial instincts” and prejudices as natural and inevitable, but also a powerful strand of liberalism that saw the race problem as necessitating, first and foremost, education, exposure, perhaps even some forms of indoctrination—but not a full-blown civil rights reform effort.

### III. THE CASE FOR THE LAW

*In the world laboratory of the sociologist, as in the more secluded laboratories of the physicist and chemist, it is the successful experiment which is decisive and not the thousand-and-one failures which preceded it. More is learned from the single success than from the multiple failures. A single success proves it can be done.*<sup>96</sup>

The antilegalist sentiment toward race relations of the *Plessy* Court and the social Darwinists remained strong well into the twentieth century, in both its conservative and reformist manifestations. Skepticism toward the efficacy of civil

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<sup>93</sup> C. C. Burlingham et al., Letter to the Editor, *Faults Found in Ives Bill: Discrimination, It Is Held, Cannot Be Overcome by Legal Means*, N.Y. TIMES, Feb. 13, 1945, at 22.

<sup>94</sup> Maslow, *supra* note 39, at 297.

<sup>95</sup> *Id.* See also Alvin Johnson, Book Review, 19 SOC. RESEARCH 390, 391 (1952) (reviewing MORROE BERGER, EQUALITY BY STATUTE: LEGAL CONTROLS OVER GROUP DISCRIMINATION (1952)) (noting that the Vice Chairman of the committee that framed New York’s Fair Employment Practices bill claimed that the majority of the committee “was skeptical of effecting moral advance through law” and “held to the notion that discrimination is a consequence of prejudice, and prejudice can be dealt with only by education”).

<sup>96</sup> Robert K. Merton, *The Self-Fulfilling Prophecy*, 8 ANTIOCH REV. 193, 210 (1948).

rights reform was a central line of defense for defenders of Jim Crow through the civil rights movement. This same skepticism steered racial progressives in the 1920s and 1930s toward educationalist projects, rather than legal reform, and it remained a central tenet of southern liberalism into the 1960s. These assumptions would have to be overcome if the nation were to be steered on a new course of a national commitment to civil rights, even in the face of considerable resistance in the white South.

The creation of a compelling, persuasive ideology of civil rights reform had two elements, each aimed at assumptions of the folkways school of thought. First was to destabilize the belief that racial hierarchies were natural and inflexible and that racial prejudice was a natural component of the human condition.<sup>97</sup> Second was to press the argument that legal commands can be particularly effective in transforming social relations.<sup>98</sup> These two projects were necessarily connected. The more malleable the attitudes and customs of Jim Crow, the more readily outside pressures, such as a federal law, could reform these attitudes and customs. And the more powerful the law, the deeper into Jim Crow race relations it could penetrate. Thus, the case for the capacity of the law made these two interlocking arguments: iniquitous racial customs and prejudices were not nearly as entrenched as was generally assumed (and certainly not the solid rock of Sumnerian folkways); and wide-scale legal reform was the most effective way to lead the nation away from its damaging tradition of racial inequality.

#### A. Myrdal's Critique of the Folkways Principle

Gunnar Myrdal's monumental 1944 study of race relations in the United States, *An American Dilemma*,<sup>99</sup> has often been heralded as marking a major breakthrough in the creation of intellectual foundations of the modern civil rights movement. At the time of its publication, it was widely recognized as a definitive statement on the pervasive costs of racial discrimination, including segregation, on American society. Hardly a statement on race relations was issued in the decade following its publication without an appreciative reference to the thousand-plus page study by the Swedish sociologist and his team of researchers.<sup>100</sup> Most famously, Chief Justice Earl Warren referenced the work in the controversial footnote eleven of the *Brown* decision.<sup>101</sup> Yet for all the thoroughness of analysis and research that went into *An American Dilemma*, it failed to recognize the central role that law—particularly federal legislative, executive, and judicial action—would play in the struggle for civil rights.

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<sup>97</sup> See *infra* Part III.A.

<sup>98</sup> See *infra* Parts III.B and III.C.

<sup>99</sup> See MYRDAL, *supra* note 37.

<sup>100</sup> See WALTER A. JACKSON, GUNNAR MYRDAL AND AMERICA'S CONSCIENCE: SOCIAL ENGINEERING AND RACIAL LIBERALISM, 1938–1987, at 241–45 (1990); DAVID W. SOUTHERN, GUNNAR MYRDAL AND BLACK-WHITE RELATIONS: THE USE AND ABUSE OF AN AMERICAN DILEMMA, 1944–1969, at 71–125 (1987).

<sup>101</sup> 347 U.S. 483, 494 n.11 (1954).

In the two-prong attack on folkways assumptions that racial liberals fought in the postwar years, Myrdal made invaluable contributions to the first, arguing that the nation was ready and willing to abandon its racist commitments, and that there was a deep (if recessive) national commitment to egalitarianism, which he labeled the “American Creed.”<sup>102</sup> At times, Myrdal seemed to believe that the key support for Jim Crow was simple ignorance—southerners did not recognize the American tradition of equality and assumed that racial hierarchies were necessary to safety and prosperity; northerners had little appreciation of the systematic refutation of the American ideal of equality taking place in the Jim Crow South.<sup>103</sup> So the path forward, according to *An American Dilemma*, lay in knowledge: in better schools; in better media coverage, leading to more publicity of what was happening in the South; and, above all, in the application of scientific expertise to the race problem. “In a sense, the social engineering of the coming epoch will be nothing but the drawing of practical conclusions from the teaching of social science that ‘human nature’ is changeable and that human deficiencies and unhappiness are, in large degree, preventable.”<sup>104</sup>

Myrdal gave little attention, however, to the critical second prong of racial legalism—the primacy of law in the assault on Jim Crow. Unlike the generation of civil rights supporters who came to power and influence in the years following *An American Dilemma*, Myrdal was tentative in relying on law as the catalyst for instigating this great American reawakening. He did not ignore the potential of civil rights reform. He lashed out, for example, at the “intellectual defeatism” of American sociologists, who, still under the influence of Sumner, were overly skeptical “towards the possibility of inducing social change by means of legislation.”<sup>105</sup> Yet he qualified these conclusions with references to a “general distrust of politics and legislation that is widespread among the educated classes of Americans.”<sup>106</sup> He emphasized an American tradition of disrespect for the rule of law, particularly in the South,<sup>107</sup> and he warned of a distinctly American “desire to regulate human behavior tyrannically by means of formal laws” citing failed efforts to legislate against drinking as an example.<sup>108</sup> If laws were to work, they would have to be carefully considered; they would need to be framed and monitored by trained experts; and they would need to be part of a multiprong

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<sup>102</sup> See MYRDAL, *supra* note 37, at 8–9, 526, 568.

<sup>103</sup> *Id.* at 44–49.

<sup>104</sup> *Id.* at 1023.

<sup>105</sup> *Id.* at 19.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 13–19, 523–72. Myrdal’s description of America’s “anarchist tendency,” *id.* at 16, was a relatively common view of the post-Prohibition moment in which he wrote. See, e.g., W.J. CASH, *THE MIND OF THE SOUTH* 31–34 (1941) (emphasizing the southern tradition of lawlessness); Adams, *supra* note 68, at 732 (describing the American people as “the most lawless in spirit of any in the great modern civilized countries”); *Laws Against Prejudice*, *COLLIER’S*, May 5, 1945, at 86 (discussing efforts at prohibiting employment discrimination).

<sup>108</sup> MYRDAL, *supra* note 37, at 16.

project of social engineering. “We are entering an era where fact-finding and scientific theories of causal relations will be seen as instrumental in planning controlled social change”—these are “new urgent tasks for social engineering.”<sup>109</sup> While Myrdal certainly saw a role for legal reform (law was “a weapon in the caste struggle”<sup>110</sup>) he placed his greatest hope for change in a national “educational offensive against racial intolerance.”<sup>111</sup> Myrdal was more an educationalist than a legalist. In the end, he put far more faith in education and intergroup consultation than in legal compulsion.

As valuable as Myrdal’s diagnostic analysis of American race relations was, the failure of *An American Dilemma* to engage at any length with law’s capacity to change racial dynamics limited its utility to the postwar generation of civil rights reformers. Robert MacIver, a Columbia University sociologist, highlighted these limitations when he criticized Myrdal for failing to offer a tangible plan for reform. Myrdal’s basic premise, MacIver explained, was “that a more precise knowledge of the facts will of itself provide the answer to our question.”<sup>112</sup> Simply learning more about the problem, Myrdal seemed to assume, would somehow solve it. But, for postwar civil rights advocates, this faith in exposure to facts and the slow processes of education was not enough. Works such as *An American Dilemma*, MacIver noted, “convey no message to the framers of social policy . . . .”<sup>113</sup> Similarly, sociologist Robert Merton warned, “One does not expect a paranoiac to abandon his hard-won distortions and delusions upon being informed that they are altogether groundless . . . . Nor will a continuing ‘educational campaign’ itself destroy racial prejudice and discrimination.”<sup>114</sup> What was needed, Merton explained, were “deliberate institutional controls.”<sup>115</sup> Prejudices “can be helped over the threshold of oblivion, not by insisting that it is unreasonable and unworthy of them to survive, but by cutting off their sustenance now provided by certain institutions of our society.”<sup>116</sup> And the way to reform institutions was to change the law.

### B. *The Turn to the Law*

Even as *An American Dilemma* dissected the problem, liberal scholars and activists were constructing a new working consensus on the law-versus-education question. The educationalist position—that progress would come through reeducation to lessen prejudicial attitudes—was surpassed in the postwar era by the

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<sup>109</sup> *Id.* at 1023.

<sup>110</sup> *Id.* at 1009. Myrdal also recognized that laws played a role in the creation of Jim Crow race relations, *id.* at 580, foreshadowing the point that C. Vann Woodward would more fully develop. *See infra* Part III.E.

<sup>111</sup> MYRDAL, *supra* note 37, at 48–49.

<sup>112</sup> ROBERT M. MACIVER, *THE MORE PERFECT UNION* 17 (1947).

<sup>113</sup> *Id.* at 18.

<sup>114</sup> Merton, *supra* note 96, at 197.

<sup>115</sup> *Id.* at 210.

<sup>116</sup> *Id.*

growing commitment to legal reform. This development was made possible by the efforts of racial liberals who adroitly promoted their newfound respect for the power of laws to remake race relations.

With the war's end, as the American people turned toward the challenges of demobilization and reconversion to a peace-time society, as they tried to come to terms with the lessons of their battle with fascism, and with the Holocaust, and as they looked at the new national security challenges of the Cold War, the intellectual battle lines in the struggle against Jim Crow shifted. Faith in laws and the institutions of government, especially the federal government, as the necessary locus for efforts of social reform has roots in many events in American history, from the Civil War to the campaigns of the Populists and Progressives, but for postwar civil rights proponents, the New Deal experience was central. Many leaders in the racial liberal movement worked in government during the New Deal and war years, including not only lawyers but also social scientists, and their experience in using the law to regulate economic relations led them to optimistically assess the possibility of doing the same for race relations.<sup>117</sup> Myrdal wrote that the New Deal legitimized a commitment "to use the state as an instrument for induced social change,"<sup>118</sup> a theme that President Truman emphasized when he sought to include federal civil rights protections as a component of his "Fair Deal" program. "The extension of civil rights today," Truman told the 1947 convention of the NAACP, "means, not protection of the people *against* the Government, but protection of the people *by* the Government. . . . Our National Government must show the way."<sup>119</sup>

This legalistic turn also had roots in the experience of the Second World War. The lessons many liberals learned from Nazi Germany was that the best defense America had in avoiding a similar fate was a faith in the American legal system.<sup>120</sup> The conflation of fascism and Soviet Communism under the rubric of "totalitarianism" extended this heightened linkage of democracy with the rule of

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<sup>117</sup> See JOHN P. JACKSON, JR., SOCIAL SCIENTISTS FOR SOCIAL JUSTICE: MAKING THE CASE AGAINST SEGREGATION 40–42 (2001) (noting the expansion of social science in the realm of public policy); MYRDAL, *supra* note 37, at 1023; SVONKIN, *supra* note 85, at 83 (stating that New Deal experiences pushed lawyers toward "progressive social change").

<sup>118</sup> MYRDAL, *supra* note 37, at 74.

<sup>119</sup> Harry S Truman, Address Before the National Association for the Advancement of Colored People (June 29, 1947), available at <http://www.presidency.ucsb.edu/ws/?pid=12686>.

<sup>120</sup> See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 247–68 (1992); EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 233–72 (1973); Carl Landauer, *Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought*, 12 YALE J.L. & HUMAN. 171 (2000); Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 447–50 (1996).

law into the early Cold War period.<sup>121</sup> Americans thankfully praised the sturdy, stabilizing nature of their political system, marking a sharp change in the discussion from Myrdal's descriptions of the nation's "anarchistic" and lawless tendencies. Legal historian Kermit Hall nicely captured this development when he wrote of "an awakening realization of the instrumental relationship between legal and social change" in this period.<sup>122</sup>

This willingness to look to the law as the basis for national strength in a world filled with totalitarian threats was further reinforced by the fact that requirements of American foreign policy during the Cold War spurred civil rights reform at home. Simply put, the United States was embarrassed by Soviet propaganda, which exploited racial discrimination in the nation that portrayed itself as the center of the "free world." To avoid alienating potential allies, particularly in the Third World, U.S. policymakers often expressed a willingness to support civil rights. But, to serve the needs of American foreign policy, this reform needed to be national in scope (preferably linked in some way to the federal government) and highly publicized. This was a battle of image as much as (or, perhaps, more than) real change.<sup>123</sup> Community antiprejudice efforts and intergroup understanding campaigns did not fit this bill; federal civil rights reform—legislation, executive orders, and Supreme Court decisions—did. With pressures both internal and external, it is not surprising that this generation would reevaluate previous assumptions about the potential for the law to positively impact the social challenges of the day.

All of these factors created a postwar generation of liberal social scientists who at times displayed an almost utopian faith in the power of the law to structure behavior. "[T]o control man's social environment is to control man. This is the main task of the law," pronounced the authors of a 1947 law review article.<sup>124</sup> The major sins of racial oppression were, with increasing frequency, attributed less to underlying attitudes and more to legalities. If, as one scholar concluded, "[t]he chief device of racial segregation in the South is law,"<sup>125</sup> then the proper remedy was self evident. At times, this faith in the law bordered on the naïve; at times, it suggested a pragmatic appraisal of the instrumental potential of law-centered rhetoric.

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<sup>121</sup> Les K. Adler & Thomas G. Paterson, *Red Fascism: The Merger of Nazi Germany and Soviet Russia in the American Image of Totalitarianism, 1930's-1950's*, 75 AM. HIST. REV. 1046 (1970).

<sup>122</sup> KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 266 (1989).

<sup>123</sup> See DUDZIAK, *supra* note 7.

<sup>124</sup> Sidney Post Simpson & Ruth Field, *Social Engineering Through Law: The Need for a School of Applied Jurisprudence*, 22 N.Y.U. L. Q. REV. 145, 145 (1947).

<sup>125</sup> Ira De A. Reid, *Southern Ways*, SURVEY GRAPHIC, Jan. 1947, at 39.



*C. The Case for Law's Capacity*

The rise of the legalist perspective came from a relatively straightforward insight: *attitudes can follow actions*. By this insight, postwar racial liberals sought to completely overturn the assumptions of folkways ideology. Social Darwinists argued that people have a relatively stable set of beliefs and customs from which their behavior derived; therefore, these folkways could not be (and should not be) reformed by legal command.<sup>126</sup> By contrast, postwar social scientists, following Myrdal, saw much less stability in popular customs and beliefs; they were largely a product of habits and actions and behavior, all of which could be changed by changing legal requirements. Once people start acting differently—when they are required to follow employment antidiscrimination regulations, for instance—their attitudes toward racial minorities will change as well. Law itself was a major creator of attitudes; law had a crucial role in the education of society.

Alternately, some argued that beneficial social change could arrive without necessarily draining citizens of internalized racist sentiments. Robert MacIver argued that the central target for government action should be discrimination (i.e., actions), rather than prejudice (i.e., beliefs): “Wherever the direct attack is feasible, that is, the attack on discrimination itself, it is more promising than the indirect attack, that is the attack on prejudice as such. It is more effective to challenge conditions than to challenge attitudes or feelings.”<sup>127</sup> MacIver here was making an analytical move central to the racial liberals. Whereas the premise of folkways thought was that prejudicial beliefs were the fundamental issue and that any “direct” approach to the problem of racial inequality would need to change these attitudes, presumably through reeducation efforts, legalists reversed the dynamic. Now it was the discriminatory action that was the fundamental problem, and the beliefs were secondary to this action. Thus, a direct attack on racial inequality meant passing laws that would require people to act differently—to stop discriminating rather than necessarily to stop hating.

