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From Buchanan to Button: Legal Ethics and the NAACP (Part II)

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FROM *BUCHANAN* TO *BUTTON*: LEGAL ETHICS AND THE NAACP (PART II)

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INTRODUCTION

This paper continues an inquiry I have undertaken into the relationship between the NAACP's public impact litigation strategies and traditional legal ethics norms. In an earlier paper,[1] I investigated the legal ethics mindset of the members of the NAACP's first national legal committee, who oversaw the organization's legal work in the period between 1910 and 1920. These lawyers were elite New York City practitioners active in bar associations that were enforcing traditional legal ethics rules against errant practitioners. I showed that these lawyers championed "test case"[2] litigation strategies that were at odds with traditional legal ethics rules prohibiting client solicitation, advertising, and barratry or "stirring up" litigation. I concluded that these lawyers were not troubled by the ten-

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1. Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, forthcoming in 20 L & Hist Rev 1 (Spring 2002), text available in pre-print form at http://www.press.uillinois.edu/journals/lhr.html (scroll to "Forthcoming"). A longer manuscript incorporating both of these articles won the Association of American Law Schools' Best Scholarly Paper Award for 2001.

2. The term "test case" is used to refer to a strategy in which an organization seeks to find or, if necessary, to create a legal controversy to establish a point of law as precedent in future cases. See *Black's Law Dictionary* 207 (7th ed 1999).

sion between the NAACP's innovative legal work and traditional legal ethics strictures because they shared an informal understanding that their public interest work should not be subject to the strictures being applied against lawyers acting with pecuniary motives, and also possessed the professional power to interpret the rules in this way without fear of censure.

This first article confined its examination to the NAACP's first decade of existence, between 1910 and 1920. The NAACP's influence on the development of the ethical norms that apply to public interest law practice by no means ends with this early period. As most vividly portrayed by Mark Tushnet,[3] the NAACP's legal wars with hostile southern states in the 1950s and 1960s culminated in the United States Supreme Court's important legal ethics decision *NAACP v Button*.[4] That case, as described further below, essentially legalized the public impact litigation techniques that are at the core of United States conceptions of how to use law as an instrument for social change.

This article picks up where my earlier article left off and explores the transition from the early twentieth-century legal ethics views of the NAACP's first national legal committee to the understanding of the relationship between legal ethics rules and public interest law reflected in *Button*. That transition reflects one aspect of an enormously complicated story that has preoccupied legal historians for many years—namely, accounting for the fundamental transformations in American jurisprudence and legal practice that occurred during the first several decades of the twentieth century. That story includes the shift from lawyers and judges' adherence to the *a priori*, individualistic approach of late nineteenth-century jurisprudence to the consequentialism and group orientation of sociological jurisprudence and legal realism, changing approaches to procedural and jurisdictional bars to class actions and other nontraditional forms of litigation, and the replacement of notions of a consensual "public interest" with ideas of interest group pluralism. Another chapter of that story, which has received too little attention thus far, involves transformations in lawyers' conceptions of their ethical obligations. That is the topic I am interested in here. I thus focus on lawyers' self-conceptions, rather than on legal doctrine per se. In so doing, I am not intending to suggest that the doctrinal context was not important; instead I am aiming for whatever insights might be revealed by reversing the traditional privileging of case law and the actions of courts over the views and actions of the lawyers who are the living embodiment of legal ethics norms.

I undertake my inquiry by setting up two contrasts. In Part I, I compare snapshot views of two United States Supreme Court cases that the NAACP litigated half a century apart, *Buchanan v Warley*[5] and *NAACP v Button*.[6] In Part

3. See Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* 272-300 (Oxford 1994) ("*Civil Rights Law*").

4. 371 US 415 (1963).

5. 245 US 60 (1917).

6. 371 US 415 (1963).

II, I contrast the biographies of two leading NAACP lawyers of different generations, Moorfield Storey and Charles Hamilton Houston. I examine the socially and historically situated perspectives of these two lawyers and analyze the complex interactions among a number of variables—including race, social standing, insider versus outsider status in the profession, political conditions, and changing jurisprudential conceptions of the nature of legal representation—that help account for their different approaches to the NAACP's legal ethics challenges during their respective generations. Finally, in Part III, I trace the development of the Supreme Court's legal ethics jurisprudence under *Button* and suggest the beginnings of a critique based on my historical analysis.

I. TWO CASES

Buchanan v Warley[7] exemplifies the NAACP's early legal work. As I discuss in greater detail in my earlier article, much of that work focused on finding—or often creating—test cases to challenge the constitutionality of racially discriminatory practices.[8] In *Buchanan*, the national office of the NAACP used such a test case strategy to challenge the constitutionality of a 1914 Louisville, Kentucky, residential segregation ordinance. To create the right circumstances for this test case, a national staff lawyer organized a new NAACP chapter in Louisville and spoke at public meetings to raise money and recruit a plaintiff. NAACP lawyers drafted test language for a real estate contract and enlisted a local real estate agent who wished to contest the law to serve as the defendant.[9] When the case reached the United States Supreme Court, the city argued that the case should be dismissed because its facts had been manufactured. That charge not only could have presented a bar to deciding the case on justiciability grounds,[10] but also could have implied ethical misconduct, since "stirring up" litigation that otherwise would not have existed was a serious ethics offense, otherwise known as "barratry."[11]

Nevertheless, patrician lawyer and NAACP President Moorfield Storey,

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7. 245 US 60 (1917).

8. See Carle, 20 L & Hist Rev 1 (cited in note 1).

9. See id.

10. See Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 Colum L Rev 444, 514 n 265 (1982) (citing cases in which the Court required "honest and actual antagonistic assertion of rights" but also noting "rather haphazard quality" of the Court's rulings on this issue).

11. See ABA Canons of Professional Ethics, Canon 28 (1908), reprinted in *Opinion of the Committee on Professional Ethics and Grievances with the Canons of Professional Ethics Annotated and the Canons of Judicial Ethics Annotated* (ABA 1957) ("*Stirring Up Litigation*: It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so."). See also *Black's Law Dictionary* at 144 (cited in note 2) ("barratry" defined as "[v]exatious incitement to litigation, esp. by soliciting potential legal clients"). Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. See Max Radin, *Maintenance by Champerty*, 24 Cal L Rev 48 (1935) (discussing early twentieth-century conceptions of related offenses of maintenance and champerty).

whom I will discuss in more detail below, simply gave short shrift to the city's charges in arguing the case for the NAACP. In an unpublished draft dissent, Justice Holmes initially agreed with the city, writing, "I cannot but feel a doubt whether the suit should be entertained without some evidence that it is not a manufactured case."[12] The Court's unanimous published opinion, however, ruled in the NAACP's favor without any mention of the manner in which the underlying controversy had come into existence.[13]

In contrast to the Court's seeming lack of concern about the lawyers' activities that created the case in *Buchanan* stands the Court's difficulty, half a century later, in deciding the legal ethics issues presented in *NAACP v Button*.[14] *Button*, as I discuss in greater detail below, arose in 1956 after Virginia enacted new criminal legislation aimed at barring the NAACP from soliciting clients. The case reached the Court on the NAACP's appeal from the decision of Virginia's highest court, which upheld the statute's constitutionality and concluded that the NAACP's litigation activities violated various legal ethics laws.[15] As Mark Tushnet's detective work in the United States Supreme Court's archives has revealed, on first hearing, a majority of the Court voted that the NAACP was subject to criminal ethics sanctions for some of its litigation techniques.[16] This would have been the final ruling in the case but for a fortuitous interim change in the Court's membership that summer which required the case to be reargued. In the end, a close majority of the Court decided, over a strong dissent by Justice Harlan, that the First Amendment protects lawyers working for social change without pecuniary motive from legal ethics constraints against barratry, solicitation, and related offenses.