But for the more optimistic of racial liberals, MacIver’s theory of racial progress did not go far enough; he was too skeptical of the ability for changed circumstances and actions to affect attitudes. And once people stop discriminating, once the legally imposed barriers that separated people were broken down, then the secondary benefits could be realized, namely the weakening of prejudice. So, in the end, the attack on discriminatory actions, these racial liberals argued, would in fact result in more egalitarian sentiments.<sup>128</sup> And, following Myrdal’s premise,

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<sup>126</sup> See, e.g., SUMNER, *supra* note 9, at 55–57, 77–78, 87.

<sup>127</sup> MACIVER, *supra* note 112, at 247.

<sup>128</sup> See, e.g., John P. Roche & Milton M. Gordon, *Can Morality Be Legislated?*, N.Y. TIMES MAGAZINE, May 22, 1955, at 47 (“In this more comprehensive analysis [of modern sociology], law itself is seen as a force which, in its impact, does more than prohibit or compel specific behavior. Indeed, in its operation, law actually provides the setting for types of social relationships—relationships which may have a profound effect on the very attitudes which are necessary to adequate enforcement of the statute in question.”).

these sentiments were lying just below the surface, waiting to be let loose. Or, in the words of B.R. Brazeal, former dean of Morehouse College, "Progressive democracy thrives on laws and juridical precedents which urge us, despite our mores, toward a greater recognition of human and social values."<sup>129</sup> As Will Maslow, perhaps the most persistent and influential advocate of the legalist position, explained, "in certain situations the absolute fiat of government is now deemed more effective than education in bringing about social change."<sup>130</sup>

One of the key points pressed by racial liberals was to complicate the traditional concept of "law." The law-versus-education "dichotomy is a forced and unnatural one," Maslow and Joseph B. Robison argued.<sup>131</sup> "[L]aw itself is a form of education and education is the prerequisite to an effective use of law."<sup>132</sup> Skepticism toward civil rights law "arises out of an outmoded notion that law is simply an extension of the policeman's club and that punishment alone is too crude an instrument to deal with deeply rooted prejudices and patterns of behavior."<sup>133</sup> But a recent generation of "social scientists have broadened our understanding of

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<sup>129</sup> B.R. Brazeal, *The Present Status and Programs of Fair Employment Practices Commissions – Federal, State, and Municipal*, 20 J. NEGRO EDUC. 378, 397 (1951).

<sup>130</sup> Maslow, *supra* note 39, at 298. See also Shad Polier, *Law, Conscience and Society*, 6 L. GUILD REV. 490, 491 (1946) ("I believe that the reduction or elimination of discrimination will inevitably lead to the reduction of and make for the elimination of bias and prejudice. I submit that external attitudes and behavior influence internal convictions and emotions of normal men and women.").

One can see evidence of this shift of emphasis (as well as the impact of postwar civil rights victories) simply by looking at the topics of the annual yearbook of the *Journal of Negro Education*. The 1944 yearbook was dedicated "Education for Racial Understanding." Martin D. Jenkins, *Editorial Comment*, 13 J. NEGRO EDUC. 265, 265 (1944). By the early 1950s, the yearbooks focused on legal reform. Chas H. Thompson, *Editorial Note*, 20 J. NEGRO EDUC. 249, 249 (1951) (issue dedicated to "The American Negro and Civil Rights in 1950"); Chas H. Thompson, *Editorial Note*, 21 J. NEGRO EDUC. 229, 229 (1952) (issue dedicated to "The Courts and Racial Integration in Education").

<sup>131</sup> Maslow & Robison, *supra* note 2, at 363.

<sup>132</sup> *Id.* See also PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 103 (1947) ("The argument is sometimes made that because prejudice and intolerance cannot be eliminated through legislation and government control we should abandon that action in favor of the long, slow, evolutionary effects of education and voluntary private efforts. We believe that this argument misses the point and that the choice it poses between legislation and education as to the means of improving civil rights is an unnecessary one. In our opinion, both approaches to the goal are valid, and are, moreover, essential to each other."); ARTHUR M. SCHLESINGER, JR., THE VITAL CENTER: THE POLITICS OF FREEDOM 190 (1949) ("While we may not be able to repeal prejudice by law, yet law is an essential part of the enterprise of education which alone can end prejudice."); LILLIAN SMITH, NOW IS THE TIME 19 (1955) ("[T]his process of bringing about change in laws, or deciding on the validity of old laws, is also an important means of educating the people whom these laws affect . . .").

<sup>133</sup> Maslow, *supra* note 39, at 298.

the causes of discrimination and of prejudice,” necessitating that “our conception of the role of law in a multigroup society . . . be revised drastically.”<sup>134</sup>

In new findings in psychology, advocates of legally enforced integration were able to locate a scientific basis for their position. Racial liberals added specificity to the idea that law affected personal beliefs, particularly in the realm of segregation, when they began drawing on the sociological concept of “contact theory.” This theory, premised on the idea that increased interaction among diverse groups would lead to improved relations between these groups, had largely displaced notions prominent earlier in the century that assumed unnecessary interactions between different groups risked destabilizing society. The basis of contact theory was that ignorance produced prejudice, and the best remedy for ignorance was exposure and education. And here is where the law could play a role, since, as one scholar put it, “some kind of legal force is necessary to bring members of the two groups into a close enough relationship for the discriminators to learn from experience how inadequate their stereotypes have really been.”<sup>135</sup> Social psychologists quickly built an entire scholarly literature around contact theory. Numerous experiments in interracial living came to the conclusion that, under the proper circumstances, living in close contact made different groups more tolerant and less prejudiced;<sup>136</sup> military<sup>137</sup> and workplace<sup>138</sup> integration studies offered much the same conclusion.<sup>139</sup>

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<sup>134</sup> *Id.* See also Polier, *supra* note 130, at 490 (“[T]he significance of law is not alone in the control of those who do not hold certain convictions but also in the control of the actual behavior of the conviction-holder . . . . The power of the law is . . . in the crystallization of the moral values which exist within the majority itself, indeed within every individual.”).

<sup>135</sup> Gene Weltfish, *Some Problems on Which We Need More Facts—and Some Implications for Action*, 1 J. SOC. ISSUES 47, 52 (1945).

<sup>136</sup> See, e.g., TOM C. CLARK & PHILIP B. PERLMAN, PREJUDICE AND PROPERTY: AN HISTORIC BRIEF AGAINST RACIAL COVENANTS 84–85 (1948) (reprint of Justice Department amicus brief in *Shelley v. Kraemer*, 334 U.S. 1 (1948)); MORTON DEUTSCH & MARY EVANS COLLINS, INTERRACIAL HOUSING: A PSYCHOLOGICAL EVALUATION OF A SOCIAL EXPERIMENT 78–88 (1951); NATIONAL COMMITTEE ON SEGREGATION IN THE NATION’S CAPITAL, SEGREGATION IN WASHINGTON 37–38 (1948); PRESIDENT’S COMMITTEE ON CIVIL RIGHTS, *supra* note 130, at 85–87; Charles Abrams, *Our Chance for Democratic Housing*, NATION, Aug. 16, 1947, at 160–62; Charles Abrams, *Race Bias in Housing*, NATION, July 19, 1947, at 67–69; Charles Abrams, *Will Interracial Housing Work?*, NATION, Aug. 2, 1947, at 122–24; Marie Jahoda & Patricia Salter West, *Race Relations in Public Housing*, 7 J. SOC. ISSUES 132, 133–36 (1951); Daniel M. Wilner, Rosabelle Price Walkley, & Stuart W. Cook, *Residential Proximity and Intergroup Relations in Public Housing Projects*, 8 J. SOC. ISSUES 45, 45 (1952).

<sup>137</sup> See, e.g., LEE NICHOLS, BREAKTHROUGH ON THE COLOR FRONT (1954); 1–2 SAMUEL STOFFER ET AL., AMERICAN SOLDIER (1949); PRESIDENT’S COMMITTEE ON CIVIL RIGHTS, *supra* note 130, at 83–84; WALTER WHITE, A MAN CALLED WHITE 248–52, 363 (1948); WALTER WHITE, HOW FAR THE PROMISED LAND? 87–103 (1955); *Armed Forces: Ahead of the Country*, TIME, June 5, 1950, at 18; Roy K. Davenport, *The Negro in the Army: A Subject of Research*, 3 J. SOC. ISSUES 32, 35–37 (1947); Ralph Ellison, *The*

Psychology supported the cause of racial liberals with a legalist agenda in another way. To believe that laws could serve an educative role, the very concept of antiprejudice “education” had to be rethought. Rather than the gradual reshaping of Sumnerian folkways favored by the earlier educationist approach, some racial liberals advocated a model of reeducation based on the more drastic attitudinal reshaping, which modern psychology convinced them was possible.<sup>140</sup> Since racial liberals, following the lead of the psychologists, saw prejudice as basically irrational,<sup>141</sup> careful demonstration of the flaws in the bigots’ reasoning would be ineffective. Rather, what was needed was a kind of attitudinal shock treatment. As the authors of *The Authoritarian Personality* explained, to deal with prejudiced people, one must exploit their tendency toward submissiveness to authority. The authoritarian personality type (a category that included southern racists) “would be impressed by legal restraints against discrimination, and . . . his self-restraint would increase as minority groups became stronger through being protected.”<sup>142</sup>

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*Booker T.*, NEW REPUBLIC, Feb. 18, 1946, at 260, 263; E. W. Kenworthy, *The Case Against Army Segregation*, 275 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 30–31 (1951); *Races: The Unbunching*, TIME, Feb. 22, 1954, at 30; Arnold M. Rose, *Army Policies Toward Negro Soldiers: A Report on a Success and a Failure*, 3 J. SOC. ISSUES 26, 27–28 (1947); Malcolm Ross, *The Need – and the Chance – for Equality*, N.Y. TIMES MAGAZINE, May 25, 1952, at 9; B.K. Thorne, *Mixed Races Train Well in Air Force*, N.Y. TIMES, Sept. 18, 1949, at 53; Roy Wilkins, *Undergirding the Democratic Ideal*, CRISIS, Dec. 1951, at 649.

<sup>138</sup> See, e.g., PRESIDENT’S COMMITTEE ON CIVIL RIGHTS, *supra* note 130, at 84–85; MALCOLM ROSS, ALL MANNER OF MEN (1948); LOUIS RUCHAMES, RACE, JOBS, & POLITICS: THE STORY OF FEPC 183–88 (1953); SEGREGATION IN WASHINGTON, *supra* note 136, at 68–74; SUMMARY AND CONCLUSIONS OF THE FAIR EMPLOYMENT PRACTICE COMMITTEE, June 28, 1946, in 11 DOCUMENTARY HISTORY OF THE TRUMAN PRESIDENCY 101–07 (Dennis Merrill, ed., 1996); Ira N. Brophy, *The Luxury of Anti-Negro Prejudice*, 9 PUB. OP. Q. 456 (1945–46); John Harding & Russell Hogrefe, *Attitudes of White Department Store Employees Toward Negro Co-Workers*, 8 J. SOC. ISSUES 18, 21–22 (1952); Ralph D. Minard, *Race Relationships in the Pocahontas Coal Field*, 8 J. SOC. ISSUES 29, 31–34 (1952); Caroline K. Simon, *Causes and Cures of Discrimination*, N.Y. TIMES MAGAZINE, May 29, 1949, at 10, 34–36.

<sup>139</sup> For more general assertions of the possibilities for diminished prejudice that would come out of increased interracial contact, see GORDON W. ALLPORT, THE NATURE OF PREJUDICE 261–82 (1954); WATSON, *supra* note 81, at 148–49; Isidor Chein, *The Problems of Inconsistency: A Restatement*, 5 J. SOC. ISSUES 52, 60 (1949); Alfred McClung Lee, *A Sociological Discussion on Consistency and Inconsistency in Intergroup Relations*, 5 J. SOC. ISSUES 12, 18 (1949); Roche & Gordon, *supra* note 128 at 44, 47; Special Issue on Intergroup Contact and Racial Attitudes 8 J. SOC. ISSUES (1952); Ruth Danenhower Wilson, *Negroes in Greater New York*, NEW REPUBLIC, July 16, 1945, at 72–74.

<sup>140</sup> See, e.g., MACLIVER, *supra* note 112, at 17–18.

<sup>141</sup> See, e.g., T. W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY 973 (1950) (“[I]t is not difficult to see why measures to oppose social discrimination have not been more effective. Rational arguments cannot be expected to have deep or lasting effects upon a phenomenon that is irrational in its essential nature . . .”).

<sup>142</sup> *Id.* at 973–74; see also WATSON, *supra* note 81, at 107 (“[T]he introduction of the change as an established, inevitable, taken-for-granted order, with a minimum of

With their appreciation for the power of the law, racial liberals reevaluated the relationship between segregation policy and race relations. Rather than viewing laws as simply *reflections* of societal attitudes, they could now be seen as formative *influences* on these attitudes. It was clear to racial liberals that discrimination, particularly when sanctioned by the state in the form of statutes, court decisions, and executive orders, increased prejudice.<sup>143</sup> “[I]t is law—prejudiced, written law—that sets the discriminatory pattern,” wrote the editors of the *New York Times* in explaining their support for civil rights legislation.<sup>144</sup> And if this was true, so was the converse. Dismissing the “rigid fatalism of William Graham Sumner,” Maslow argued that “removing discrimination results as a by-product in a lessening of prejudice.”<sup>145</sup> The report of the President’s Committee on Civil Rights—the most influential civil rights policy statement of the early postwar years—came to much the same conclusion: “The achievement of full civil rights in law may do as much to end prejudice as the end of prejudice may do to achieve full civil rights.”<sup>146</sup>

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preliminary debate, seemed to work most effectively.”); Kenneth B. Clark, *Desegregation: An Appraisal of the Evidence*, 9 J. SOC. ISSUES 2, 74–75 (1953).

<sup>143</sup> “Much intolerance and discrimination are today encouraged by the law . . . . Those who are opposed to civil rights laws on the ground you cannot legislate morality should ponder the possibility that we have been legislating immorality!” Robert K. Carr, *To Secure These Rights*, N.Y. TIMES MAGAZINE, Jan. 22, 1950, at 11.

<sup>144</sup> *Legislating Civil Rights*, N.Y. TIMES, Mar. 4, 1949, at 20.

<sup>145</sup> Will Maslow, *Prejudice, Discrimination, and the Law*, 275 ANNALS AM. ACAD. POL. & SOC. SCI. 10, 14 (1951); see also WILLIAMS, *supra* note 85; John H. Burma, *Race Relations and Antidiscriminatory Legislation*, 56 AM. J. SOC. 416, 416–17 (1951); J.D. Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 572 (1951); Wilfred C. Leland, Jr., *We Believe in Employment on Merit, But . . .*, 37 MINN. L. REV. 246, 249 (1953).

<sup>146</sup> PRESIDENT’S COMMITTEE ON CIVIL RIGHTS, *supra* note 130, at 134; see also Burma, *supra* note 145; Harold Dublirer, *Legislation Outlawing Racial Discrimination in Employment*, 5 LAWYERS GUILD REV. 101, 107–08 (1945); Shad Polier, *Law, Conscience and Society*, 6 LAWYERS GUILD REV. 490, 491 (1946).

*D. Faith Confirmed—Early Civil Rights Reforms*

With seductive simplicity, the 1947 report of the President's Commission on Higher Education summarized the basic premise of postwar racial liberalism: "Where assurance of good conduct in other fields of public concern has not been forthcoming from citizen groups, the passage of laws to enforce good conduct has been the corrective method of a democratic society."<sup>147</sup> But translating this seemingly common-sense assumption into policy reform, moving from changing mainstream discourse about law to changing actual law, proved a monumental challenge.

Civil rights activists faced one of their stiffest challenges in the ultimately unsuccessful struggle to pass federal legislation creating a permanent Fair Employment Practices Committee (FEPC). The issue was a focal point for legalist claims. In a 1948 editorial supporting the passage of an FEPC bill, the *Washington Post* noted that while educational efforts were important, they should not be used as a replacement for legal reform: "The example of the Federal Government is a potent factor in the educative process."<sup>148</sup> Charles S. Johnson, president of Fisk University, himself a committed proponent of educationalist reform measures, demonstrated the growing attraction of the legalist position. "At first sight, legislative and governmental action may not appear to fall in the category of building bridges of understanding," Johnson explained in 1946.<sup>149</sup> "But such action is educational in the deepest sense, for it teaches by example rather than precept, and it invests that example with the authority of the national will."<sup>150</sup>

Racial liberals also focused on executive action as another area in which to examine the efficacy of civil rights law. By far, the most significant presidential initiative of the period was Truman's executive order desegregating the military. It caused no major upheavals and was generally considered an important success story.<sup>151</sup> Many saw the desegregation of the military as reinforcing the "contact theory" premise being developed by social psychologists. "[W]here men do live and work together regardless of race and religion," one commentator wrote,

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<sup>147</sup> 2 PRESIDENT'S COMMISSION ON HIGHER EDUCATION, *HIGHER EDUCATION FOR AMERICAN DEMOCRACY: EQUALIZING AND EXPANDING INDIVIDUAL OPPORTUNITY* 27 (1947).

<sup>148</sup> *Anti-Discrimination Bill*, WASH. POST, Mar. 11, 1948, at 10; see also Brazeal, *supra* note 129, at 397 (describing FEPC as "a rationally coercive pioneering force in the strengthening of civil rights").

<sup>149</sup> Matthew William Dunne, *Next Steps: Charles S. Johnson and Southern Liberalism*, 83 J. NEGRO HIST. 1, 22 (1998).

<sup>150</sup> *Id.*

<sup>151</sup> See, e.g., PRESIDENT'S COMMITTEE ON EQUALITY OF TREATMENT AND OPPORTUNITY IN THE ARMED SERVICES, *FREEDOM TO SERVE* (1950); *Armed Service Integration*, 57 CRISIS 443 (1950); see also *supra* note 137 and accompanying text (sources positively assessing military integration).

“prejudice and intolerance begin to decline and awareness of the importance of the individual as against his membership in a racial group begins to grow.”<sup>152</sup>

The case for law’s capacity received its most thorough evaluation in the area of state and local civil rights legislation. Southern members of Congress blocked federal civil rights legislation through this period, but in the states and major cities outside the Deep South, the decade following World War II saw an explosion of antidiscrimination laws.<sup>153</sup> In making the case for these laws, civil rights advocates regularly drew on their confident claims about the power of civil rights laws to change social behavior. More importantly in terms of creating pressure for additional federal action, state and local antidiscrimination efforts provided civil rights advocates and their allies in the social sciences plentiful evidence to draw upon in further advancing their case for the efficacy of civil rights laws. As the report of the President’s Committee on Civil Rights explained, a key to civil rights progress “is to give the public living examples of civil rights in operation.”<sup>154</sup>

Civil rights activity below the federal level has largely been lost to history. In light of the subsequent achievements of the civil rights movement, the passage of moderate fair employment and public accommodation legislation in northern and western states seems unremarkable, even unimportant. They were compromise bills, lacking truly effective enforcement mechanisms, often reliant on voluntary contributions of affected industries. But, when viewed from the perspective of the period in which they were passed, in light of decades of inaction in protecting blacks from racial discrimination, they marked the dawn of a new era in civil rights: liberal activists celebrated these efforts, studying them and publicizing them as models for more ambitious reform policy. In this way, state and local reforms proved critical to the development of federal civil rights reform.

Although these local and state laws had many obvious shortcomings—most significantly inadequate enforcement mechanisms—liberal reformers of the day considered them largely effective and went out of their way to publicize them as models of civil rights reform in action. “The act has worked, and worked smoothly,” MacIver concluded about a landmark New York antidiscrimination

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<sup>152</sup> Carr, *supra* note 143, at 43.

<sup>153</sup> The model for practically all subsequent state-level antidiscrimination law in the field of employment was New York’s Ives-Quinn Act of 1945, the first law prohibiting discrimination on the basis of race or religion in employment outside the public sector. New York also led the way in pioneering antidiscrimination policies in education. Reformers used these New York laws as models for similar bills in other states and in various localities. By mid-1945, twenty states had either passed or had pending antidiscrimination bills of various sorts. *See* Dublirer, *supra* note 146, at 104–05; Will Maslow, *Fair Employment State by State*, NATION, Apr. 14, 1945, at 410. The flurry of state-level civil rights activity continued throughout the rest of the decade. *See* RUCHAMES, *supra* note 138, at 165–80; Morroe Berger, *Fair Employment Practices Legislation*, 275 ANNALS AM. ACAD. POL. & SOC. SCI. 34, 34 (1951); Brazeal, *supra* note 129, at 385–92; Burma, *supra* note 145, at 419 (1951).

<sup>154</sup> PRESIDENT’S COMMITTEE ON CIVIL RIGHTS, *supra* note 130, at 173.

law. "All contrary anticipations have been falsified."<sup>155</sup> Caroline Simon, previously a member of the New York State Commission Against Discrimination, wrote in 1949 that the Commission had "changed the entire pattern of employment of the most populous state in the union in less than four years."<sup>156</sup> In the blunt assessment of one journalist, "[t]wo years of state FEPC's have done more to end job discrimination than fifty years of private agitation, good-will conferences, [and] educational campaigning."<sup>157</sup>

Reformers often used laudatory assessments of state-level initiatives as empirical evidence to support similar reform in other states or, more significantly, in the federal government. They provided tangible evidence that civil rights laws could be effective, even in the face of considerable opposition from public opinion and business interests. The state-level reforms were thus important stepping stones toward a more comprehensive, far-reaching national racial reform movement. As the fight for a permanent federal FEPC was taking place in Congress, Herbert N. Northrup, a consultant to the wartime FEPC, drew on the experiences of state reform as evidence for his support of the bill.<sup>158</sup> "Thus far opponents and sponsors of FEPC have fought their battle largely in the realm of speculation," and the federal FEPC could be seen as just a temporary, wartime experiment, he noted.<sup>159</sup> "Now, however, the situation is different. We have had experience."<sup>160</sup> The New York experience in particular, Northrup concluded, "has served as a laboratory for the whole nation."<sup>161</sup> Northrup was not alone in his use of state and local experiments to promote more ambitious efforts. When, in 1949, Attorney General J. Howard McGrath sought evidence for his assertion that national civil rights laws could contribute to the decline of prejudice, he cited the experiences of state fair employment practices legislation as "indicating that this kind of law can create a climate of opinion in which discrimination tends to disappear."<sup>162</sup> Similarly, in framing an editorial in support of a federal civil rights bill, the *New York Times* began by summarizing accomplishments that had taken place in the states.<sup>163</sup>

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<sup>155</sup> MACIVER, *supra* note 112, at 165.

<sup>156</sup> Simon, *supra* note 138, at 36.

<sup>157</sup> Irwin Ross, *Tolerance by Law?* 195 HARPERS 458, 465 (1947). *See also* Carr, *supra* note 143, at 42; Charles W. Cobb, Jr., *The Outlook Regarding State FEPC Legislation*, 31 J. NEGRO HIST. 247, 249 (1946); Dublirer, *supra* note 146, at 107; G. James Fleming, *Educational Aspects of FEPC Laws*, 19 J. NEGRO EDUC. 7, 8–9 (1950); Louis C. Kesselman, *The Fair Employment Practices Commission Movement in Perspective*, 31 J. NEGRO HIST. 30, 31 (1946); Ross, *supra* note 137, at 24, 26.

<sup>158</sup> Herbert R. Northrup, *Proving Ground for Fair Employment: Some Lessons from New York State's Experience*, 4 COMMENTARY 552 (1947).

<sup>159</sup> *Id.* at 552.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 556.

<sup>162</sup> *Tolerance Linked to Security of U.S.: McGrath Says Civil Rights Laws Clear the Atmosphere for Democratic Growth*, N.Y. TIMES, Dec. 18, 1949, at 3.

<sup>163</sup> *Civil Rights in the States*, N.Y. TIMES, Aug. 14, 1949, at E8.



The states were working as the social “laboratories” Justice Louis Brandeis envisioned in an earlier era.<sup>164</sup> They offered, in the words of Caroline Simon, a “rough-and-ready laboratory of practical affairs.”<sup>165</sup> As racial liberals searched for tangible examples to support their assertion that laws could change behavior, that racial discrimination was a social problem properly dealt with through government action, the reforms taking place throughout much of the nation on the state and local level proved to be invaluable resources.

### *E. Historians and the Origins of Jim Crow*

One of the most prominent efforts to emphasize the importance of the law in the area of race relations took place on the battlefield of historical interpretation. When, for example, Oscar and Mary Handlin examined the origins of racism and slavery in America, they found that the formalization of the institution of slavery toward the end of the seventeenth century—manifested through statutes and enforcement of contracts—solidified a racial hierarchy that exhibited considerable fluidity in previous decades.<sup>166</sup> The Handlins’ article directly challenged previous accounts of the formation of slavery in early America, which had described slavery as a consequence of innate prejudice of whites toward blacks. One scholar described the broader implications of their claims: “Late and gradual enslavement undercut the possibility of natural, deep-seated antipathy toward Negroes.”<sup>167</sup> Thus, in this interpretation, it was the legalization of slavery that led to racial discrimination, rather than, as previous scholars generally argued, preexisting racial prejudice and discrimination that led to the development of the institution of slavery. The relevance for the postwar civil rights campaign was obvious: “[I]f whites and Negroes could share the same status of half freedom for forty years in the seventeenth century, why could they not share full freedom in the twentieth?” asked historian Winthrop Jordan.<sup>168</sup> “Prejudice must have followed enslavement, not vice versa, else any liberal program of action would be badly compromised.”<sup>169</sup>

While the Handlins’ reading of the history of slavery informed mid-twentieth century racial concerns only indirectly, the influence of C. Vann Woodward’s *The Strange Career of Jim Crow* (1955) was direct and immediate. Woodward explicitly framed this book—which Martin Luther King Jr. praised as “the

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<sup>164</sup> “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>165</sup> Simon, *supra* note 138, at 10.

<sup>166</sup> Oscar & Mary F. Handlin, *Origins of the Southern Labor System*, 7 WM. & MARY Q. 199, 201–06 (1950).

<sup>167</sup> Winthrop D. Jordan, *Modern Tensions and the Origins of American Slavery*, 28 J. S. HIST. 18, 20 (1962).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 21.

historical bible of the civil rights movement”<sup>170</sup>—not only as a reinterpretation of the rise of segregation in the late nineteenth and early twentieth century, but also as a statement about the potential for civil rights reform in postwar America. *Strange Career* grew out of a series of lectures Woodward wrote in the months following *Brown* and presented at the University of Virginia in the fall of 1954 (delivered, as Woodward made a point of noting in the preface of the book, to an “unsegregated” audience).<sup>171</sup> Analogous to the Handlins’ findings, Woodward found a large measure of fluidity in the racial hierarchy in the late nineteenth century, prior to the imposition of Jim Crow statutes. The title of his second chapter, “Forgotten Alternatives,” captured the essence of his thesis.<sup>172</sup> Woodward’s message to the nation, and particularly to his native South, was that race relations had not always been this way, that segregation was a relatively recent construct, and that dismantling Jim Crow was therefore more possible than many thought.<sup>173</sup> As Woodward described in the preface, “Unable to remember a time when segregation was not the general rule and practice, [southerners] have naturally assumed that things have ‘always been that way.’”<sup>174</sup> The historian who more than any other gave shape to this view that the situation had “always been that way” was Ulrich B. Phillips, who in 1928 famously declared that the central theme of southern history was a shared belief among whites in their supremacy over blacks.<sup>175</sup> Woodward directly challenged this point by highlighting an era, not so far gone, when white supremacy was not quite so dominant.

Like the Handlins, the key pieces of evidence for his argument were statutes. Woodward explicitly critiqued Sumner’s argument that laws had little effect on cultural practices. While conceding that “laws are not an adequate index of the extent and prevalence of segregation and discriminatory practices in the South,”<sup>176</sup> he emphasized that laws were essential to the development of segregation. Before the imposition of Jim Crow laws in the late nineteenth century, Woodward wrote, “the Negro could and did do many things in the South that in the latter part of the period, under different conditions, he was prevented from doing.”<sup>177</sup> “[S]egregation statutes, or ‘Jim Crow’ laws . . . constituted the most elaborate and formal expression of sovereign white opinion upon the subject”;<sup>178</sup> they gave an “illusion of permanency.”<sup>179</sup> While recognizing “evidence that segregation and discrimination became generally practiced before they became law,” Woodward emphasized “that segregation and ostracism were not nearly so harsh and rigid in

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<sup>170</sup> C. VANN WOODWARD, *THINKING BACK* 92 (1986).

<sup>171</sup> WOODWARD, *supra* note 37, at x.

<sup>172</sup> *Id.* at 31.

<sup>173</sup> *See id.* at 31–35.

<sup>174</sup> *Id.* at vii.

<sup>175</sup> Ulrich B. Phillips, *The Central Theme of Southern History*, 34 *AM. HIST. REV.* 30, 31 (1928).

<sup>176</sup> WOODWARD, *supra* note 37, at 87.

<sup>177</sup> *Id.* at 91.

<sup>178</sup> *Id.* at 7.

<sup>179</sup> *Id.* at 8.

the early years as they became later”—that is, after the legalization of Jim Crow.<sup>180</sup> Prior to this point, “it was not yet an accepted corollary that the subordinates had to be totally segregated and needlessly humiliated by a thousand daily reminders of their subordination.”<sup>181</sup> In sum: “The policies of proscription, segregation, and disfranchisement that are often described as the immutable ‘folkways’ of the South, impervious alike to legislative reform and armed intervention, are of a more recent origin . . . . [T]he belief that they are immutable and unchangeable is not supported by history.”<sup>182</sup>

Woodward, a southerner who was an outspoken critic of segregation, did not hide the present-day concerns that he sought to address.

The national discussion over the questions of how deeply rooted, how ineradicable, and how amenable to change the segregation practices really are is being conducted against a background of faulty or inadequate historical information. And some of the most widely held sociological theories regarding segregation are based upon erroneous history.<sup>183</sup>

That this careful and respected historian would concern himself so directly in the ongoing debate over legal change and segregation was in large part a product of his recent involvement with the NAACP’s legal campaign against school segregation. Woodward, like his friend and fellow historian John Hope Franklin, had aided Thurgood Marshall and the NAACP lawyers in their historical research.<sup>184</sup> Looking back on his work, after over a decade of controversy over his thesis regarding the late onset of rigidity in Jim Crow race relations, Woodward would recognize the pressures his civil rights sympathies placed upon his scholarship.

If the thesis were sound, then the traditional defenses of segregation were breached and weakened because they pictured the system as entrenched in immemorial and unbroken usage and quite beyond the reach of legal action. And again, if the system were of relatively recent origin and was itself the result of political and legal action, then reformers might take hope that segregation was not all that invulnerable and that the law might be used effectively to bring about change.<sup>185</sup>

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<sup>180</sup> *Id.* at 23; see also Howard N. Rabinowitz, *More Than the Woodward Thesis: Assessing the Strange Career of Jim Crow*, 75 J. AM. HIST. 842, 844 (1988) (“[D]espite [Woodward’s] partial disclaimers, the existence of a law enforcing segregation has always been the key variable in evaluating the nature of race relations.”).

<sup>181</sup> WOODWARD, *supra* note 37, at 26.

<sup>182</sup> *Id.* at 47.

<sup>183</sup> *Id.* at ix.

<sup>184</sup> KLUGER, *supra* note 16, at 623–24, 638; WOODWARD, *supra* note 37, at 88–89.

<sup>185</sup> C. VANN WOODWARD, AMERICAN COUNTERPOINT: SLAVERY AND RACISM IN NORTH-SOUTH DIALOGUE 237 (1971).

The general belief that law was the key to understanding the development of Jim Crow was prevalent during the early postwar period—Woodward's work was simply the most widely identified with this argument. For example, in 1950, law professor Thomas Emerson, in arguing for Supreme Court leadership in ridding the nation of racial segregation, argued that if the Court had struck down the segregation law in *Plessy*, it could "have exercised its judicial powers and prestige to nip segregation in the bud, at a time when the break with slavery was fresh. Unfortunately, it did not choose to do so."<sup>186</sup> Political scientist Alan Westin wrote a profile of Justice John Marshall Harlan, whose famous dissent in *Plessy* took on a prophetic quality in the postwar period, in which he attributed Harlan's great midlife transformation on the race question (he had been a slaveholder before the Civil War) to the passage of the Reconstruction Amendments—simply put, the force of the legal transformation led to a personal transformation.<sup>187</sup> For Westin, writing in 1957, three years after *Brown*, the implications for the present were clear: "Now, like Harlan, these men [i.e., white southerners] have been carried across the barrier by the change in fundamental law which the *Segregation Cases* decreed, and a new range of possibilities has opened to them."<sup>188</sup>

The lessons of history had long been the proud terrain of Jim Crow's defenders, who argued that white supremacy, in belief and practice, was an unchanging heritage of southern life. These lessons were now being challenged. Civil rights advocates found history to be valuable ground through which they could demonstrate that prejudice was not permanently embedded in southern society, and, more consequentially for postwar civil rights, that laws had been particularly effective at shaping personal beliefs, and thereby remaking race relations.

#### IV. THE TRIUMPH OF FAITH IN THE LAW: THE ROAD TO *BROWN*

*The old alibi that you have to educate the people first and do the right thing afterward has now been exploded by the Supreme Court.*<sup>189</sup>

The claim that law was uniquely suited to addressing America's racial dilemma received extensive support in the debate over school segregation that culminated in *Brown*. When, in the late 1940s and early 1950s, school desegregation litigation emerged as the next major civil rights battleground, opponents regularly conceded that civil rights legislation might be appropriate. If a state wanted to desegregate its schools, critics allowed, it certainly could do so. And perhaps Congress could pass a federal law desegregating schools. But they

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<sup>186</sup> Thomas I. Emerson, *Segregation and the Law*, NATION, Mar. 25, 1950, at 270.