This juxtaposition of *Buchanan* and *Button* raises puzzling questions: Why, given the Court's seeming indifference to charges of "manufacturing" a case in *Buchanan* in the 1910s, did it have a so much greater difficulty with the NAACP's litigation practices in *Button* almost half a century later? Why was NAACP President Moorfield Storey, who was active in many of the very bar organizations that were making and enforcing traditional legal ethics rules, so nonchalant about the potential legal ethics violations involved in staging fictitious controversies, recruiting parties, and advertising legal services in *Buchanan*? And why, if these legal ethics matters were of such seeming unconcern to lawyers such as Storey who were involved in the NAACP in the 1910s, were its later lawyer-leaders Charles Hamilton Houston and Thurgood Marshall so concerned about potential legal ethics attacks, as Mark Tushnet has described,[17] when they took over the organization's direction in the mid-1930s?

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12. Schmidt, 82 Colum L Rev at 512 (cited in note 10).
13. *Buchanan*, 245 US at 60.
14. 371 US 415 (1963).
15. *NAACP v Harrison*, 202 Va 142, 116 SE2d 55 (1960).
16. See Tushnet, *Civil Rights Law* at 277-80 (cited in note 3).
17. See id at 272-300.

The answers to these questions, I argue below, can be located in part in the different socially and historically situated positions of two generations of NAACP lawyers.

II. TWO LAWYERS

Here I contrast the professional biographies of two lawyers who served as key national advocates for the NAACP during their respective generations as a means of exploring the transition from *Buchanan* to *Button.* In so doing, I hope to highlight some of the overlooked but important factors that drive change in legal ethics norms over time—to focus, in other words, not only on changes in case law and formally codified rules, but also on how differences in lawyers' life experiences, social and political contexts, professional statuses, and jurisprudential commitments all affect the way that legal ethics law gets made and transformed across generations.

A. MOORFIELD STOREY

Moorfield Storey, as already noted, was the NAACP's Supreme Court advocate in *Buchanan v Warley.*[18] Examining Storey's professional biography helps to explain his approach to that case and the Supreme Court's reaction to him. Indeed, his biography epitomizes the elite social and professional standing of the white lawyers involved in the NAACP's national legal operations in the first decade of its existence.[19]

Born in 1845 to one of the oldest Puritan families in New England, Moorfield Storey was a Boston "blue blood" of impeccable social standing. Storey's grandfather had made money in trade with South America, but he later lost it. The family was thus of the social elite but not rich. Storey's father, a Harvard Law School educated lawyer, was not particularly ambitious or successful in his legal career, but had an engaging personality and was well connected socially.[20] Storey's father had also been active in the abolitionist cause, and the values and acquaintances Storey acquired through his childhood association with this movement stayed with him, eventually propelling him into the presidency of the NAACP.

1. Education and Practice Experience

Like his father and grandfather before him, Storey attended Harvard Col-

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18. 245 US 60 (1917).

19. For a description of the lawyers involved in the NAACP's first national legal committee, see Carle, 20 L & Hist Rev 1 (cited in note 1).

20. William B. Hixson, *Moorfield Storey and the Abolitionist Tradition* 3-16 (Oxford 1972) ("*Moorfield Storey*").

lege. He graduated in 1866 and enrolled in Harvard Law School that same year, a few years prior to Christopher Langdell's introduction of his new rigorous case method of study at the school. According to Storey, the law school functioned as little more than a social club for young men who could afford to spend additional years in school. There he drifted pleasantly through his classes, where "[s]tudy . . . was optional" and his routine consisted of "Boston parties . . . from half-past nine [at night] to about three," with the remainder of his time "largely devoted to sleep."[21]

Bored with what law school had to offer, Storey left during his second year of study to assume a position, arranged by his father, as private secretary to the abolitionist senator Charles Sumner.[22] In 1869, Storey, recently engaged to be married, left his clerkship with Sumner to return to Boston where he obtained a job, once again through his father's connections, "looking up law" for the law firm of Brooks and Ball, one of Boston's "busiest" commercial law firms.[23] Storey soon left that job to take a position, this time arranged for him by Sumner, as an assistant district attorney. In 1873, Storey returned to Brooks and Ball as a partner and practiced business law there until 1887, when he formed his own law firm, Storey, Thorndike and Hoar. Storey's clients included the Union Pacific Railroad Company and other railroads, as well as brokerage firms and mortgage trust companies.[24] Storey's firm also prospered in serving as independent bond counsel, "act[ing] for all sorts of bond-buyers all over the country," an area of law practice that depended on the impeccability of the reputations of the lawyers providing opinions on the validity of bond issues.[25]

Storey described his role in the firm as being "largely in charge of litigation."[26] Representing clients in the customs, income tax, insurance, bankruptcy,

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21. Mark DeWolfe Howe, *Portrait of an Independent: Moorfield Storey, 1845-1929* 36-37 (Houghton Mifflin 1932) ("*Portrait of an Independent*").

22. Hixson, *Moorfield Storey* at 11 (cited in note 20).

23. Howe, *Portrait of an Independent* at 131 (cited in note 21).

24. Id at 183. Another of Storey's clients was the United Fruit Company, a notoriously bad actor in Latin America that Storey defended from antitrust charges after it engineered the Costa Rican government's seizure of a rival company's property in Panama. See *American Banana Co v United Fruit Co*, 213 US 347 (1909). Storey's representation of this client seems notably incongruous with his activism in support of the Anti-Imperialist League. In his unpublished autobiography, Storey stated, perhaps somewhat defensively, "We did not undertake to advise [United Fruit] on questions of business, but only questions of law." Howe, *Portrait of an Independent* at 185 (cited in note 21). On the history of United Fruit Company's actions in Central America, see generally Paul J. Dosal, *Doing Business with the Dictators: A Political History of United Fruit in Guatemala: 1899-1944* (Scholarly Resource 1993); Charles D. Kepner, Jr. and Jay J. Soothill, *The Banana Empire: A Case Study of Economic Imperialists* (Vanguard 1935).

25. Howe, *Portrait of an Independent* at 185 (cited in note 21) (quoting from Storey's unpublished autobiography). On the special position of Boston "gentlemen" lawyers in the field of independent bond counseling, see Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise 1870-1920*, in Gerald L. Geison, ed, *Professions and Professional Ideologies in America* 79, 131 n 40 (North Carolina 1983).

26. Quoted in Howe, *Portrait of an Independent* at 186 (cited in note 21).

and securities areas,[27] Storey accumulated an impressive record that won him a reputation as one of Boston's premier lawyers. Storey's law practice thus allowed him to provide comfortably for his family despite his lack of inherited wealth.

But Storey was far from single-minded about his pursuit of economic success. Like many other elite lawyers of his time, Storey devoted considerable time to civic matters. Storey sat on the Harvard Board of Overseers[28] and, if his account is true, found himself elected ABA president in 1885 after delivering a well received speech—even though he "had never attended any of the meetings or taken [his] membership seriously."[29] This professional honor gave him still higher standing and visibility at the bar.[30] Storey attributed his involvement in the NAACP and other unpopular political causes later in his life to his attainment of this high pinnacle of professional success, writing in his unpublished autobiography, "When I was placed in positions where my views counted, I developed a predilection for the under-dog."[31]

Despite his commitment to reform causes, Storey was a deeply traditional legal thinker. Storey agreed with those who saw "knowledge of the law as a science" discerned through study of classical works.[32] His writings bear no signs of having been influenced by the law-as-policy thinking of the early twentieth century.[33] It was, indeed, the very traditionalism of Storey's legal thinking that motivated his civil rights activism. Storey believed deeply in the principles of due process and individual rights and, further motivated by the example of his family's own activism in the abolitionist movement, gave life to his beliefs through his own activism.[34] That activism covered both domestic and international matters. Storey was passionately opposed to United States imperialism in the Philippines,[35] a cause to which he devoted a great deal of time—perhaps even more than he gave to the NAACP if his personal scrapbooks are taken as the meas-

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27. Id at 164.

28. Id at 165.

29. Quoted in id at 187.

30. Id at 188.

31. Quoted in id at 169.

32. See Moorfield Storey, *The Reform of Legal Procedure* 6 (Yale 1911).

33. See Hixson, *Moorfield Storey* at 34 (cited in note 20). In this respect, Storey's world view was at odds with the unabashed progressivism of some of the other renowned lawyers, including Louis Brandeis, Karl Llewellyn, and Roscoe Pound, who also played (much more peripheral) roles in the early NAACP.

34. Storey sometimes struggled with the tension between his commitment to the cause of African-American civil rights and his deeply conservative political and jurisprudential perspective. He had great personal difficulty, for example, in supporting the NAACP's campaign to make lynching a federal crime. Storey believed such federal legislation would violate the principles of federalism announced by the United States Supreme Court, which he viewed as pronouncements of unambiguous law. See Susan D. Carle, *Reenvisioning Models for Pro Bono Lawyering: Some Historical Reflections*, 9 Am U J Gender Soc Pol & L 81, 88 (2001).

35. See Hixson, *Moorfield Storey* at 45-97 (cited in note 20); Howe, *Portrait of an Independent* at 196-229 (cited in note 21). On the relationship between the rise of domestic racism and American imperialism overseas, see C. Vann Woodward, *The Strange Career of Jim Crow* 72-73 (Oxford 3d ed 1974).

ure.[36] On the domestic front, Storey had spoken out early in his career against the wave of violence, segregation, and disenfranchisement against African Americans that was overcoming the United States, and this outspoken position, unusual among his peers, quickly earned him a reputation as a defender of African-American civil rights. In addition, the Storey family's friendships with William Lloyd Garrison and his grandson, NAACP Board Chair Oswald Garrison Villard, gave Storey a special personal connection to some of the NAACP's founders. As a result of these friendships, his public position on the issue of African-American civil rights, and his prestige as a lawyer and former president of the ABA, Storey found himself elected president of the NAACP in 1910, again at a meeting he did not attend. Storey was to hold this position, as well as serve as a legal advisor and chief Supreme Court advocate for the NAACP, until his death in 1929 at eighty-four years of age.

Although Storey's correspondence with the NAACP on occasion displays some crankiness and weariness, Storey's commitment to the NAACP was wholehearted and sincere. In the organization's early years, Storey contributed large amounts of money[37] and lent his name to the NAACP's "Moorfield Storey" fundraising drive, which put the organization on reasonably firm financial footing through the 1920s. Storey frequently used his personal connections to assist the NAACP's causes, helping, for example, to organize a campaign within the ABA to oppose the exclusion of three African-American attorneys from membership,[38] and used his power as a member of the Harvard Board of Overseers to halt the introduction of segregation in Harvard's dormitories.[39] On another occasion, Storey wrote to President Wilson and demanded a hearing on the institution of race segregation in federal employment facilities under that administration.[40] Storey also played an important role in recruiting other prominent white lawyers to assist in arguing high profile NAACP cases.[41]

Just as Storey's reputation and stature helped the NAACP in these and other respects, Storey's service as the NAACP's first chief Supreme Court advo-

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36. See Papers of Moorfield Storey, Moorfield Storey Scrapbooks, Box 22 (Library of Congress Manuscript Div) ("*Storey Papers*").

37. See, for example, Executive Committee Meeting (Apr 11, 1911), in *Papers of the NAACP* Part 1, Reel 1 (U Publication 1982, 1996) ("*NAACP Papers*").

38. On this debacle, see Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 65-66 (Oxford 1976); John A. Matzko, *The Early Years of the American Bar Association, 1878-1928* 234-46 (1984) (unpublished PhD dissertation, University of Virginia) (on file with the University of Virginia library). The compromise Storey was involved in negotiating permitted the three African-American lawyers who had been denied membership to join but instituted a rule prohibiting African Americans from membership prospectively. No African-American lawyer subsequently obtained admission to the ABA until the 1940s. See Richard L. Abel, *American Lawyers* 108 (Oxford 1989).

39. *Storey Papers* at Box 4, Antilynching Speeches-Articles folder (cited in note 36).

40. Charles Flint Kellogg, *NAACP: A History of the National Association for the Advancement of Colored People, Vol. I: 1909-1920* 167 (Johns Hopkins 1967).