<sup>187</sup> Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637, 709–10 (1957).

<sup>188</sup> *Id.* at 709.

<sup>189</sup> Frederic Wertham, *Nine Men Speak to You: Jim Crow in the North*, NATION, June 12, 1954, at 498.

drew the line when civil rights advocates argued that school segregation was wrong not just as a policy matter, but as a constitutional matter—and therefore the issue was one for the federal courts. Critics of judicial leadership in dismantling Jim Crow drew on several principles. They argued that such a social transformation was a political issue, and it was a violation of democratic principles for unelected judges to initiate such a monumental social upheaval.<sup>190</sup> They also argued the legal merits of the constitutional claim, noting that the history behind the framing of the Fourteenth Amendment gave little indication that it was intended to prohibit segregated schools,<sup>191</sup> and further, there was too much precedent for the Court to change course at this point.<sup>192</sup> These critics also had a final, powerful argument in their arsenal—an argument historians of *Brown* have largely overlooked: they were deeply skeptical of the capacity of the law to dismantle Jim Crow.

Those opposing judicial intervention argued that a legal pronouncement, even by an institution as esteemed as the highest court of the land, without sufficient support on the ground, would be ineffective, perhaps even counterproductive. Here was a test of the capacity of the law in its barest form: could the mere words of the Supreme Court—which was, after all, the “least dangerous branch,” in Alexander Hamilton’s famous estimation, having “neither Force nor Will, but merely judgment”<sup>193</sup>—lead to the abandonment of segregated schools, the centerpiece of modern Jim Crow? By the early 1950s, with the Supreme Court sending unmistakably promising signals that the Justices were willing to confront this issue, racial liberals would focus their energies on this crucial question with renewed intensity. The NAACP lawyers who pressed the school desegregation cases drew extensively upon the scholarship and claims of racial legalism. And the Justices of the Supreme Court would show considerable sympathy toward the legalist claims. Although the Justices never embraced the high optimism toward the capacity of the law of committed postwar racial liberals, these arguments influenced the Court, helping to quell the Justices’ fears that the judiciary lacked the power to press the desegregation project forward into this potentially explosive area.

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<sup>190</sup> I. A. NEWBY, CHALLENGE TO THE COURT, 6, 15–16 (Louisiana State University Press 1969) (1967).

<sup>191</sup> See, e.g., ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952–1955, at 207 (Leon Friedman ed., 1969) (statement of John W. Davis) (“[T]he overwhelming preponderance of the evidence demonstrates that the Congress which submitted, and the state legislatures which ratified, the Fourteenth Amendment did not contemplate and did not understand that it would abolish segregation in public schools . . .”).

<sup>192</sup> See, e.g., *id.* at 215 (again quoting Davis) (“[S]omewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance.”).

<sup>193</sup> THE FEDERALIST no. 78, at 523 (J.E. Cooke ed., 1961).

### A. *The Skeptics' Case*

Those who continued to voice resistance toward civil rights reform generally based their position on a combination of pessimism toward the state of race relations and skepticism toward the capacity of the law, particularly when new legal requirements derive from the judicial (as opposed to the legislative) process. While the harsh, dismissive pessimism of the early Jim Crow era had dissipated, echoes of *Plessy* and Sumner would still be heard in the postwar period.

A representative summary of the skeptics' position can be found in a 1950 opinion from the United States Court of Appeals for the District of Columbia evaluating a challenge to federal segregation law applying to the District of Columbia.<sup>194</sup> The court framed the legal question as "whether the Constitution lifted this problem [i.e., segregation] out of the hands of all legislatures and settled it," to which it concluded that the Constitution did not.<sup>195</sup> To support this conclusion, the opinion shifted from constitutional analysis to an evaluation of the sociology of race relations and the power of legal change.

Since the beginning of human history, no circumstance has given rise to more difficult and delicate problems than has the coexistence of different races in the same area. Centuries of bitter experience in all parts of the world have proved that the problem is insoluble by force of any sort. The same history shows that it is soluble by the patient processes of community experience.<sup>196</sup>

Thus, civil rights reform, when not produced by majoritarian processes, is nothing more than "force" (equating federal law with "force" was a standard move of the skeptics), which, following the folkways assumptions, cannot change social practices that are built upon attitudes; this was a job for education, for "the patient processes of community experience." Although this reasoning appears at least sympathetic to the Sumnerian skepticism toward all legal reform that runs against folkways, the court added that its argument was against *judicial* intervention, not against law per se. "Such problems lie naturally in the field of legislation, a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstance."<sup>197</sup> This was the folkways school in its modern form. It attempted to steer the debate over the capacity of the law into an institutional competency discussion. Thus, the crucial question for the postwar struggle over the capacity of the law would largely revolve around a debate over the capacity of the courts.

The fact that the debate was about *schools* also gave ammunition to these latter-day Sumnerians. Skeptics regularly stressed the special place of education in

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<sup>194</sup> Carr v. Coming, 182 F.2d 14 (D.C. Cir. 1950).

<sup>195</sup> *Id.* at 16.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

the social system as a justification for giving latitude to states to allow school assignment policy to reflect local customs. Compulsory school laws, “provide[] that the school shall supplement the work of the parent in the training of the child and in doing so it is entering a delicate field and one fraught with tensions and difficulties,” explained a 1951 federal district court opinion that rejected a constitutional challenge to segregated schools in South Carolina.<sup>198</sup>

[T]he law must take account, not merely of the matter of affording instruction to the student, but also of the wishes of the parent as to the upbringing of the child and his associates in the formative period of childhood and adolescence. If public education is to have the support of the people through their legislatures, it must not go contrary to what they deem for the best interests of their children.<sup>199</sup>

This approach to education echoed the late-nineteenth-century belief that schools belonged to a “social” (as opposed to “civil” or “political”) sphere, into which federal constitutional norms should not enter.<sup>200</sup>

The Supreme Court was given ample opportunity to weigh the claims of the skeptics, for this was a central element of the arguments the states offered in defending their segregation statutes in *Brown*. During oral argument John W. Davis, attorney for South Carolina, emphasized the importance of allowing school practices to reflect social customs.

Is it not of all the activities of government the one which most nearly approaches the hearts and minds of people, the question of education of their young?

Is it not the height of wisdom that the manner in which that shall be conducted should be left to those most immediately affected by it, and that the wishes of the parents, both white and colored, should be

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<sup>198</sup> *Briggs v. Elliott*, 98 F. Supp. 529, 535 (D.C.S.C. 1951).

<sup>199</sup> *Id.*

<sup>200</sup> *See, e.g., Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (“The object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.”).

ascertained before their children are forced into what may be an unwelcome contact?<sup>201</sup>

Similarly, the Virginia Attorney General laid out his vision of the negative impact a desegregation ruling would have, in language echoing Sumnerian folkways principles. Such a decision would be “contrary to the customs, the traditions and the mores of what we might claim to be a great people, established through generations, who themselves are fiercely and irrevocably dedicated to the preservation of the white and colored races.”<sup>202</sup>

The claims of the legal skeptics were also the concerns of the Supreme Court Justices. As they considered whether to take the momentous step of striking down segregated education as in violation of the Fourteenth Amendment, the last thing the Justices wanted to do was to issue a decision that was ignored. They feared what Holmes had warned against in *Giles*—a decision that proved no more than an “empty form.”<sup>203</sup> “[N]othing would be worse, from my point of view,” warned Justice Frankfurter during oral arguments in *Brown*, “than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks.”<sup>204</sup> Or, an even worse outcome would be to issue a decision that ignited the South. “[I]t is generally recognized,” observed a 1952 law review note, “that the Court avoids a *per se* ruling because it is reluctant to cause social revolution by judicial fiat.”<sup>205</sup> The Justices of the Court were paying careful attention to developments in race relations and the achievements of civil rights campaigns, and they were all impressed at the progress that was being made.<sup>206</sup> If they were to strike down segregated schools, they would have to believe that the decision would contribute to this already well-developed trend away from Jim Crow.

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<sup>201</sup> See ARGUMENT, *supra* note 191, at 61.

<sup>202</sup> *Id.* at 98.

<sup>203</sup> See, e.g., KLARMAN, *supra* note 28, at 311 (“[T]he probable consequences of invalidating segregation weighed heavily on the justices.”).

<sup>204</sup> ARGUMENT, *supra* note 191, at 48.

<sup>205</sup> Note, *Grade School Segregation: The Latest Attack on Racial Discrimination*, 61 YALE L.J. 730, 739 n.38 (1952).

<sup>206</sup> See *infra* Part IV.C.



*B. The Racial Liberals' Case*

As the NAACP lawyers prepared their legal challenge to school segregation, they found much support for their positions, particularly their optimistic assessments of the potential for federal civil rights reform, in recent legal and social scientific scholarship. The civil rights lawyers highlighted studies that emphasized that a Supreme Court desegregation ruling would not be particularly explosive in the South. Because of social and cultural changes already under way (encouraged by previous civil rights reforms), combined with a belief that top-down legal commands could be effective in the area of race relations, racial liberals had high hopes for the effects of a revision of formal federal law. They believed the Supreme Court could provide the critical intervention that would allow the nation to finally abandon Jim Crow policy, practices, and beliefs.

The case for the capacity of the law in the context of school desegregation was built upon at least a decade of civil rights accomplishments. These included the Supreme Court decision in the white primary case of 1944,<sup>207</sup> the desegregation of the military by executive order in 1948,<sup>208</sup> and the 1950 Supreme Court decisions holding that the separate-but-equal principle established in *Plessy* no longer satisfied the requirements of the Fourteenth Amendment when applied to university education.<sup>209</sup> Each of these civil rights milestones offered a new opportunity to restate the case for the law in the battle for racial equality. For example, William H. Hastie wrote an article evaluating the white primary decision in which he noted: "For the student of statecraft *Smith v. Allwright* provides occasion for fresh discussion of the wisdom and efficacy of judicial decisions which impose sanctions contrary to what seems to be the immediate will and desire of large segments of the population."<sup>210</sup> Although the decision was greeted with defiance and ominous warnings by segregationists, "[n]ow, a year later, after the hue and cry have subsided, it is noteworthy that only South Carolina has been moved to undertake legislative nullification of the judicial mandate."<sup>211</sup> Hastie continued,

it now can be stated with confidence that the declaration of the law in *Smith v. Allwright* is in fact serving to stimulate public acceptance of the Negro as a voter. Prejudice against permitting the Negro to vote is proving not to be so deep seated and widespread as to cause, on any dangerous or alarming scale, more than a vocal challenge to the authority

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<sup>207</sup> *Smith v. Allwright*, 321 U.S. 649, 664–66 (1944) (holding Texas's all-white Democratic primary system unconstitutional).

<sup>208</sup> Exec. Order No. 9,981, 13 Fed. Reg. 4,313 (July 26, 1948).

<sup>209</sup> *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641–42 (1950).

<sup>210</sup> William H. Hastie, *Appraisal of Smith v. Allwright*, 5 L. GUILD REV. 65, 65 (1945).

<sup>211</sup> *Id.* at 66.

of the national government. To put the matter somewhat differently, the nation is strong enough and its people are sufficiently civilized so that such pronouncement by our highest Court can and does serve as a catalyst of supporting sentiment rather than an incitation to rebellion.<sup>212</sup>

Similar assessments emerged in the wake of Truman's military desegregation order and the higher education rulings. In 1949, sociologist Arnold M. Rose (who had worked closely with Gunnar Myrdal in the preparation of *An American Dilemma*) published an article in *Common Ground*, titled "'You Can't Legislate Against Prejudice'—Or Can You?" in which he summarized what appeared to be an emerging scholarly consensus: "A significant amount of evidence has become available to indicate that the attitude of prejudice, or at least the practice of discrimination, can be substantially reduced by authoritative order."<sup>213</sup>

By the early 1950s, when the NAACP brought their challenge to grade school segregation to the Supreme Court, racial liberal ideology pervaded scholarly and popular literature. In 1952, for instance, the *Yale Law Journal* published a student note that concluded: "An examination of the available evidence makes it doubtful that major violence would accompany educational desegregation."<sup>214</sup> Peaceful desegregation was already taking place, much of it by legal compulsion. As support, the Note looked to judicially led efforts to end white primaries and segregation in higher education:

These instances of southern adjustment to enforced desegregation strongly suggest that the normal reaction of the South to Supreme Court decisions is not violence. Generally, the only resistance takes the form of attempted circumvention. Tighter decrees and persistent enforcement ultimately overcome even this type of resistance. Thus there is little reason for the courts to allow threats of violence and civil strife to delay desegregation.<sup>215</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> Arnold M. Rose, 'You Can't Legislate Against Prejudice'—Or Can You?, 4 COMMON GROUND 61, 61 (1949).

<sup>214</sup> Note, *supra* note 205, at 739.

<sup>215</sup> *Id.* at 743 (footnotes omitted); see also Bernard Crick, *Eve of Decision: The South and Segregation*, NATION, Oct. 31, 1953, at 352 ("Of course the transition to racial coeducation will be difficult and marked by many personal tragedies, but by and large the South is waiting for its fate to be decided in Washington with notable calm."); Comment, *Racial Violence and Civil Rights Law Enforcement*, 18 U. CHI. L. REV. 769, 781 (1951) ("[R]acial violence can be prevented even where the enforcement of civil rights law involves direct attack on established patterns of racial segregation. The key to such successful law enforcement is decisive and informed government action."); Channing Tobias, *Implications of the Public School Segregation Cases*, 60 CRISIS 612, 613 (1953) ("There is mounting evidence that a constantly growing segment of southern whites is ready to accept the end of segregation."); Benjamin E. Mays, transcript of radio address (Jan. 27, 1954), William O. Douglas Papers, Container 1150, Manuscripts Division,

This note was carefully read by many involved in *Brown* litigation; it was cited in an NAACP brief and in an influential bench memo by one of Chief Justice Warren's clerks.<sup>216</sup>

As soon as the school segregation cases began to reach the Supreme Court in 1951, leading civil rights activists sought to assure anyone who would listen that a desegregation order would not lead to major disturbances, and that the entire process, following the path set by military and higher education integration, would be smoother than expected. Racial segregation in southern schools was already "fading away," observed Clarence Mitchell, the head of the Washington, D.C., branch of the NAACP.<sup>217</sup> When asked for his prediction of the impact of a Supreme Court school desegregation ruling, Mitchell replied:

The whole thing would go well. There would be no problem. I get around quite a lot in the Southern communities. The South more and more is getting into a mental state where it knows that segregation must go in almost everything. With this attitude, segregation sort of fades away.<sup>218</sup>

The NAACP journal the *Crisis* dismissed predictions of violence in reaction to Court-ordered desegregation, citing as evidence the success of the higher education cases and the "high respect" of the American people for the Supreme Court.<sup>219</sup> In early 1954, as the Court deliberated on *Brown*, Thurgood Marshall stated that a favorable Court ruling would mean most schools could be integrated in four or five years (although he added, in a rare and surprising display of pessimism probably intended to assuage lingering fears of upheavals, that in isolated sections of the Deep South such a ruling "would have no effect for thirty years").<sup>220</sup> The *New York*

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Library of Congress, Washington, D.C. ("Desegregation will be easier than we think because it has been in process fifteen years or more and no calamity has fallen upon the South . . . . If the United States Supreme Court rules against segregation in the public schools, I believe the southern people will meet the challenge with dignity, poise, and calm.").

<sup>216</sup> Appendix to Appellants' Briefs, *Brown v. Board of Education*, 347 U.S. 483 (1954), in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 55 (Philip B. Kurland & Gerhard Casper eds., 1975); Bench Memorandum from Justice Earl Pollock, Segregation Cases, Nos. 1, 2, 4, 8, and 10, 1953 Term, at 12, Earl Warren Papers, Container 574, Manuscripts Division, Library of Congress, Washington, D.C. On the significance of this bench memo, see Christopher William Schmidt, Postwar Liberalism and the Origins of *Brown v. Board of Education* 461–66, 490–92, 523–25, 535–36 (Nov. 2004) (unpublished Ph.D. dissertation, Harvard University) (on file with author).

<sup>217</sup> *School Bias Seen 'Fading' in South*, N.Y. TIMES, Oct. 28, 1951, at 87.

<sup>218</sup> *Id.*

<sup>219</sup> Editorial, *School Cases*, 60 CRISIS 356, 357 (1953).

<sup>220</sup> *'Upheaval' Doubted If School Bias Ended*, N.Y. TIMES, Jan. 24, 1954, at 34.