41. See Robert L. Zangrando, *The NAACP Crusade Against Lynching, 1909-1950* 85-88 (Temple 1980).

cate undoubtedly helped it win cases. By 1913, Storey had already represented the NAACP as amicus curiae in *Guinn v United States*,[42] which invalidated states' use of "grandfather clauses" to disenfranchise African-American voters and gave the NAACP an important early victory that helped build its reputation and membership. Moreover, Storey's stellar reputation produced results that may have been impossible for a lawyer with a lesser reputation to obtain, as when he successfully defended the poor tenant farmers whose lives were at stake in *Moore v Dempsey*.[43]

2. *Moore v Dempsey*

Moore v Dempsey expanded the U.S. Supreme Court's grant of due process protections to criminal defendants.[44] The story underlying *Moore* bears retelling in order to highlight the significance of Storey's achievement in winning this case.[45] The case arose when a group of African-American tenant farmers in rural Phillips County, Arkansas, sought to organize a tenants' organization to obtain higher prices for their cotton crops. The group held a meeting in a church to raise money for the organization and to consult with the son of a white lawyer, U.S. Bratton, about their legal rights. A group of whites stormed the church and a shootout ensued in which a white man was killed. This confrontation quickly escalated into a countywide rampage that left more than 200 African Americans and several whites dead.

In the ensuing weeks, almost ninety African-American citizens of Phillips County—but no whites—were indicted on charges of murder. NAACP national staff member Walter White traveled to Phillips County to investigate the situation personally under the guise of a newspaper reporter. Barely escaping with his life after his true identity was discovered, White drafted vivid reports describing the prevailing mob mentality in the county that obliterated any chance of a fair trial for the Phillips County defendants. The NAACP began raising money to help in the defense and eventually began working with a local committee that had retained as its lawyer Scipio Africanus Jones, an African-American attorney of high reputation.[46] Jones ended up handling the bulk of the defense work,

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42. 238 US 347 (1915).

43. 261 US 86 (1923).

44. For a recent assessment of the significance of *Moore v Dempsey* in this respect, see Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich L Rev 48, 52-61 (2000) ("*Racial Origins*").

45. Richard C. Cortner, *A Mob Intent on Death: The NAACP and the Arkansas Riot Cases* (Wesleyan 1988) (an especially invaluable resource on the *Moore* case because many of the manuscripts concerning this case have been lost).

46. Born enslaved, Scipio Jones attended public schools after emancipation and then attended a private college. He was denied admission to the University of Arkansas' law school on account of race but gained entry to the Arkansas bar in 1889 after reading law in the offices of white lawyers in Little Rock. See Mary White Ovington, *Portraits in Color* 92-93 (Viking 1927) (biographical essay); Tom Dillard, *Scipio A. Jones*, 31 Ark Historical Q 201 (1972); Judith Kilpatrick, *Race Expectations: Arkansas African-American Attorneys (1865-1950)*, 9 Am U J Gender Soc Pol & L 63, 70-74 (2000). Jones built a successful law practice

which spanned five years and included several rounds of appeals, retrials, and habeas proceedings.

When the case reached the United States Supreme Court, Jones urged the NAACP to approach Storey to represent the Phillips County defendants. Storey responded, "I must be satisfied . . . that they have a good case," and asked James Weldon Johnson to find "a good lawyer" to brief the cases for him and "submit them to me for my judgment," explaining, "I do not want to appear in court in a case that I cannot maintain."[47] Storey examined the case more closely and agreed to handle it, and soon after reported that he was growing "more and more confident that my cause is just."[48]

Storey's task of achieving a reversal of the defendants' convictions in *Moore v Dempsey* was not an easy one. Several years earlier another prominent Supreme Court advocate, Louis Marshall (who also later argued Supreme Court cases for the NAACP), had lost an appeal to the Court in a similar case, *Frank v Mangum*.[49] That case arose after Leo Frank, a Jewish factory owner in Fulton County, Georgia, was accused of murdering a young female employee and convicted in a trial dominated by an angry mob. Marshall sought habeas corpus review of the conviction on the ground that the disorder surrounding Frank's trial had deprived him of due process of law, but the Court denied Marshall's petition. The Court held that it must defer to the results of the state courts' appeal procedures and the lower courts' findings about the fairness of the trial even though the district court had not held a factual hearing into the matter before reaching its conclusions on the habeas petition.[50]

The extremely deferential standard of scrutiny that the Court had announced it would apply in reviewing cases raising due process violations based on allegations of mob dominated trials presented a troubling roadblock in securing the Supreme Court's reversal in *Moore v Dempsey*. Storey's evidence was based on the affidavits of the five defendants who had been sentenced to death, each of whom stated that his confession to charges of murder had been extracted through whipping and other forms of torture, and two affidavits from white railroad men of dubious reputation who claimed they had witnessed and participated in the whipping of the defendants.[51] The lower court had considered these affidavits but nevertheless dismissed the habeas corpus petition without a factual hearing. Storey's task was to convince the Supreme Court to reverse the lower

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combining the representation of African-American fraternal organizations with civil rights cases.

47. Letter from Moorfield Storey to James W. Johnson (Nov 3, 1921), in *NAACP Papers* at Part 1, Reel 24, frame 177 (cited in note 37).

48. Letter from Moorfield Storey to Walter White (Nov 15, 1922), in Papers of Arthur Spingarn, Box 7, July-Dec 1922 folder (Library of Congress Manuscript Div).

49. 237 US 309 (1915).

50. See 237 US at 329, 332. The *Frank* case had a tragic ending: Leo Frank was later lynched by a mob while ostensibly in state custody.

51. See *Moore*, 261 US at 92-93 (McReynolds dissenting); Cortner, *A Mob Intent on Death* at 121-25 (cited in note 45).

court despite the precedent presented by *Frank*.

After briefing and oral argument, Storey achieved this result. He convinced a majority of the Court that the case should be remanded to the lower court with instructions to conduct a full factual inquiry into the allegations raised in the affidavits submitted in support of the habeas petition.[52] In dissent, Justice McReynolds, joined by Justice Sutherland, forecast "grav[e]" consequences if "every man convicted of crime in a state court may . . . by swearing, as advised, that certain allegations of fact tending to impeach his trial are true . . . thereby obtain as of right further review."[53] McReynolds argued that "[u]nder the disclosed circumstances I cannot agree that the solemn adjudications by courts of a great State . . . can be successfully impeached by the mere *ex parte* affidavits made upon information and belief of ignorant convicts joined by two white men—confessedly atrocious criminals."[54] McReynolds was wrong, however, in asserting that "the mere *ex parte* affidavits" of "ignorant convicts" and "criminals" had achieved the result in *Moore v Dempsey*. An added ingredient in the mix was the fact that one of the nation's most renowned and well respected Supreme Court advocates had chosen to represent the defendants.[55]

Storey's writings give us a window into his conception of his role in serving as the NAACP's legal advocate. In his Storrs Lectures delivered at Yale Law School, Storey presented his vision of lawyers as guardians of the "deep public interest in which the calling of the lawyer is affected."[56] Storey denounced as "pernicious" Lord Brougham's doctrine that "makes no distinction between the client who is guilty and one who is innocent, between justice and injustice, between right and wrong."[57] Storey argued that lawyers should refrain from engaging in procedures to manipulate court processes when the substantive merits of the case were not on the client's side.[58] Moreover, Storey argued that it was the

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52. On remand, the NAACP faced significant problems in obtaining the needed testimony from the two railroad men who had given affidavits. In the intervening years, these witnesses had demanded and received substantial economic support from the NAACP (on the ground that giving their affidavits had cost them their livelihoods and their homes), and thus were vulnerable to being discredited on the stand. Even worse, it is likely that they would have refused to enter the state to give testimony, out of fear for their lives. For the story of how Jones succeeded in negotiating a compromise that achieved the defendants' release, see Cortner, *A Mob Intent on Death* at 166-84 (cited in note 45).

53. *Moore*, 261 US at 93 n 1 (internal quotations omitted).

54. Id at 102.

55. For a discussion of the remarkableness of the Supreme Court's reversal of position in *Moore*, see generally Klarman, *Racial Origins* at 59-61, 77 (cited in note 44). Klarman notes that this reversal occurred only eight years after *Frank* and that changes in the Court's membership in the meantime "[i]f anything . . . appeared disadvantageous to litigants seeking the Court's intervention against mob-dominated trials." Id at 59.

56. Storey, *The Reform of Legal Procedure* at 6 (cited in note 32).

57. Id at 30. Whether Storey practiced what he preached is a different matter. See Carle, 9 Am U J Gender Soc Pol & L at 84 n 14, 93 (cited in note 34) (noting inconsistency between Storey's opposition to imperialism as a matter of public policy and his representation of the United Fruit Company). See also note 24.

58. Storey condemned practices such as refusing to admit a debt owed in order to buy more time to

lawyer's duty (not the possibly "angry or unscrupulous" client's) to "decid[e] whether or not to carry a case further"—a duty the lawyer must carry out as "an officer of the Court, whose duty it is to help in securing justice," rather than as an agent of his client, whose purpose might be "to delay or defeat [justice]."[59]

These sentiments echoed views expressed by turn-of-the-century lawyers who adhered to the "lawyers as gatekeepers of justice" view of lawyers' proper role vis-a-vis their clients.[60] But Storey took his ideas a step farther when he argued that lawyers should use their personal reputations to vouch for the "rightness" of their clients' causes. Storey asserted:

> When it is known that [a lawyer's] presence in Court means that he thinks his client right, that mere presence has great weight with jury or with Court. The services of such a man are sought by all, and the client is fortunate who secures them. . . . To such men, only, come the highest rewards of our profession.[61]

This strong claim—that the mere presence in court of a lawyer of high reputation could provide a warranty of the justice of a client's cause—was unusual even among those who argued for lawyers' duty to police the justice of their clients' causes; far more common at the time were acknowledgments that lawyers' ethical duties stopped short of lending their personal morality to the clients they represented. But Storey's statement captured the essence of his approach to lawyering for the NAACP. As we have seen, Storey lent his reputation to the organization when he judged a case to be right and just.[62] In so doing, he boosted his client's credibility at a time when its organizational resources were otherwise slim.

Storey's conception of his role as a lawyer helps explain his lack of concern about the charges by attorneys for the city of Louisville that the NAACP had "manufactured" the facts underlying *Buchanan v Warley*. For Storey, as for the other lawyers of similar professional stature who were directing the NAACP's national legal operations in its earliest years,[63] the notion that laudable public service work could give rise to serious ethics concerns was simply a non-issue.

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pay it back, raising meritless defenses, and forcing the other side in a lawsuit to "pay for everything you get." Storey, *The Reform of Legal Procedure* at 33 (cited in note 32).

59. Id at 157. This conception thus reverses the emphasis we would place today on the relative importance of the lawyer's duties to the court and client in deciding whether a lawsuit should be filed. Compare with Model Rules of Professional Conduct Rule 1.2(a) (1999) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement.").

60. For further discussion of this concept, see Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 L & Soc Inquiry 1, 10-13, 18-22 (1999).

61. Id at 40.

62. This was true in his pro bono work, though apparently not a standard he applied to paying clients. See note 24.

63. For more on these lawyers, see Carle, 20 L & Hist Rev at 1 (cited in note 1).

Storey was implicitly confident that his willingness to lend his enormous stature to the NAACP would signal to the Court that he believed in the "justice" of his client's cause—as in *Moore*—and that he could thus count on the Justices taking his case seriously.

Storey's jurisprudential outlook, which saw the development of the Supreme Court's jurisprudence as a gradual unfolding of inherently correct principles of law, further supported his confidence that the Court would see the case in the same light as he did. In other words, the Court and Storey shared a world view that permitted the smoothing over of potential legal ethics problems with the understanding that the underlying merits of the case were just.[64]

In contrast, the Supreme Court's concerns in later decades about how the NAACP carried out its innovative and far reaching public impact litigation strategy would be far more acute. As a window into the complex interplay of factors that explain this changed response, I contrast Storey's professional biography with that of a later NAACP leader, Charles Hamilton Houston.

B. CHARLES HAMILTON HOUSTON

If Storey exemplified the professional and social privilege of the elite white lawyers who led the NAACP's legal operations in its first decade of existence, African-American lawyer Charles Hamilton Houston exemplified the new kind of civil rights lawyer who took charge of the NAACP in the mid-1930s. Even by the 1920s, as August Meier and Elliott Rudwick have documented, a shift had begun in the racial balance of the NAACP's staff and legal committee.[65] In the early 1930s, the Harvard-educated Charles Hamilton Houston began to impress

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64. One commentator on an earlier draft of this paper helpfully pointed out that the jurisprudence of the United States Supreme Court at the time generally displayed little concern about the evils of "collusive" litigation. But see Schmidt, 82 Colum L Rev at 514 n 265 (cited in note 10) (citing cases in which the court upheld the "honest and actual" controversy requirement). This commentator cited *Pollock v Farmers' Loan and Trust Co*, 157 US 429, on rehearing, 158 US 601 (1895), as one example of litigation in which, as in *Buchanan*, the parties were not truly adverse. The case challenged the constitutionality of the corporate income tax, in which the defendant no more wanted the conclusion that the tax was valid than Warley hoped his contract could be upheld. In *Pollock*, however, the lawyers did not "create" the facts to the same extent that the NAACP's lawyers did in *Buchanan*; the defendant in *Pollock* independently owed the tax at issue, whereas there would have been no legal obligation to test in *Buchanan* had the NAACP's lawyers not drafted a test contract. Thus *Buchanan* arguably raised a more serious question regarding the ethics of "creating" litigation that would not have existed otherwise than did test case litigation of the *Pollock* variety.