*Times* reported Marshall's comments under the headline: "'Upheaval' Doubted If School Bias Ended."<sup>221</sup>

The claims of the racial liberals steadily seeped into mainstream discussions on the fate of Jim Crow. "Segregation has been legally disintegrating under one court decision after another," observed a 1953 *New York Times* editorial.<sup>222</sup> Impressive strides were being made within higher education, and "the legal issue has descended to the public schools by a logical sequence of events."<sup>223</sup> There were "risks" involved when a change in law is placed in opposition to "mores and social practices . . . [y]et change in race relations in the South . . . has been swift in recent years."<sup>224</sup> The editorial concluded:

The Supreme Court will render its decision on segregation in the public schools in a climate of growing tolerance that is one of the most heartening signs of our times. The climate suggests that, whatever the decision of the court may be, democracy has nothing to fear from more democracy.<sup>225</sup>

This editorial is particularly notable because it marked a transformation of the position of the *Times* editorial board. The *Times* had given a far more measured reaction to the 1950 decisions desegregating higher education, praising the Court for not moving too quickly: "[A]s long as considerable numbers of people, including the majority of dominant elements in whole communities, think differently, we cannot expect the millennium. The situation calls for a period of education—how long a period no one can say."<sup>226</sup> In just three years, the newspaper had gone from opposing a school desegregation decision in favor of "a period of education" to accepting, even inviting such a decision.

The NAACP lawyers recognized the potential for their cause in extrapolating examples of civil rights success stories to the issue of grade school segregation. When they argued their case before the Court, the civil rights lawyers had to do more than just present a convincing interpretation of the Constitution that would support their position. And they had to do more than just convince the Justices of the wrongness of segregation. They also had to paint a picture of what the country would look like after *Plessy* was overturned. And their picture was relentlessly sanguine.

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<sup>221</sup> *Id.* Immediately after *Brown*, Marshall reiterated his hopeful prediction. *NAACP Sets Advanced Goals*, N.Y. TIMES, May 18, 1954, at 16 ("Mr. Marshall, asked how long he thought it would be before segregation in education was eliminated, replied it might be 'up to five years' for the entire country. He predicted that, by the time the 100th anniversary of the Emancipation Proclamation was observed in 1963, segregation in all its forms would have been eliminated from the nation.")

<sup>222</sup> *The Paradox of Segregation*, N.Y. TIMES, June 14, 1953, at E10.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Separate But Equal*, N.Y. TIMES, June 6, 1950, at 28.

The social scientific studies referenced in the NAACP briefs included not just references to the damage segregation inflicted on black children (the material that eventually found its way into the famous eleventh footnote of the *Brown* opinion), but also to the malleability of prejudices in the face of outside stimulus.<sup>227</sup> Attached to one NAACP brief was an appendix entitled, “The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement.”<sup>228</sup> In summarizing the anticipated consequences of a desegregation order, the statement echoed the characteristic optimism of racial liberals: “desegregation has been carried out successfully in a variety of situations although outbreaks of violence had been commonly predicted.”<sup>229</sup> It specifically noted successes with desegregation in the military, housing, and industry and referenced the latest studies supporting the racial liberal adherence to racial contact theory.<sup>230</sup> In 1953 the *Journal of Social Issues* dedicated an entire issue to a presentation of research that social psychologist Kenneth Clark compiled during his work with the NAACP lawyers in the segregation cases.<sup>231</sup> The focus of this article was not on his research demonstrating the damages of segregation (Clark’s famous doll studies<sup>232</sup>), but on his work evaluating the potential impact of a school desegregation order. Clark argued that although experience had demonstrated that there were necessary preconditions to successful integration—including, most notably, strong leadership—wide-scale mandatory integration was feasible. He concluded, “when desegregation takes place it is generally evaluated, even by those who [were ] initially skeptical, as successful and is seen as increasing rather than decreasing social stability.”<sup>233</sup>

The points Thurgood Marshall made during the first round of oral arguments in *Brown* also emphasized a faith in the capacity of the law.<sup>234</sup> Marshall pointed to previous judicial interventions on matters of civil rights, specifically the white primary and higher education decisions, as evidence of the power of the Court:

[T]he record shows . . . that all of these predictions of things that were going to happen [riots, organized resistance, etc.], they have never happened. And I for one do not believe that the people in South Carolina or those southern states are lawless people.

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<sup>227</sup> See Appellants’ Briefs, *Brown v. Board of Education*, 347 U.S. 483 (1954), in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 27–42 (Philip B. Kurland & Gerhard Casper eds., 1975).

<sup>228</sup> Appendix to Appellants’ Briefs, *supra* note 216.

<sup>229</sup> *Id.* at 55–56.

<sup>230</sup> *Id.* at 55–57.

<sup>231</sup> Kenneth B. Clark, *Desegregation: An Appraisal of the Evidence*, 9 J. SOC. ISSUES 2 (1953).

<sup>232</sup> See KLUGER, *supra* note 16, at 315–21, 353–56; Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 169–78 (Theodore M. Newcomb & Eugene L. Hartley eds., 1947).

<sup>233</sup> Clark, *supra* note 231, at 59.

<sup>234</sup> See ARGUMENT, *supra* note 191, at 61–68.

Every single time that this Court has ruled, they [i.e., white southerners] have obeyed it, and I for one believe that rank and file people in the South will support whatever decision in this case is handed down. . . .

. . . .  
. . . [P]eople have grown up and understand each other. They are fighting together and living together.<sup>235</sup>

Marshall explained that he did “not think that segregation in public schools is any more ingrained in the South than segregation in transportation,”<sup>236</sup> an area in which the Court had already made significant desegregation rulings.<sup>237</sup> The real problem of segregation, he contended, was “the state-imposed part of it”<sup>238</sup>—that is, the segregation *laws* were the fundamental problem, more than the fact of segregation itself. And in a dramatic exchange with Justice Reed, who wondered if segregation might be justified as a way to maintain order,<sup>239</sup> Marshall left the Court with this hopeful image:

I know in the South where I spent most of my time, you will see white and colored kids going down the road together to school. They separate and go to different schools, and they come out and they play together. I do not see why there would necessarily be any trouble if they went to school together.<sup>240</sup>

### C. *The Brown Court*

Each Justice came to support the desegregation decision through his own path of reasoning and conscience. But certain common themes emerged from the Justices’ deliberation process. All nine men were clearly aware of the changes in social attitudes and scientific findings on race. This was particularly true of those Justices who struggled most with the decision. Considering the strong integrationist tenor of most of these scholarly works, such study undoubtedly exerted pressure to support desegregation. With some exceptions, the Justices of the Supreme Court accepted the basic premises of the racial liberal argument: that

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<sup>235</sup> *Id.* at 65, 67.

<sup>236</sup> *Id.* at 46.

<sup>237</sup> See *Henderson v. United States*, 339 U.S. 816, 825–26(1950) (holding that a railroad that seated customers by race violated the Interstate Commerce Act); *Morgan v. Virginia*, 328 U.S. 373, 383–86(1946) (holding that a Virginia law that required motor carriers to segregate passengers by race was unconstitutional); *Mitchell v. United States*, 313 U.S. 80, 97(1941) (holding that a carrier that refused to allow a passenger to travel first class because of his race violated the Interstate Commerce Act).

<sup>238</sup> ARGUMENT, *supra* note 191, at 49.

<sup>239</sup> *Id.* at 67.

<sup>240</sup> *Id.*

racial attitudes were not set in stone and that they had shown significant improvement in recent years; and that civil rights laws could be effective even in the face of initial popular resistance.

On matters of civil rights, the Justices were constantly looking to social developments beyond the Court. Felix Frankfurter and Stanley Reed carefully assembled extensive files of material on segregation and civil rights reform, pouring over the latest developments and findings. Law professor Herbert Wechsler captured this interest in a scene he described about visiting Justice Reed in his office while the Justices were deliberating on the segregation cases. “There he was sitting behind a big desk . . . and all over were spread magazines and journals of psychiatry and psychology,” Wechsler recalled. “He looked a little weary, and he pointed to the whole batch and asked, ‘You know anything about discrimination?’”<sup>241</sup>

Of course, simply engaging with recent liberal scholarship was different from embracing its claims. Not all were convinced. Of all the Justices on the *Brown* Court, Robert Jackson was probably the most antagonistic toward basic racial liberal assumptions. “You can’t *cure* this situation by putting children together,”<sup>242</sup> he told his colleagues in the conference following the first round of oral arguments in the school segregation cases, thereby caricaturing and dismissing a central claim of racial contact theory. In his unpublished concurring opinion in *Brown*, Jackson wrote that courts “cannot eradicate” the “fears, prides and prejudices” that support segregation.<sup>243</sup>

This Court, in common with courts everywhere, has recognized the force of long custom and has been reluctant to use judicial power to try to recast social usages established among the people. . . . Today’s decision is to uproot a custom deeply embedded not only in state statutes but in the habit and usage of people in their local communities.<sup>244</sup>

From this he concluded, “in embarking upon a widespread reform of social customs and habits of countless communities, we must face the limitations on the nature and effectiveness of the judicial process.”<sup>245</sup>

Jackson also drew attention to an irony inherent in the reasoning behind the legal attack on segregation. Racial liberals criticized *Plessy* for its faulty reasoning that laws were powerless to change social habits. Yet a strong argument could be made that the failure of *Plessy* was actually a product of the basic correctness of

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<sup>241</sup> Interview by Richard Kluger with Herbert Wechsler (Nov. 21, 1971), *Brown v. Board of Education* Collection, Series 1, Box 5, Manuscripts and Archives, Yale University, New Haven, Conn.

<sup>242</sup> THE SUPREME COURT IN CONFERENCE, 1940–1985, at 652 (Del Dickson ed., 2001) [hereinafter IN CONFERENCE].

<sup>243</sup> Memorandum from Mr. Justice Jackson 2 (Mar. 15, 1954), Robert H. Jackson Papers, Container 184, Manuscripts Division, Library of Congress, Washington, D.C.

<sup>244</sup> *Id.* at 9–10.

<sup>245</sup> *Id.* at 12.

this proposition. The legal requirement in the 1896 ruling was that segregated facilities were constitutionally acceptable as long as they were equal, yet this requirement, announced from the apex of the American legal system, was systematically ignored. Law had failed—and failed miserably—to do what racial liberals insisted it had the power to do. Jackson highlighted this fact in his concurrence: “I see no reason to expect a pronouncement that segregation is unconstitutional will be any more self-executing or any more efficiently executed than our pronouncement that unequal facilities are unconstitutional.”<sup>246</sup> This inconvenient fact received only occasional mention among supporters of desegregation.<sup>247</sup>

Hugo Black also expressed reservations about the legalist assumptions that dominated discussions of civil rights reform. While committed to overruling *Plessy*, he also played the role of the Court’s Cassandra. During the Justices’ conferences, the Alabama Justice frequently aired his skepticism regarding compliance in the South to a federal court order. He even predicted that violence would result from a desegregation order. In 1950, when there was some discussion among the Justices regarding the difficulties of issuing a desegregation order that applied to higher education but not public schools, Black told his colleagues, “At this time, it might make trouble in the South in the lower schools. Schools would close rather than mix races at the grade and high school levels.”<sup>248</sup> Even a move against segregation in higher education might result in “clashes.”<sup>249</sup> In 1952, when the Justices first squarely faced school desegregation, his predictions were even more dire. “[T]here may be violence if [the] Court holds segregation unlawful . . . . [S]tates would probably take evasive measures while purporting to obey.”<sup>250</sup> Of all the Justices, Black was probably the least aware of, or the least interested in, the ongoing debate over the capacity of the law to change race relations.

Yet Black’s influence on his fellow Justices was limited. As the only voice of the Deep South, the Justices obviously listened to his predictions with particular interest. But the fact that few of the Justices echoed Black’s estimation of the likely results of a ruling (and at least one openly took issue with Black’s predictions), indicates that they had other, more influential voices sending quite

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<sup>246</sup> *Id.* at 12–13.

<sup>247</sup> See, e.g., Edith Udell Fierst, *Constitutionality of Educational Segregation*, 17 GEO. WASH. L. REV. 208, 211 (1949).

<sup>248</sup> THE SUPREME COURT IN CONFERENCE, 1940–1985, at 639 (Del Dickson ed., 2001) [hereinafter IN CONFERENCE].

<sup>249</sup> *Id.*

<sup>250</sup> Douglas Conference Notes, No. 8, *Brown v. Board of Education of Topeka* (Dec. 13, 1952), William O. Douglas Papers, Container 1150, Manuscripts Division, Library of Congress, Washington, D.C. See also KLUGER, *supra* note 16, at 593–94 (discussing Justice Black’s predictions about southern resistance to school desegregation); Letter from Justice Robert Jackson to Professor Charles Fairman (Mar. 13, 1950), at 1–2 Robert H. Jackson Papers, Container 12, Manuscripts Division, Library of Congress, Washington, D.C. (referencing Black’s view that outlawing segregation would result in “resistance and trouble in the South”).



different signals. Jackson, who expressed such skepticism toward the tenets of racial legalism, was generally optimistic that civil rights progress was taking place and would continue to take place. The Supreme Court, he assumed, would eventually have to follow that trend.<sup>251</sup> Even Reed, the last holdout in *Brown*, recognized the clear direction of change on civil rights. In 1949 Reed wrote a personal memorandum in which he noted (with some resignation): “It may be that segregation is not a lasting condition. It may be an exception of the moment in the movement toward abolition of all distinctions of people by law.”<sup>252</sup> During the Court’s deliberation on *Brown*, he had his clerks researching the latest trends in civil rights policy.<sup>253</sup> In oral arguments, after listening to Marshall’s optimistic assessment of southern race relations and prediction for a smooth transition to integration, Reed responded, “I am not thinking of trouble.”<sup>254</sup> His concern was whether the federal courts should be getting involved in this issue.<sup>255</sup>

Despite Black’s relentless pessimism, and Jackson’s quieter skepticism, the dominant attitude among the Justices confronting school desegregation was one of hopefulness. The efforts of racial liberals to redefine the grounds on which racial reform was discussed, to inject confidence into the campaign for federal civil rights policies, and to move the powerful liberal establishment toward the tenets of racial liberalism was, by the early 1950s, largely successful. The *Brown* ruling emerged from this atmosphere of optimism. With the exception of Black, the Justices underestimated the potential for organized resistance to their desegregation order. “The Court expected some resistance from the South,” Warren later wrote in his memoirs. “But I doubt if any of us expected as much as we got.”<sup>256</sup> Justice Burton noted: “There is a trend away from separation of the races in restaurants, the armed forces, and so forth.”<sup>257</sup> He also saw a clear line of progression from the higher education decisions to *Brown*.<sup>258</sup> In a direct counter to Black’s insistence on the problems that a desegregation decision would create in the South, Justice Minton asserted: “There may be trouble in the offing, but I doubt it.”<sup>259</sup> He supported this assessment by pointing to the successful integration of the military.<sup>260</sup> He also drew on his own experience in Indiana, where, in his estimation, “segregation is on its way out.”<sup>261</sup>

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<sup>251</sup> “Whatever we might say today, within a generation it will be outlawed by decision of this Court because of the forces of mortality and replacement which operate upon it.” Memorandum from Mr. Justice Jackson, *supra* note 243, at 1.

<sup>252</sup> JOHN D. FASSETT, *NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY* 561–62 (1994).

<sup>253</sup> *Id.* at 565–67.

<sup>254</sup> ARGUMENT, *supra* note 191, at 67.

<sup>255</sup> *Id.*

<sup>256</sup> EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* 290 (1977).

<sup>257</sup> IN CONFERENCE, *supra* note 248, at 658–59.

<sup>258</sup> *Id.* at 659.

<sup>259</sup> *Id.* at 660.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 659–60.

By far, the most persistent proponent of racial liberal optimism on the Court was Frankfurter. Frankfurter was in the midst of his own battle between his commitment to the doctrine of judicial restraint (which led him to consider school desegregation an issue better left to legislatures) and his lifelong opposition to racial discrimination and segregation. If Frankfurter were to abandon judicial restraint in this particular case, it would be the product of not only his belief in the wrongness of segregation, but also his assessment of the readiness of American society to accept a judicial desegregation ruling. His central concern was to protect the Court, which he saw as an inherently fragile institution whose authority was largely dependent on its prestige in the national consciousness, from becoming politicized and, as a result, weakened. According to Philip Elman, one of the Justice's close correspondents during this period, Frankfurter "was waiting for public opinion to form; he was waiting for the effects of the Court's decisions in *Henderson*, *Sweatt*, and *McLaurin* to be felt; he was waiting for some movement outside the court system toward racial integration."<sup>262</sup>

To measure the public mood, Frankfurter had his clerks track down information on the latest developments of various integration efforts, and the reports he received indicated that the integration process was going smoothly.<sup>263</sup> Extrapolating from integration success stories in the border states, Frankfurter convinced himself that the South was also moving in a promising direction. He prided himself on his contacts with lawyers in the South (most of whom were former students of his), and the impression that Frankfurter gained from these contacts was that the South was prepared to accept a Supreme Court desegregation ruling.<sup>264</sup>

When Warren arrived, Frankfurter immediately pressed his optimistic assessment of the changing dynamics of race relations on the new Chief Justice. Frankfurter would prove a particularly influential voice for Warren as he approached the task of writing the *Brown* opinion. In a memorandum written in the

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<sup>262</sup> Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960*, 100 HARV. L. REV. 817, 823 (1987).

<sup>263</sup> Letter from Helen Newman, Supreme Court Librarian, to M. L. Brooks, Superintendent of Public Instruction, Phoenix, Arizona (July 27, 1953), Felix Frankfurter Papers, Part 2, Reel 4, Frame 258, Modern Manuscripts Collections, Harvard Law School, Cambridge, Mass.; Letter from Helen Newman, Supreme Court Librarian, to Jack D. Williams, President of Phoenix Elementary School Board (July 27, 1953), *id.* at Frame 259; Letter from Robert D. Morrow, Superintendent of Tucson Public Schools, to Dr. H. N. Sims (Oct. 19, 1951), *id.* at Frames 362–63; Letter from Robert D. Morrow, Superintendent of Tucson Public Schools, to Alyce E. Walker (Nov. 20, 1951), *id.* at Frames 365–66; Letter from Robert D. Morrow, Superintendent of Tucson Public Schools, to Annette Lawrence (Feb. 6, 1952), *id.* at Frames 367–68; *Tucson Negro Teachers To Be Retained: Character, Ability Only Hiring Basis, Superintendent Says*, undated press clipping, *id.* at Frame 364.

<sup>264</sup> Frankfurter's estimation of his connection with the region was seriously exaggerated. See MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* 140 (1991) ("In fact, Frankfurter knew very few southern lawyers and had very little correspondence with lawyers practicing below the Mason-Dixon line.").

summer of 1952 and passed on to Warren when he arrived on the Court, Frankfurter noted: “The policy of segregation has in the short period of thirty years undergone great modification. . . . [I]t is fair to say that the pace of progress has surprised even those most eager in its promotion.”<sup>265</sup> This fact was central to Frankfurter’s reasoning in the case:

The legal problem confronting this Court is the extent to which this desirable and even necessary process of welding a nation out of such diverse elements can be imposed as a matter of law upon the States in disregard of the deeply rooted feeling and tradition, based upon local situations, to the contrary.<sup>266</sup>

This hurdle could be overcome through either a reevaluation of the role of the Court (of the capacity of the law, essentially) or a reevaluation of the extent of opposition to the proposed Court ruling—or some combination of the two, toward which Frankfurter was working. Not only was the practice of segregation changing but also the beliefs that accompanied this arrangement. “Law must respond to transformation of views as well as to that of outward circumstances. The effect of changes in men’s feelings for what is right and just is equally relevant in determining whether differentiation of treatment by law is a denial of ‘the equal protection of the laws.’”<sup>267</sup> In the months leading up to the ruling, Frankfurter gave an article to Warren that had recently been published in the *Washington Post*. The article, titled “Virginia Has Lost Alarm at Racial Ruling,” explained that a school desegregation decision “is awaited in Virginia with grave anxiety, but without anything resembling hysteria.”<sup>268</sup> Warren returned the article with a note, dated May 4, 1954, that read: “Felix: This is a splendid and encouraging article. I enjoyed our discussion yesterday. It was extremely helpful to me.”<sup>269</sup>

Warren’s political background predisposed him to share Frankfurter’s optimism toward the trend of American race relations. He came to the Court after serving a decade as a popular governor of California, and he brought with him an understanding of how the previous decade had transformed race relations as a matter of politics and public policy. His background in California politics gave him a sense of optimism about the progress of race relations. Following a federal appeals court decision striking down a California school district’s policy of separately educating children of Mexican descent,<sup>270</sup> the California legislature

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<sup>265</sup> Memorandum from Justice Felix Frankfurter 2 (Sept. 26, 1952), Earl Warren Papers, Container 571, Manuscripts Division, Library of Congress, Washington, D.C.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* Benjamin Muse, *Virginia Has Lost Alarm at Racial Ruling*, WASH. POST, Apr. 25, 1954 at 1.

<sup>268</sup> *Id.*

<sup>269</sup> Letter from Justice Earl Warren to Justice Felix Frankfurter (May 4, 1954), Felix Frankfurter Papers, Part 2, Reel 4, Frame 9, Modern Manuscripts Collections, Harvard Law School, Cambridge, Mass.

<sup>270</sup> *Westminster School Dist. v. Mendez*, 161 F.2d 774, 781 (9th Cir. 1947) (en banc).

passed, and Governor Warren signed, a bill prohibiting school segregation in the state.<sup>271</sup> Thus, with judicial prodding and strikingly little fanfare or controversy, California discarded legal segregation in its schools. California saw another major civil rights ruling when, in 1948, the California Supreme Court ventured into a field that the U.S. Supreme Court would not hazard until the late 1960s and ruled unconstitutional the state's miscegenation statute—the first time that any court, state or federal, had done so.<sup>272</sup> By the time Warren left California, he had already taken part in a civil rights project that was not overly controversial within his home state, and whose successes, he felt, had resulted from a combination of leadership, political skill, and moderation.<sup>273</sup>

Warren's *Brown* opinion included a reference to the importance of law in creating the harmful environment the Court was striking down as unconstitutional. Warren quoted from the finding of fact of the district court decision in *Brown*,<sup>274</sup> which had concluded that the damages segregation inflicted on black children "is greater when it has the sanction of the law."<sup>275</sup> This lower court finding, in turn, had apparently drawn on expert testimony of psychologist Louisa Pinkham Holt, who had explained:

The fact that it is enforced, that it is legal, I think, has more importance than the mere fact of segregation by itself does because this gives legal and official sanction to a policy which is inevitably interpreted both by white people and by Negroes as denoting the inferiority of the Negro group.<sup>276</sup>

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<sup>271</sup> CHARLES WOLLENBERG, *ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS, 1855–1975*, at 132 (1976).

<sup>272</sup> *Perez v. Lippold*, 198 P.2d 17, 29 (Cal. 1948).

<sup>273</sup> See generally Schmidt, *supra* note 216, at 378–439.

<sup>274</sup> *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951).

<sup>275</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

<sup>276</sup> KLUGER, *supra* note 16, at 421; see also I.A. NEWBY, *CHALLENGE TO THE COURT: SOCIAL SCIENTISTS AND THE DEFENSE OF SEGREGATION, 1954–1966*, at 33–34 (rev. ed., 1969) (discussing scholarship on the effects of segregation on young children); John P. Jackson, *The Triumph of the Segregationists? A Historiographical Inquiry Into Psychology and the Brown Litigation*, 3 HIST. PSYCH. 239, 254–56 (2000) (discussing studies of the psychological damage from legally imposed segregation).

The NAACP brief in *Brown* quoted from the lower court findings and added:

The testimony [on which the court based its finding] further developed the fact that the enforcement of segregation under law denies to the Negro status, power and privilege. . . ; interferes with his motivation for learning . . . ; and instills in him a feeling of inferiority . . . resulting in a personal insecurity, confusion and frustration that condemns him to an ineffective role as a citizen and member of society. . . . Moreover, it was demonstrated that racial segregation is supported by the myth of the Negro's inferiority . . . , and where, as here, the state enforces segregation, the community at large is supported in or converted to the belief that this myth has substance in fact.

The Court's approach to drafting the desegregation opinions reflected an underlying confidence in the efficacy of legal rules, even in the volatile area of southern race relations. Justice Clark, who tended to echo Black's dire warnings of what a desegregation decision would do to the South, noted that "[t]here is a danger of violence *if* this is not well handled."<sup>277</sup> This was a warning that the implementation should be done carefully, a point on which all the Justices were in agreement. But this concession, even as limited as it was, was significant. The fact that most of the Justices thought that a properly worded, preferably unanimous opinion could be effective, that it could follow in the footsteps of the white primary and higher education decisions, was a critical step in the creation of *Brown*. "Whether one approves or disapproves" of the segregation decisions, noted two social scientists in 1955, "it is clear that the court has undertaken a monumental project in the field of social engineering, and one obviously based on the assumption that morality *can* be legislated."<sup>278</sup> *Brown* reflected a sea change in assumptions within mainstream policy discourse toward the prospects of civil rights laws to change social practices and attitudes—a transformation that was the culmination of at least a decade of efforts by proponents of racial liberal ideology.

#### D. *The Implementation Decision*

Initially at least, developments on the ground following the 1954 desegregation decision did little to disabuse the Justices or the civil rights lawyers and their supporters of their optimistic assessment of the prospects for desegregation. Contrary to the predictions of many segregationists, *Brown* did not spark an immediate backlash. In fact, initial reactions to the ruling were generally promising. The day after *Brown*, the *New York Times* reported that "[l]eading American educators . . . did not believe there would be great difficulty in putting

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Brief for Appellants at 9, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *see also* Appendix to Appellants Briefs at 9, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) ("[S]egregation gives official recognition and sanction to these other factors of the social complex, and thereby enhances the effects of the latter in created the awareness of social status differences and feelings of inferiority. The child who, for example, is compelled to attend a segregated school may be able to cope with ordinary expressions of prejudice by regarding the prejudiced person as evil or misguided; but he cannot readily cope with symbols of authority, the full force of the authority of the State—the school or the school board, in this instance—in the same manner. Given both the ordinary expression of prejudice and the school's policy of segregation, the former takes on greater force and seemingly becomes an official expression of the latter." (internal footnotes omitted)); Brief for the United States as Amicus Curiae at 3, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), ("[R]acial discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society dedicated to freedom, justice, and equality.").

<sup>277</sup> IN CONFERENCE, *supra* note 248, at 659 (emphasis added).

<sup>278</sup> Roche & Gordon, *supra* note 128, at 229.

the ruling into effect . . . . No one expected any violence nor any real crisis to develop. A gradual changeover from the present system to a nonsegregated policy was predicted.”<sup>279</sup> The newspaper also ran an article summarizing the work of psychologist Kenneth Clark, who found desegregation occurring peacefully, even in places with “deeply rooted prejudices.”<sup>280</sup> Key to success, Clark noted, was the perception that the tide of opinion was shifting: “even deeply prejudiced persons went along with desegregation when they saw it was accepted by others in the community.”<sup>281</sup> A *Washington Post* editorial explained, “The decision will prove, we are sure—whatever transient difficulties it may create and whatever irritations it may arouse—a profoundly healthy and healing one. It will serve—and speedily—to close an ancient wound too long allowed to fester.”<sup>282</sup> Now the outcome was clear, declared C. Vann Woodward in his lectures at the University of Virginia in the fall of 1954. “A unanimous decision, it has all the moral and legal authority of the Supreme Court behind it, and it is unthinkable that it can be indefinitely evaded.”<sup>283</sup> Similarly, Channing H. Tobias, chairman of the NAACP board of directors, told a meeting of black leaders soon after *Brown* that “the entire South will meet the test of the Supreme Court decision in the spirit of loyal, law-abiding citizens.”<sup>284</sup>

This optimism, when translated into proposals for implementing school desegregation, pointed in two different directions. It encouraged the NAACP legal team to push an uncharacteristically aggressive line in its briefs and oral arguments on the implementation decree, arguing for “immediate” or “forthwith” desegregation. Throughout the school litigation campaign, the NAACP lawyers had proven themselves exceptionally adept at taking the temperature of public and judicial sentiment, steering their litigation strategy to coincide with this sentiment,

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<sup>279</sup> Benjamin Fine, *School Leaders Applaud Decision*, N.Y. TIMES, May 18, 1954, at 14.

<sup>280</sup> *Anti-Bias Trends Listed in Survey*, N.Y. TIMES, May 18, 1954, at 22.

<sup>281</sup> *Id.* For Clark’s study, see Clark, *supra* note 231.

<sup>282</sup> Editorial, WASH. POST & TIMES HERALD, in *Editorial Excerpts from the Nation’s Press on Segregation Ruling*, N.Y. TIMES, May 18, 1954, at 19.

<sup>283</sup> WOODWARD, *supra* note 37, at 149.

<sup>284</sup> Henry Lee Moon, *New Emancipation: The Atlanta Conference*, NATION, June 5, 1954, at 484; see also *Arkansas Will Conform*, N.Y. TIMES, May 19, 1954, at 18 (quoting Gov. Francis Cherry that “Arkansas would not approach the Supreme Court’s ruling with the idea of being an ‘outlaw’”); *Court Said to End ‘A Sense of Guilt,’* N.Y. TIMES, May 18, 1954, at 18 (quoting Howard Odum: “[T]he South is likely to surprise itself and the nation and do an excellent job of adjustment.”); Lillian Smith, Letter to the Editor, *Rules on Schools Hailed*, N.Y. TIMES, June 6, 1954, at E10 (noting that Southerners “will accept whole heartedly the challenge of making a harmonious, tactful change-over from one kind of school to another”); Letter from William T. Coleman to Justice Felix Frankfurter, Supreme Court of the United States (May 20, 1954), Felix Frankfurter Papers, Part 3, Reel 3, Frame 939, Modern Manuscripts Collections, Harvard Law School, Cambridge, Mass. (“Now that the Constitutional barrier has been removed, I am quite sure that the responsible people on both sides will be able to get together and work out a proper implementation of the decision.”).

and keeping themselves ready to adjust their tactics to take advantage of new openings when opinion developed in favorable directions. As a result, the NAACP campaign had two defining characteristics: it tended toward pragmatism and, at times, caution; and it was overwhelmingly successful at winning major cases in the Supreme Court. Yet the lawyers' approach to the implementation decision, influenced by the heady atmosphere created by their great victory in the 1954 decision, broke from their traditional caution.<sup>285</sup>

In rallying around the principle of forthwith desegregation, the NAACP lawyers emphasized in their arguments for *Brown II* the promising changes that were already taking place. Marshall noted that "it matters not whether that firm hand is executive, legislative or judicial," concluding that "the district court, once properly instructed by this Court, will be the type of firm hand."<sup>286</sup> "I have no doubt whatsoever," he told the Court, "that the people in South Carolina and North Carolina, once the law is made clear, will comply with whatever that court [the Fourth Circuit] does."<sup>287</sup> The white primary cases<sup>288</sup> had "raised terrific racial feeling and it worked out."<sup>289</sup> In the higher education cases,<sup>290</sup> state attorneys general had predicted catastrophe and "not a single prediction came true."<sup>291</sup>

Within the twelve states that had made efforts to fall in line with the Court's holding in these earlier cases, there was "only one untoward incident."<sup>292</sup> The desegregation of interstate transportation facilities resulting from the 1950 *Henderson* decision had similarly beneficial results.<sup>293</sup> Despite the "dire predictions" that the railroad industry would collapse in the South, the ruling resulted in "less trouble than we had before."<sup>294</sup> Whenever faced with a major social problem, Marshall told the Justices, "the history of our Government shows that it is the inherent faith in our democratic process that gets us through, the faith that the people in the South are no different from anybody else as to being law-abiding."<sup>295</sup>

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<sup>285</sup> Marshall was initially reluctant to push for the "forthwith" argument, but his colleagues eventually convinced him to push the more aggressive line. See KLUGER, *supra* note 16, at 718–23.

<sup>286</sup> ARGUMENT, *supra* note 191, at 395.

<sup>287</sup> *Id.* at 396.

<sup>288</sup> Terry v. Adams, 346 U.S. 249 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

<sup>289</sup> ARGUMENT, *supra* note 191, at 398; see also Thurgood Marshall, *The Rise and Collapse of the 'White Democratic Primary,'* 26 J. NEGRO EDUC. 249, 254 (1957) (arguing that the success of the legal attacks on the white primary indicated that southern efforts to circumvent *Brown* were destined to fail).

<sup>290</sup> Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

<sup>291</sup> ARGUMENT, *supra* note 191, at 398.

<sup>292</sup> *Id.*

<sup>293</sup> See *Henderson v. United States*, 339 U.S. 816 (1950).

<sup>294</sup> ARGUMENT, *supra* note 191, at 398.

<sup>295</sup> *Id.* at 399; see also *id.* at 436 ("I am particularly shocked at arguments [by opposing counsel] of the impotency of our Government to enforce its Constitution."); Brief for Appellants, *supra* note 276, at 14 n.5 ("In the instant cases, dark and uncertain

In their written brief, the NAACP lawyers pressed their case for an aggressive legal mandate even more forcefully; and they again drew directly on the legalist position.