Part of the problem in all of these cases was the unavailability of a declaratory judgment as a form of relief prior to passage of the Declaratory Judgment Act in 1934. See generally Donald L. Doernberg and Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L Rev 529, 547-61 (1989) (describing the Supreme Court's rigid application of case or controversy requirements prior to the Declaratory Judgment Act's passage).

65. See August Meier and Elliott Rudwick, *Attorneys Black and White: A Case Study of Race Relations Within the NAACP*, in August Meier and Elliott Rudwick, *Along the Color Line: Explorations in the Black Experience* 128-73 (Illinois 1976); August Meier and Elliott Rudwick, *The Rise of the Black Secretariat in the NAACP, 1909-1935*, in Meier and Rudwick, *Along the Color Line* at 94-127.

the NAACP with his command of the courtroom.[66] In 1934, Houston joined the NAACP national staff as special counsel. From that point on, the lawyers affiliated with the legal committee became much less involved in the organization's legal affairs and control of the organization's legal work vested in Houston, and later in Houston's protégé, Thurgood Marshall.[67]

This shift in the organization's legal leadership signaled important changes at many levels, as illustrated by the contrast between the biographies of Houston and Storey. In some respects the two men appear similar: both held elite educational credentials and both became known as the NAACP's foremost legal advocates during their respective generations. In many other respects, however, their lives stand in sharpest contrast. Both attended Harvard Law School but their experiences there were very different, a result not only of differences in class and race but also of the changing pedagogy and jurisprudence of the intervening fifty years. Houston's assumption of the role of chief public advocate for the NAACP in the 1930s thus marked a key transition in the organization's legal program—not only from one led predominantly by whites to one led predominantly by African Americans,[68] but also from an approach to law based on a confidence in natural law principles, as in Storey's world view, to an approach based on the social policy focus of sociological jurisprudence and early legal realism.

Houston's life story is insightfully examined by his biographer, Genna Rae McNeil.[69] Born in 1895, Houston was raised in Washington, D.C., in a middle class African-American family. His father held a law degree from Howard University and struggled to make a living practicing law, working part-time as a government clerk for most of Houston's childhood to make ends meet. In the evening, Houston's father taught at Howard University's law school. Houston's mother had been a teacher and worked as a hairdresser to help earn the money that would allow Houston to attend college and law school.[70] Supported economically by his parents, Houston graduated magna cum laude from Amherst College in 1915. He served in the United States army as an officer during World War I, where his personal experiences with racial prejudice led him to decide on law as a career.[71] In 1919, Houston was admitted to Harvard Law School, which at that time accepted a few "superior" black students in each class. Using Veterans Bureau education benefits supplemented by money sent from home, Houston attended Harvard Law School from 1919 to 1922, obtaining an LL.B. and

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66. Meier and Rudwick, *Attorneys Black and White* at 149-51 (cited in note 65).

67. See Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* 31-32 (North Carolina 1987) ("*NAACP's Legal Strategy*").

68. See Meier and Rudwick, *Rise of the Black Secretariat* (cited in note 65).

69. Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (Pennsylvania 1983) ("*Groundwork*").

70. Id at 15-34.

71. Id at 36-45.

then an LL.M. in jurisprudence.

In short, the seeming similarity in Houston's and Storey's educational backgrounds masks deep differences. Storey, as we have seen, drifted pleasantly through his two years of study at Harvard Law School, engaged primarily in socializing at Boston high society parties and clubs.[72] Houston, in contrast, was excluded on racial grounds from the fraternities and clubs that provided the focus of law school social life. Storey spent almost no time on his classwork; Houston, who carried the extra burden of having to disprove assumptions that his race would make him an inferior student, devoted almost all of his time to study.[73] Storey absorbed traditional jurisprudence with an emphasis on individual rights; Houston studied sociological jurisprudence with Roscoe Pound.

1. Sociological Jurisprudence

Houston's law school notes reveal the intensity of his study of the history and theories of jurisprudence with Pound. Houston's notebooks, preserved for scholars' examination at Howard University's Moorland-Spingarn Research Center, contain hundreds upon hundreds of pages of comprehensive notes, color-coded outlines, and abstracts of assigned articles and independent reading that would put any contemporary law student to shame.[74] His notes capture Pound expounding that while nineteenth-century schools of jurisprudence "are concerned with the content of the law; sociological [jurisprudence] considers the working of the law rather than its content." Similarly, Houston records Pound describing law "as a social institution capable of improvement by conscious human effort as well as natural growth," so that the "[j]urist's duty is to discover the best means of conscious improvement."[75] Sociological jurisprudence, Houston learned, involved a concern "not with what law is but with what it does" and "with the legal order we are trying to achieve through law."[76]

Upon his graduation from Harvard Law School in 1923, Houston settled in Washington, D.C., going into practice with his father and teaching part-time, as his father had, at Howard University Law School. In 1929, Houston became Vice Dean at Howard and began the efforts that would transform that law school from an unaccredited night school to a fully accredited institution dedi-

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72. Howe, *Portrait of an Independent* at 36 (cited in note 21).

73. McNeil, *Groundwork* at 46-52 (cited in note 69).

74. Charles Hamilton Houston Papers, Box 163-5, folders 1, 3-5, 8-10, 16, 18 (Moorfield-Spingarn Research Center, Howard University) ("*Houston Papers*").

75. Id at folder 8 (lecture notes for October 26, 1922).

76. Id at folder 3. Other samples of Houston's lecture notes from Pound's classes contain lengthy analyses of the history of jurisprudence, with comparisons to the developing jurisprudence of the twentieth century, such as, while "19th century schools look for something behind the rule; sociological [jurisprudence gives] effect to social engineering; the stress is on the end we are aiming at," and standards are "shifting from equality of action to equality in the satisfaction of wants." Id at folder 8 (lecture notes for October 26, 1922).

cated to training new generations of African-American lawyers. Houston took the ideas he gained through his elite law school training, including his immersion in the new sociological jurisprudence that took improved social policy as the goal and law as the means or instrument to attain that goal, and applied them to create a vision of African-American lawyers as "social engineers."[77] By passing on these ideas in training and mentoring a new generation of mostly African-American civil rights lawyers, Houston ensured that his vision would have a deep and lasting impact on how we think today about public interest law.

Not only his education but also his practice experience contributed to Houston understanding the NAACP's legal challenges in a very different way than Storey had. Storey, a legal insider, had little to fear from the legal ethics establishment, but Houston's early formative practice experiences gave him a different perspective. Houston learned early in his career that merely believing in the justness of one's cause was not sufficient to dismiss the possibility of legal ethics attacks.

2. Practice Experience

One of Houston's most significant formative experiences took place in a case that vividly demonstrated the potential consequences of being accused of legal ethics breaches as a lawyer for an unpopular cause. The case involved disciplinary proceedings that the state of Maryland instituted against Bernard Ades, a white lawyer for the Industrial Labor Defense (ILD), an organization with Communist party sympathies that sought to combat racial and other forms of injustice in the courts by providing legal representation to defendants wrongly charged with crimes.[78] Ades had allegedly pressed offers of legal services on several unwilling defendants, including Euel Lee, an African-American man who had been convicted of murder and sentenced to death. Another allegation was that Ades had convinced this client to bequeath his body to him and that Ades intended to give his client's body to the ILD to exhibit in a protest demonstration. The legal charges against Ades included improperly injecting himself into Lee's case for the purpose of asserting the views of the ILD rather than the interests of his client, stirring up litigation, solicitation of business, barratry, incitement of racial prejudice, and making false statements about court officials to the media.[79]

The state of Maryland sought Ades' disbarment on these charges, but Houston, with assistance from Thurgood Marshall, then newly graduated from Howard Law School, successfully defended Ades from the charges that he had

77. McNeil, *Groundwork* at 84 (cited in note 69). This is the term used by McNeil, though she does not examine in depth its connection to the sociological jurisprudence Houston absorbed in law school.

78. For an account of the difficult relations between the ILD and the NAACP in the 1920s, see Dan T. Carter, *Scottsboro: A Tragedy of the American South* 51-103 (Louisiana State 1969).

79. See Complaint, *In re Ades*, in *Houston Papers* at Box 163-36, folder 15 (cited in note 74).

unlawfully solicited business and stirred up racial prejudice. Ades received only a reprimand for his conduct in connection with the disposal of his client's body and criticisms of the courts.[80] Houston later stated that he thought *Ades* was the best case he ever prepared.[81]

Although he could not have known it at the time, the precedent Houston set in *Ades* would become important when the NAACP clashed with legal ethics authorities in hostile southern states in the 1950s and 1960s. It was also important in demonstrating to Houston the NAACP's vulnerability to legal ethics charges in hostile jurisdictions. Indeed, Houston's correspondence reflects his concern with this issue from the time he took over the NAACP's legal operations.

Houston's concerns about the NAACP's vulnerability to legal ethics charges are reflected, for example, in 1937 correspondence between Houston and the chair of the Mobile, Alabama, branch of the NAACP. The branch had asked that the national office contact local school principals to urge "their cooperation in securing memberships and funds for promoting [a] proposed teachers' salary case here."[82] Houston declined this request, explaining that it "is impossible for the National Office to do this because that would open us up to the charge of fomenting litigation." Houston further cautioned that "you, yourself, must be careful to see that whatever you do, you do not put down too much in writing"; it "is one thing to talk to the principals and an entirely different thing to write them." Houston suggested that the branch send the principals a copy of an article on teacher salary equalization from *The Crisis*, which would "give them the ways and means of going about the matter of protecting their rights but it will not be any solicitation to them." Houston ended by reiterating that his reaction did not reflect a "disposition to shirk on our part" but only concern that "we have got to watch out for every possibility of twisting the issues around so that we get ourselves in a jam."[83] Forwarding this reply to Thurgood Marshall, Houston attached a memo warning "[t]hese letters would be all that would be needed for an Alabama court to hold you in contempt or to cause you to be indicted for champerty."[84]

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80. See *In re Ades*, 6 F Supp 467, 482 (1934).

81. Letter from Charles H. Houston to Walter White (Jan 2, 1940), in *Houston Papers* at Box 163-25, Walter White 1940 folder (cited in note 74).

82. Letter from Charles H. Houston to J.L. LeFlore, Mobile, Alabama (Oct 14, 1937), in Papers of the NAACP Records, Group I, Box 5-G, Mobile, Ala, Oct-Dec 1937 folder (Library of Congress Manuscript Div).

83. Id.

84. Id. See also Tushnet, *NAACP's Legal Strategy* at 105 (cited in note 67) (describing Houston's concern that involvement in particular cases might lead to charges of "trumped up" litigation); Tushnet, *Civil Rights Law* at 117 n 4 (cited in note 3) (quoting correspondence between Marshall and Walter White in 1940 and 1941, in which Marshall advised White that asking a teachers' association for "contributions to the NAACP on condition that we file [a] case for them" was "clearly within the statutes forbidding the solicitation of legal business," and warned, "All of the states in the South are convinced that they cannot defeat these cases in court and are looking for any means at all to stop them.").

In short, Houston came to his work at the NAACP with a cautious awareness of the way that legal ethics rules could be used to damage vulnerable, unpopular organizations. That caution was based on his personal, educational, and professional experiences, which gave him a very different understanding of the nature of law and of lawyering in the public interest than Storey held. Storey saw law as a manifestation of a natural justice; Houston saw law as inherently political and manipulable for social policy aims—good *or* bad. Storey approached his advocacy for the NAACP with the unconscious self-assurance of a member of the bar's patrician elite; Houston, while gaining much from his elite educational credentials, had a strong awareness of his racial status as an outsider, both professionally and as a political citizen.

These many contrasts in turn reflect, in complicated ways, the changing sensibilities of the legal profession and the country as a whole during the first half of the twentieth century. The contrasts between the professional life experiences of these two important NAACP leaders help illuminate the complex phenomena that account for the *Buchanan* to *Button* transition.

III. LEGAL ETHICS AND THE LATER NAACP

The story of the NAACP's legal ethics troubles reaches its denouement in the legal ethics attacks the organization endured in the South in the 1950s and 1960s. Houston did not remain head of the NAACP's legal operations long enough to lead it through these attacks; in 1938, he left his full-time position with the NAACP to return to practice with his father in Washington, D.C., where he pursued advocacy on economic justice issues.[85] However, as McNeil persuasively demonstrates, Houston's leadership laid the "groundwork" for the organization's future. Consistent with his emphasis on educating new generations of lawyers, Houston had trained a cadre of young African-American attorneys to continue the work of social engineering through law that he envisioned for the NAACP. One of those lawyers was Thurgood Marshall, whom Houston groomed to be his successor as NAACP legal director. Marshall brought to this position the same caution about the organization's vulnerability to legal ethics charges that Houston had displayed.[86]

In his compelling account of the NAACP's litigation against segregated schools, Tushnet documents the many ways in which Marshall sought to guard the NAACP from attacks on the legal ethics front. As former Legal Committee chair Arthur Spingarn had many years before,[87] Marshall strove mightily to

85. Houston's litigation of civil rights issues against labor unions on behalf of African-American employees made foundational law on labor unions' duties of fair representation to members. See, for example, *Steele v Louisville & Nashville RR Co*, 323 US 192 (1944).