The underlying assumption—that change in attitude must precede change in action—is itself at best a highly questionable one. There is a considerable body of evidence to indicate that attitude may itself be influenced by situation and that, where the situation demands that an individual act as if he were not prejudiced, he will so act, despite the continuance, at least temporarily, of the prejudice. We submit that this Court can itself contribute to an effective and decisive change in attitude by insistence that the present unlawful situation be changed forthwith.<sup>296</sup>

To support this point, the NAACP cited a list of studies of integration efforts in the military, housing, sports, and schools.<sup>297</sup>

The NAACP lawyers did not get what they wanted. In its implementation ruling, the Supreme Court gave control of desegregation to the lower federal courts without strict deadlines.<sup>298</sup> The Justices' refusal to adopt timetables for integration, however, was not necessarily because they saw the prospects for a successful implementation of the decision in a dramatically different light than the civil rights lawyers. Indeed, the Court (with the vocal exception of Justice Black) was largely responding to the same optimism that guided the NAACP. Yet the Justices came to a quite different conclusion as to what this faith in the command of the law meant for framing an implementation policy.

When considering the implementation decision, a sharp split developed between Justice Black and the other justices over the likely impact of the ruling in the Deep South. Black continued to say what he had been saying for some time now: the South was going to revolt. He warned “[s]ome counties won’t have Negroes and whites in the same school this generation. . . . We have no more chance to enforce this in the Deep South than to enforce Prohibition in New York City . . . . It is futile to think that in these cases we can settle the question of segregation in the South.”<sup>299</sup> Black proposed that the Court avoid treating the cases as class actions on behalf of all black children in segregated schools and limit the holding to the named plaintiffs in the case,<sup>300</sup> a remarkable concession for a Justice who was such a strong proponent within the Court for the ruling in the first place. Douglas was the only other justice who thought this approach a good one.<sup>301</sup>

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prophecies as to anticipated community reactions to school desegregation are speculative at best.”)

<sup>296</sup> Brief for Appellants, *supra* note 276, at 18 (footnotes omitted).

<sup>297</sup> *Id.* at 18 n.9.

<sup>298</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294, 299-301 (1955).

<sup>299</sup> IN CONFERENCE, *supra* note 248, at 665.

<sup>300</sup> *Id.* at 665–66.

<sup>301</sup> *Id.* at 667.



The other Justices, however, refused to agree with this pessimistic assessment of the prospects for desegregation—a point scholars have failed to fully appreciate.<sup>302</sup> None of the Justices had any illusions about the process being easy, but Black had been playing the Cassandra role in all previous civil rights cases, and thus far events had largely proven him mistaken. Philip Elman, who was in close contact with Frankfurter during this time, noted that Black was “scaring the shit out of the justices, especially Frankfurter and Jackson, who didn’t know how the Court could enforce a ruling against Plessy.”<sup>303</sup> The process of deliberating over implementation led many to envision the difficulty of the process of making desegregation work. As Frankfurter put it, a “declaration of unconstitutionality is not a wand by which these transformations can be accomplished.”<sup>304</sup> The Justices found themselves face to face with the potential of opposition in the oral arguments for the implementation decision during which attorneys for the states warned of the challenges desegregation would face.<sup>305</sup> “Without a favorable community attitude, no satisfactory adjustment is possible,” explained a lawyer for Virginia.<sup>306</sup> Yet—and here is the key point—most of the Justices remained generally hopeful that the momentum for change was already established and that the power of the Court’s voice, if its words were carefully chosen, would continue to move the issue forward.

Thus, the same faith in the power of the law that had mobilized racial liberals was evident among the Justices as they attempted to imagine the reaction to their decision. The Justices (save Black) thought that a well-written decision, one that effectively balanced assertion and flexibility, would be critical to the success of implementation. Justice Reed, who struggled more than anyone to join the first *Brown* decision, began his comments in the conference of December 1953 by noting, “I have a firm belief that there is a considerable group wanting to give this decision sympathetic consideration. When *some* schools are opened, it will have a further effect.”<sup>307</sup> Although the Justice from Kentucky recognized the potential for localized defiance (“our order may result in public schools being abolished”), he

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<sup>302</sup> See, e.g., MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, 217, 220–21, 228–31 (1994) (treating the fears expressed by Justice Black as representative of the general mood of the Court).

<sup>303</sup> Interview by Richard Kluger with Philip Elman (Aug. 19, 1971), *Brown v. Board of Education* Collection, Series 1, Box 2, Manuscripts and Archives, Yale University, New Haven, Conn.; see also Elman, *supra* note 262, at 828.

<sup>304</sup> Letter from Justice Felix Frankfurter to Brethren of the Supreme Court of the United States (Jan. 15, 1954), Earl Warren Papers, Container 571, Manuscripts Division, Library of Congress, Washington, D.C.

<sup>305</sup> See, e.g., ARGUMENT, *supra* note 191, at 433 (Virginia’s Attorney General describing “the sudden shock entailed by the uprooting and demolishing of a way of life enshrined and institutionalized in the hearts and minds of the overwhelming majority of millions of law-abiding citizens, their fierce and deepseated devotion to their customs and traditions composing as they do, the warp and woof of their mores of life . . .”).

<sup>306</sup> *Id.* at 425.

<sup>307</sup> IN CONFERENCE, *supra* note 248, at 666–67.

concluded on an optimistic note: “The border states will be examples.”<sup>308</sup> Frankfurter too insisted on the critical importance of careful leadership by the Court: “What we do is largely educational.”<sup>309</sup> Dismissing pessimistic findings of polls conducted in segregated states, Frankfurter joined Reed in his predicting that the entire South would eventually fall into line: “By gradual infiltration of border states, the process of desegregation can spread to the Deep South.”<sup>310</sup> Justice Clark agreed with Frankfurter on the importance of desegregation outside the Deep South. “Texas is not going to present many acute problems,” the Texan told his fellow Justices.<sup>311</sup> “[T]here will not be too much trouble there.”<sup>312</sup> There would be pockets of resistance and some administrative concerns, but he felt that a gradual remedy would be effective.<sup>313</sup>

In the face of the massive resistance that soon took shape, the idea that a well-reasoned, carefully crafted opinion might be effective in significantly mollifying opposition to desegregation appears, in a word, quaint. The mobilized opposition, when it took shape, would have little concern for the Court’s niceties. Yet the fact that this view dominated the Justices’ understanding of what they were undertaking was a testament to the exaggerated sense of importance the Justices held toward the Court—and, more generally, toward the power of the law. This was a lesson that a generation of racial liberals had been insistently trying to promulgate to the rest of the nation. In this effort, they had been remarkably successful.

The deep-seated commitment to the guiding force of the law held by committed racial liberals is given graphic illustration by Thurgood Marshall’s reaction to *Brown II*. Although he did not get the immediate desegregation with strict timetables he had asked for in his arguments, he was still largely satisfied with what the Court had produced. This is a striking fact, the only reasonable explanation for which is to point to Marshall’s undiminished faith in the power inherent in the Court’s command. At a press conference in New York soon after the decision came down, the NAACP released a statement that noted: “We see nothing in the language of the opinion which sustains the view of some Southern states that delay in compliance may be of indefinite length.”<sup>314</sup> In a private conversation a few days later, Marshall declared: “The more I think about it, I think it’s a damned good decision! . . . [T]he laws have got to yield! They’ve got to yield to the Constitution.”<sup>315</sup> “You can say all you want,” he concluded, “but those

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<sup>308</sup> *Id.* at 666.

<sup>309</sup> *Id.* at 667.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 668.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> KLUGER, *supra* note 16, at 746–47 (quoting transcribed conversation with Carl Murphy).

white crackers are going to get tired of having Negro lawyers beating ‘em every day in court. They’re going to get tired of it.”<sup>316</sup>

The commitment of the NAACP leadership to this hopeful vision of racial change was more than just Thurgood Marshall and his colleagues advocating for their clients. Civil rights leaders of the day not only used racial liberal assumptions as a tool for forwarding their agenda, they also were committed to—perhaps, in ways, even seduced by—racial liberal ideology, especially the faith in the power of legal reform. The entire school desegregation litigation campaign was premised on a deep commitment to the power of the courts and, more generally, the laws to shape human behavior. Years later Marshall would recall, “I had thought, we’d all thought, that once we got the Brown case, the thing was going to be over.”<sup>317</sup> Marshall’s colleague Robert Carter would later regret the narrow focus of the NAACP on attacking de jure segregation rather than focusing on the more basic concerns of educational opportunity.<sup>318</sup> “In a sense, these men were profoundly naïve,” noted a scholar who worked with the NAACP lawyers.<sup>319</sup> “They really felt that once the legal barriers fell, the whole black-white situation would change.”<sup>320</sup> Marshall, in particular, “truly believed in the United States and the Constitution, but that the whole system was tragically flawed by the segregation laws. Wipe away those laws and the whole picture would change.”<sup>321</sup>

Marshall was not alone among the pioneering generation of civil rights lawyers in his optimistic assessment of the prospects for implementation. As late as 1957, Judge William H. Hastie, who had helped in the early stages of the NAACP’s litigation campaign before becoming the first African American

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<sup>316</sup> *Id.* at 747; see also JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 78 (2001) (quoting Marshall, in 1956, saying, “We’ve got the other side licked. It’s just a matter of time”); Robert Carter & Thurgood Marshall, *The Meaning and Significance of the Supreme Court Decree*, 24 J. NEGRO EDUC. 397, 397 (1955) (“[T]he formula devised is about as effective as one could have expected. The net result should be to unite the country behind a nationwide desegregation program, and if this takes place, the Court must be credited with having performed its job brilliantly.”).

Later in life Marshall would say that he was “shattered” by the 1955 decision. “They gave us *nothing* and then told *us* to work for it. I thought I was the dumbest Negro in the United States,” he recalled. Cass Sunstein, *Did Brown Matter?*, *NEW YORKER*, May 3, 2004, at 103. Yet contemporary evidence indicates that Marshall, while surely disappointed by not convincing the Court to follow the NAACP recommendation for immediate desegregation, was generally satisfied with the implementation decree.

<sup>317</sup> THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 463 (Mark V. Tushnet ed., 2001).

<sup>318</sup> See KLUGER, *supra* note 16, at 534 (quoting Robert Carter, “we really had the feeling that segregation itself was the evil—and not a symptom of the deeper evil of racism”); Robert L. Carter, *A Reassessment of Brown v. Board*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 21, 21–28 (Derrick Bell ed., 1980).

<sup>319</sup> KLUGER, *supra* note 16, at 639 (quoting Alfred Kelley).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

appointed to a federal court of appeals, believed that the battles of civil rights litigation were all but over. "Son," he told a young black lawyer interested in following in his footsteps, "I am afraid that you were born fifteen years too late to have a career in civil rights."<sup>322</sup> In the immediate aftermath of the *Brown* decisions, Marshall's optimism was more the rule than the exception among the decision's supporters.

## V. FAITH TESTED: THE ORDEAL OF IMPLEMENTATION AND MASSIVE RESISTANCE

The triumph of *Brown* was ironically also a new challenge to the premise that the law could lead the battle against racial prejudice. Court-mandated school desegregation soon inspired organized resistance—widespread rejection of federal law—that refuted the ideological heart of racial liberalism. Those who had been arguing for the past decade that the nation was ready for change and that the strength of the law would effectively bring outliers in line with national opinion were not prepared for massive resistance. Thus *Brown* was at once a triumphant achievement of the campaign to reenvision the capacity of the law, even as it became a new point of departure for a powerful reconsideration of the legalist position. *Brown* became a contested symbol, claimed by both legalists and skeptics in their debate over the relationship between law and social reform.

### A. Massive Resistance

While the initial *Brown* decision was accompanied by considerable optimism, much of this hopefulness dissolved in the years following *Brown II*. In the face of massive resistance, "[t]he judicial process had reached the limit of its capacity."<sup>323</sup> While segregationists countered *Brown* with attempts at legal refutation, by challenging the Court's reliance on psychology<sup>324</sup> or even going so far as to defend a state's right to "interposition,"<sup>325</sup> massive resistance, at its most effective, was a mobilized political and social movement. As explained by one of the attorneys who argued on behalf of South Carolina before the Court in *Brown*:

Our only hope, at present, lies not in carrying on the battle in the courts by the presentation of legal defense, but in taking the battle to the people and using the same psychological and sociological warfare that has been

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<sup>322</sup> The young lawyer was Derrick Bell, and the episode with Hastie is recorded in DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 3 (2004).

<sup>323</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 256 (1962).

<sup>324</sup> See, e.g., NEWBY, *supra* note 276, at 33, 63–65.

<sup>325</sup> See, e.g., NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S* 126–49 (1969).

so successfully carried on against us, i.e., the principles of mass psychology expressed through organized public opinion.<sup>326</sup>

In essence, the white South hoped to bypass unsupportive legal institutions and launch a Myrdalian “educational offensive,” only this time with the goal of bolstering the failing Jim Crow system.

The opening salvo of massive resistance came in the form of a congressional statement, the so-called “Southern Manifesto” of March 12, 1956, which denounced the *Brown* decisions as a “clear abuse of judicial power” that trampled on “the reserved rights of the states and the people.”<sup>327</sup> The separate-but-equal principle “restated time and again, became a part of the life of the people of many of the States and confirmed their habits, customs, traditions, and way of life.”<sup>328</sup> The Manifesto helped transform scattered discontent and prevalent uncertainty into a united, even “respectable,” movement, as southern politicians rallied behind their shared opposition to “forced” integration of schools.<sup>329</sup> And in doing so, they also rallied behind an effort to elevate their commitment to “folkways” against the “stateways” embodied in the *Brown* decision. Again, quoting Bickel:

The Supreme Court’s law, the southern leaders realized, could not in our system prevail—not merely in the very long run, but within the decade—if it ran counter to deeply felt popular needs or convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country.<sup>330</sup>

Of course, many had always resisted the arguments of the racial liberals that the law of the land would be enough to break apart Jim Crow: some because they supported segregation as a policy and a practice, some because they retained a Sumnerian skepticism toward the capacity of the law, some because of a mixture of the two. But with the white South organized around a commitment to preserving segregation, critics of racial liberalism’s vision of the capacity of the law, who had been in retreat, throwing out last-ditch arguments of a position whose time had passed, now gained a new level of credence and legitimacy. Before massive resistance, these skeptics might have been dismissed as nothing more than defenders of the dying cause of Jim Crow. Now some of their claims seemed to have a ring of truth to them. They seemed to capture, better than the claims of legalists, what was happening in the nation, as an entire region of the country had committed itself to refuting the clear mandate of the Supreme Court—and doing so in the name of local customs and mores.

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<sup>326</sup> *Id.* at 170–71.

<sup>327</sup> 102 CONG. REC. 4460 (1956).

<sup>328</sup> *Id.*

<sup>329</sup> See, e.g., BARTLEY, *supra* note 325, at 126–49; KLARMAN, *supra* note 28, at 385–442.

<sup>330</sup> BICKEL, *supra* note 323, at 258.

The most prominent representative of this skeptical position was President Eisenhower. Eisenhower rejected the racial liberal claims for the capacity of law to undermine negative racial attitudes. In the aftermath of *Brown*, he repeatedly dismissed the idea that law could affect prejudice. “[I]t is difficult through law and through force to change a man’s heart,” he explained at a 1956 news conference.<sup>331</sup>

[W]e must all . . . help to bring about a change in spirit so that extremists on both sides do not defeat what we know is a reasonable, logical conclusion to this whole affair, which is recognition of equality of men. . . . This is a question of leadership and training and teaching people, and it takes some time, unfortunately.<sup>332</sup>

Eisenhower used this skepticism to justify his tepid public support for federal involvement in desegregating schools.<sup>333</sup> Eisenhower only roused himself to act on behalf of *Brown* in the face of a flagrant challenge to federal authority in the Little Rock Crisis of 1957.<sup>334</sup>

Eisenhower’s skeptical assessment of the potential of civil rights reform seemed to many a fair explanation for the limited efficacy of *Brown* and the emergence of organized white southern resistance, with its threatening calls for interposition and nullification. Adlai Stevenson, the Democratic presidential candidate in 1952 and 1956, who prior to *Brown* had expressed moderate support for federal civil rights measures,<sup>335</sup> now mirrored Eisenhower’s views on the relationship between race relations and law. “On civil rights,” historian Arthur M. Schlesinger, Jr., recorded in his diary following a conversation with Stevenson in 1956,

he kept saying that the basic fact was the difficulty of the adjustment; that it was raising false hopes to suggest that people’s minds and hearts could be changed by coercion; that the Negro leaders were defeating their own purposes when they put on pressure; that the only Negro hope was to reduce tension and let the moderate-minded southerners assume

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<sup>331</sup> Dwight D. Eisenhower, The President’s News Conference of September 5, 1956, available at <http://www.presidency.ucsb.edu/ws/?pid=10591>.

<sup>332</sup> *Id.* Despite his call for leadership, Eisenhower saw little role for the nation’s chief executive in leading on school desegregation. “I think it makes no difference whether or not I endorse [*Brown*]. The Constitution is as the Supreme Court interprets it; and I must conform to that and do my very best to see that it is carried out in this country.” *Id.*

<sup>333</sup> In private, Eisenhower was even more dismissive of *Brown*: “I am convinced that the Supreme Court decision *set back* progress in the South *at least fifteen years* . . . . We can’t demand *perfection* in these moral things. . . . And the fellow who tries to tell me that you can do these things by *force* is just plain *nuts*.” EMMET JOHN HUGHES, *THE ORDEAL OF POWER: A POLITICAL MEMOIR OF THE EISENHOWER YEARS* 201 (1963).

<sup>334</sup> See, e.g., JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974*, at 413–16 (1996).

<sup>335</sup> See, e.g., *Stevenson Hailed for Rights Stand*, N.Y. TIMES, Sept. 10, 1952, at 15.

local leadership and work out the problems of adjustment in a gradualist way.<sup>336</sup>

Leadership on the civil rights issue, Stevenson believed, required the President to play the role of a “conciliator,” not the imposition of new legal requirements; he even suggested the idea of calling for “a year moratorium on all further agitation, legal action, etc. in the civil rights field.”<sup>337</sup>

Segregationists predictably trotted out the failures of Reconstruction and Prohibition to demonstrate the futility of legal reforms that ran against entrenched beliefs and practices. The Attorney General of Virginia, in response to what he called Thurgood Marshall’s “siren song entitled ‘the People of the South are Law-abiding People,’” told the Court in the oral arguments in *Brown II*:

Yes, we are an orderly law-abiding people. We lead in giving law and order to the nation. We washed the Eighteenth Amendment out of the Constitution and flooded the Volstead Act to oblivion on the stream of our honest spirits because it affected the way of life of the American people.<sup>338</sup>

(To this, Marshall responded that he was “shocked that anybody classes that right to take a drink of whiskey involved in prohibition with the right of a Negro child to participate in education.”<sup>339</sup>) Organized resistance to desegregation expanded efforts to resurrect the ghosts of Reconstruction and Prohibition. Whites in the South must “shape their destiny and control their way of life, just as they did in the far more dangerous period of Reconstruction,” instructed a segregationist editor.<sup>340</sup> In the wake of the Little Rock crisis, a law professor at Southern Methodist University in Texas who supported integration warned that pressing desegregation too quickly would only lead to more opposition. It was “extremely hard [to change popular attitudes] overnight by a court decree . . . . The people of the North didn’t change their habits in regard to drinking promptly because of the 18th Amendment.”<sup>341</sup> One fervent defender of states’ rights and segregation wrote an open letter to Eisenhower in 1959 condemning his role in the Little Rock showdown. “To force [desegregation] upon the Southern white will, I think, meet with as much opposition as the prohibition amendment encountered in the wet states.”<sup>342</sup> Similarly, in making his case against pending civil rights legislation in 1960, Senator William Fulbright referenced the failure of Prohibition, concluding,

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<sup>336</sup> ARTHUR M. SCHLESINGER, JR., JOURNALS, 1952–2000, at 41 (2007).

<sup>337</sup> *Id.* at 42.

<sup>338</sup> ARGUMENT, *supra* note 191, at 435.

<sup>339</sup> *Id.* at 436.

<sup>340</sup> KLARMAN, *supra* note 28, at 416.

<sup>341</sup> *Urges North Be Sympathetic On Integration*, CHI. DEFENDER, Sept. 9, 1958, at A3 (quoting Arthur L. Harding).

<sup>342</sup> MILTON R. KONVITZ & THEODORE LESKES, A CENTURY OF CIVIL RIGHTS 255–56 (1961).

“legislation to regulate men’s mores is doomed to failure.”<sup>343</sup> Ominous references to Reconstruction and Prohibition remained a touchstone for critics of federal civil rights law into the 1960s.

### *B. The Capacity of the Law Reconsidered*

With the strengthening of massive resistance emboldening civil rights opponents in their dismissal of civil rights law as ineffective or even counterproductive, racial liberals found their commitment to their optimistic claims of the pre-*Brown* period sorely tested. For some supporters of the civil rights project of the 1950s and 1960s, the experience of implementing school desegregation, with dramatic victories, frequent disappointments, and practically no integration in the Deep South for at least a decade following *Brown*, led to a more chastened vision of the capacity of the law.

In the aftermath of *Brown*, more measured assumptions about the role of law in shaping social behavior gained prominence among legal scholars, historians, and social psychologists. Within legal academia, perhaps no scholar more thoroughly and thoughtfully probed the limitations of the law in the decades following *Brown* than Alexander Bickel. Bickel’s major contribution was to inject a recognition of expediency and efficacy of legal change into the judicial formulation of legal principles.<sup>344</sup> The legitimacy of a Supreme Court decision, he argued, derived from social acceptance of the principle underlying that decision.<sup>345</sup> Bickel envisioned a dialogic relationship—“a continuing colloquy”—between the Court, which translates fundamental principles into legal commands, and society (represented most prominently by the elected branches of government).<sup>346</sup> This sensitivity to the need for principled pragmatism in the reformation of the law<sup>347</sup> only increased in subsequent years, as Bickel came to increasingly emphasize tradition and custom as the basis for legal development.<sup>348</sup>

C. Vann Woodward’s thesis from *The Strange Career of Jim Crow*—that the appearance of Jim Crow laws marked a fundamentally new and more repressive stage in southern race relations—came under fire as scholars unearthed prejudicial attitudes and discriminatory practices that thrived without the imprimatur of Jim Crow laws.<sup>349</sup> Woodward would spend much of his career qualifying some of the

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<sup>343</sup> *Id.* at 261.

<sup>344</sup> BICKEL, *supra* note 323 at 68–72.

<sup>345</sup> *Id.* at 239.

<sup>346</sup> *Id.* at 240.

<sup>347</sup> “[T]he rule of principle in our society is neither precipitate nor uncompromising . . . leeway is provided to expediency along the path to, and alongside the path of, principle . . .” *Id.* at 244.

<sup>348</sup> See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 5 (1975) (“Law is the principle institution through which a society can assert its values.”).

<sup>349</sup> See, e.g., LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860*, 114–52 (1961) (arguing for existence of pervasive segregation in the antebellum North); RICHARD WADE, *SLAVERY IN THE CITIES: THE SOUTH 1820–1860*, 266–



more sweeping statements about the role of the law in *Strange Career* and refuting its simplistic cooptation.<sup>350</sup> As massive resistance took form, he would reconsider his assertion that the South would follow the Court's lead.<sup>351</sup> The post-*Brown* period also saw social psychologists questioning the overly optimistic conclusions toward the possibility of intergroup contact that had been promoted following WWII.<sup>352</sup>

One group particularly shaped by the failed promises of *Brown* were young African Americans in the South. They had been told that the Supreme Court had ended segregation in schools, yet most continued to attend, year after year, the same separate schools. When they saw the drama of the Little Rock "nine," the black students who integrated Central High School under the protection of federal troops, they saw not the power of the law so much as heroic public defiance in the face of injustice. Then, in 1960, this generation of African American students decided to pursue a new approach to achieving racial change, an approach that would not rely on laws and legal institutions. The student sit-in movement of 1960 was in large part a reaction to the failures of school desegregation and the limited achievements of civil rights reform. As much as possible, student demonstrators pushed the law to the side, recognized (without necessarily accepting) the disjuncture between morality and legality, and worked to change minds more than laws. Rather than focusing on legal reform, they spoke more of ridding society of offensive practices that were designed to subjugate and humiliate African Americans. And the best way to attack these practices was to appeal to the conscience of whites—not to "force" them to change through legal compulsion, but to convince them to see the injustice of their way of life.<sup>353</sup>

Martin Luther King, Jr. immediately grasped the significance of the sit-ins as an alternative to an NAACP-led project of school desegregation litigation that, by this point, had stalled in the face of legal delays interspersed with occasional token efforts at integration. To King, the students were "seeking to dignify the law and to

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70 (1964) (citing examples of segregation embedded in law and public policy in the antebellum South); JOEL WILLIAMSON, *AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861–1877*, 274–99 (1965) (arguing that separation of the races as a means of white control existed in South Carolina during Reconstruction).

<sup>350</sup> See, e.g., WOODWARD, *supra* note 170, at 237–38.

<sup>351</sup> C. Vann Woodward, *The Great Civil Rights Debate*, 24 COMMENTARY 283, 284 (1957) ("Not until Congress reached a major decision would popular opinion be fully aroused and expressed."); C. Vann Woodward, *The South and the Law of the Land*, 26 COMMENTARY 369, 371 (1958) ("Comfortable assurances about respect for the law being ingrained in the character of the South are misleading in this instance and lend a false color of optimism to the outlook.")

<sup>352</sup> See, e.g., Claire Selltiz & Stuart W. Cook, *The Effect of Personal Contact on Intergroup Relations*, 2 THEORY INTO PRACTICE 158 (1963).

<sup>353</sup> See Christopher W. Schmidt, *Divided By Law: The Sit-Ins, the NAACP, and the Role of the Courts in the Civil Rights Movement* (Sept. 18, 2008) (unpublished manuscript, on file with author).

affirm the real and positive meaning of the law of the land.”<sup>354</sup> In rejecting the idealistic vision of the law that pervaded the NAACP’s work leading up to *Brown*,<sup>355</sup> he adopted instead an explanation for the relationship between law and prejudicial attitudes that balanced an appreciation of the value of legal change with a call to go beyond just changing laws. “The law tends to declare rights—it does not deliver them. A catalyst is needed to breathe life experience into a judicial decision by the persistent exercise of the rights until they become usual and ordinary in human conduct.”<sup>356</sup> King’s vision of social justice demanded not only legal reform, through recognized institutional channels such as litigation and lobbying, but also social action, through nonviolent protest. The invaluable contribution of King to the struggle for racial equality stemmed from his skepticism toward the efficacy of legal change when it was unaccompanied by organized social action. His vision resonated in the post-*Brown* years, when the limited accomplishments of school desegregation litigation challenged the central claim of racial liberalism.

## VI. CONCLUSION

*The political world of make-believe mingles with the real world in strange ways, for the make-believe world may often mold the real one . . . . Because fictions are necessary, because we cannot live without them, we often take pains to prevent their collapse by moving the facts to fit the fiction, by making our world conform more closely to what we want it to be. We sometimes call it, quite appropriately, reform or reformation, when the fiction takes command and reshapes reality.*<sup>357</sup>

The debate over the capacity of the law invariably comes down, at one point or another, to a leap of faith—it involves, in historian Edmund Morgan’s words, a

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<sup>354</sup> *Meet the Press: Interview with Martin Luther King, Jr.* (NBC television broadcast Apr. 17, 1960), in 5 *THE PAPERS OF MARTIN LUTHER KING, JR.* 428, 430 (Clayborne Carson et al., eds., 2005).

<sup>355</sup> Although King suggested that he too had bought into the lure of racial legalism when the decision first was announced. Martin Luther King, Jr., *The Time for Freedom Has Come*, N.Y. TIMES MAG., Sept. 10, 1961, at 118 (“When the United States Supreme Court handed down its historic desegregation decision in 1954, many of us, perhaps naively, though that great and sweeping school integration would ensue.”).

<sup>356</sup> *Id.* at 119; see also Martin Luther King, Jr., *The Ethical Demands for Integration*, Dec. 27, 1962, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 117, 124 (James M. Washington ed., 1986) (“A vigorous enforcement of civil rights laws will bring an end to segregated public facilities which are barriers to a truly desegregated society, but it cannot bring an end to fears, prejudice, pride, and irrationality, which are the barriers to a truly integrated society.”).

<sup>357</sup> EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 14 (1988).

turn to “fiction.”<sup>358</sup> The question is simply too indeterminate, with too many moving parts, too many angles of approach. In a complex society with multiple levels of governance and a diverse populace, one can always find examples of law reshaping beliefs and practices, just as one can always find support for the failure of law to do the same. When evaluating the efficacy of the law during the height of Jim Crow, for example, one’s conclusions will be sharply different depending on whether one focuses on Jim Crow legislation in the states (as Woodward did), or whether one focuses on the failure of the Fourteenth Amendment and federal civil rights legislation to protect the most basic rights of African Americans—or even the egregious failure of *Plessy* to ensure real equality of segregated facilities. Whether one finds “law” in the Jim Crow era (or any era) effective or not largely depends on one’s starting assumptions about which laws are most relevant. Furthermore, modern-day defenders of the capacity of the law have rightly emphasized the subtle ways in which the law can operate to influence social interactions or shape consciousness. Even if a legal mandate from the Supreme Court may have limited direct influence, new legal norms seep into society, making some options seem more legitimate or feasible, while discouraging others—and thus affecting (if not necessarily dictating) social practices, customs, and attitudes.<sup>359</sup> Yet even this cultural analysis of the efficacy of law points in different directions: social historians have demonstrated that oppressed groups have countless ways to exercise resistance and autonomy, even within oppressive legal systems.<sup>360</sup>

In light of these complications, any sweeping generalization of what the law and the courts *can* do necessarily slips into a discussion of what the law and the courts *should* do. In this case, the descriptive is inherently, insistently normative. Exaggerated conclusions about the incapacity of the law have always been used to bolster underlying skepticism toward whether the law should be employed for a particular end. In the era of Jim Crow, a commitment to white supremacy was often rationalized through skepticism toward the power of law to challenge social inequality. And the converse has also held: exaggerated estimates for the capacity of the law reinforced the positions of those who are already committed to pressing legal reform through the courts.

The inescapable complexity of the question of what law can accomplish, and the inevitable normativity of the debate over law’s capacity, were exemplified in the racial liberalism of the 1940s and 1950s. The legalist position was a powerful weapon of reform. It was a necessary corrective to the self-serving, status-quo enforcing skepticism toward the law embodied in the *Plessy* Court’s dismissal of

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<sup>358</sup> *Id.* at 13–14.

<sup>359</sup> See, e.g., Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 729–42 (1994) (summarizing “dispute-centered” tradition of legal analysis, which recognizes the “constitutive capacity of law”).

<sup>360</sup> See, e.g., JAMES SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE 28–85 (1985); Robin D.G. Kelley, *‘We Are Not What We Seem’: Rethinking Black-Working Class Opposition in the Jim Crow South*, 80 J. AM. HIST. 75 (1993).

laws as powerless to affect “racial instincts.”<sup>361</sup> This was a useful, perhaps even necessary, fiction—a fiction that contained the possibility of creating an atmosphere in which facts might eventually conform to aspiration, when “the fiction takes command and reshapes reality.”<sup>362</sup> The postwar campaign to promote the efficacy of civil rights reform helped to open opportunities in the cause of racial equality that would have been inconceivable to earlier generations. Without the deeply held optimism toward the capacity of law to release American society from the fetters of Jim Crow practices and racist beliefs, it is hard to imagine that the liberal establishment would have accepted civil rights reform, including legally mandated desegregation, as a necessary part of the public policy landscape of the day. And without this baseline of support, the Supreme Court would never have taken their monumental step in *Brown*.<sup>363</sup>

Yet, like Myrdal’s claim for the pervasiveness of racial egalitarianism, the claims of racial liberalism outran reality, contributing to an overly sanguine idea on the part of activists and judges of what court decisions and other legal changes could actually accomplish. So while recognizing the unquestionable achievements of racial legalism, one must also acknowledge that this newfound appreciation for law’s capacity in the field of race relations had its costs. By promoting antidiscrimination law as the key to unlocking generations of entrenched social inequality, legalists shifted attention from other paths toward the goal of racial justice. The intensive focus on using laws to undermine prejudicial attitudes deemphasized the structural elements of racial inequality. The inflated optimism toward the potential of turning the law against discriminatory behavior pulled energy and resources from efforts to promote equality through economic reform; advocates of this path often argued for an alliance between the civil rights movement and the labor movement. The belief that racial justice would come through structural and economic transformation more than antidiscrimination law dominated the progressive agenda in the 1930s and early 1940s.<sup>364</sup> The subsequent rise of racial legalism contributed to the marginalization of these arguments. Finally, another cost of racial legalism was its downgrading of the importance of on-the-ground struggle, protest, and resistance as a necessary element in creating the conditions necessary for social change.

Eventually, the claims of racial liberals helped set in motion events that would fulfill, to a considerable extent, their promises to reshape social norms. In the process of creating a new ideology of civil rights, racial legalism dramatically raised expectations for change, and when the majesty of the law failed to deliver on these promises, disappointment and frustration inspired other avenues of reform. Thus, the challenge to racial liberal expectations in the wake of *Brown* was a critical factor in launching the next stage of the civil rights movement, when the frontlines of the battle moved from the courtroom to the streets. Postwar racial

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<sup>361</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

<sup>362</sup> MORGAN, *supra* note 357, at 14.

<sup>363</sup> See generally KLARMAN, *supra* note 28.

<sup>364</sup> See sources cited at *supra* note 13.

liberals were essential, if largely unwitting, forefathers of direct-action protests of the 1960s, a movement far more skeptical toward the capacity of the law than the liberal reformers of the previous generation. These protests were driven by the goal not only of making the law more just—for as the failed promise of *Brown* had made clear, this was just an initial step—but of ensuring that legal principles would be translated into a more just society.