86. Tushnet, *Civil Rights Law* at 274 (cited in note 3).

87. See Carle, 20 L & Hist Rev at 1 (cited in note 1).

monitor the activities of local lawyers affiliated with the NAACP.[88] As Spingarn had, he sometimes succeeded and sometimes failed at this task. Tushnet describes, for example, how the national NAACP ran into legal trouble at least once for supporting litigation when local counsel advanced living expenses to a plaintiff in a test case.[89]

The legal attacks against the NAACP acquired new venom after the United States Supreme Court decided *Brown v Board of Education* in 1954. The state of Texas sued the NAACP after local counsel sent out letters urging students to apply to segregated colleges and go to segregated parks in order to create the facts to file test cases.[90] In 1956, Texas succeeded in enjoining the NAACP Legal Defense and Education Fund from soliciting litigation anywhere in the state.[91]

During the same period, five other southern states—Georgia, Mississippi, South Carolina, Tennessee, and Virginia—adopted stricter anti-barratry statutes aimed at curtailing the NAACP's activities within their borders.[92] These initiatives were part of a broad campaign to cripple the NAACP's post-*Brown* desegregation efforts. Other legislative avenues included laws requiring political organizations to register and disclose their membership lists to the state, use of reporting and disclosure requirements under corporate and tax laws, and outright prohibitions against advocating school integration.[93]

A. DEFENDING AGAINST LEGAL ETHICS ATTACKS

The NAACP and its legal arm, the Legal Defense Fund,[94] decided to challenge the stricter new anti-barratry statutes enacted by a number of southern states in the wake of *Brown* by filing declaratory judgment actions against one such statute in federal district court in Virginia.[95] While the old Virginia law had

88. See, for example, Tushnet, *Civil Rights Law* at 153 (cited in note 3) (counseling branch office that the national office could not suggest that students initiate lawsuits).

89. Tushnet, *Civil Rights Law* at 272 (cited in note 3).

90. Id at 272-73.

91. Id at 273.

92. Walter F. Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 W Pol Q 371, 374 (1959); 2 Race Relations L Rptr 892, 892-94 (1957).

93. See Murphy, 12 W Pol Q at 374-79 (cited in note 92); 2 Race Relations L Rptr at 892-94 (cited in note 92). Many of these statutes were struck down by federal courts on constitutional grounds. See, for example, *NAACP v Alabama*, 357 US 449 (1958) (striking down a statute that required the NAACP to turn over its membership lists to the state on grounds that this mandate violated members' constitutional right to "freedom of association").

94. The Legal Defense Fund was formed in 1939 primarily for tax reasons. See Tushnet, *Civil Rights Law* at 27 (cited in note 3).

95. See *NAACP v Patty*, 159 F Supp 503 (ED Va 1958). On the state's appeal to the U.S. Supreme Court, Justice Harlan wrote a majority opinion remanding the case to the district court with instructions to abstain from construing the contested portions of Virginia's revised statutes until the state courts had been given the opportunity to interpret them. See *Harrison v NAACP*, 360 US 167, 178-79 (1959). *Button* arose from the NAACP's appeal from the state Supreme Court's unfavorable decision on remand. For greater

forbidden only the solicitation of legal business by "runners and cappers,"[96] the new statute included a much wider criminal prohibition against such solicitation by any "agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability."[97] Virginia's highest court upheld the constitutionality of this statute and concluded that certain of the NAACP's litigation activities violated this law and some ABA canons as well. In particular, the court said that the NAACP violated Canon 35, which restricted legal representation by lay intermediaries, and Canon 47, which prohibited the "unauthorized practice of law."[98]

The NAACP appealed the Virginia court's ruling to the United States Supreme Court and the Court held oral arguments twice. At the time, no one knew the reason for this unusual step, but Tushnet's research has revealed that the Court's decision would have come out the other way had it not been for the resignations of two justices, Charles Whittaker and Felix Frankfurter, between the 1961 and 1962 terms.[99] The first draft majority opinion, which Frankfurter wrote in 1961, concluded that "the state did not have to exempt the NAACP simply because its lawyers were 'moved not by financial gain but by public interest.'"[100] This would have been the outcome in the case had the two new justices joining the Court in 1962, Byron White and Arthur Goldberg, not altered the balance on the Court so that a majority voted in favor of striking down the statute.[101] Luckily for the NAACP, the new majority opinion came out the opposite way from Frankfurter's, adopting the distinction between conduct engaged in for nonpecuniary interests versus pecuniary gain that the NAACP had advocated in its brief.

B. *NAACP v BUTTON*

In considering the issues raised in *Button*, the Court had little authoritative legal ethics precedent on which to rely. Indeed, most of the legal ethics law that did exist pointed in the other direction, as Justice Harlan pointed out in his dissent.[102] The only legal ethics rulings the Court could cite in favor of its decision

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detail on the procedural history of these cases, see Tushnet, *Civil Rights Law* at 274-77 (cited in note 3).

96. A runner "solicits business for attorney from accident victims"; a capper is "a decoy or lure for purpose of swindling." *Black's Law Dictionary* 1333, 211 (6th ed 1990).

97. *Button*, 371 US at 423 n 7, citing Va Code §§ 54-74, 54-78, 54-79 (1950), as amended by Acts of 1956, Ex Sess, c 33 (Repl Vol 1958).

98. *Harrison*, 202 Va at 156-57, 164, 116 SE2d at 67, 72.

99. Tushnet, *Civil Rights Law* at 279 (cited in note 3).

100. Id at 278, quoting draft opinion (Jan 1962), in Frankfurter Papers, Box 164, folder 5 (Harvard Law School).

101. White agreed with the majority that the state could not constitutionally prohibit "advising the employment of particular attorneys," but dissented in part because he agreed with some of Harlan's dissenting views about the dangers of lay intermediary organizations controlling litigation. See *Button*, 371 US at 447 (White concurring in part and dissenting in part).

102. See *Button*, 371 US at 456-60 (Harlan dissenting) (citing legal ethics case law contrary to major-

were *In re Ades*, the case Houston and Marshall had litigated so many years before; a 1935 ABA ethics opinion in which the ABA opined that a lawyer could properly offer over the radio to represent without compensation individuals who wished to join a group of manufacturers to challenge the constitutionality of the National Labor Relations Act;[103] and a Georgia case from the 1940s in which a local bar association was permitted to offer to represent pro bono persons victimized by usurers.[104]

Given this dearth of authoritative legal ethics precedent supporting the NAACP's position, the Court could not have plausibly based a ruling in the NAACP's favor solely on legal ethics law. Instead, the Court decided the case as a matter of first impression under the First Amendment. The Court held that "the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business."[105] The Court emphasized the political nature of legal representation in giving voice to those disenfranchised by majoritarian political processes. As Justice Brennan wrote for the majority:

> Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930s[106], for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.[107]

The Court further acknowledged that its perspective was strongly influenced by a *realpolitik* sense of the true purposes underlying Virginia's new statute, noting:

> We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought. In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity

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ity's holding).

103. See ABA Committee on Professional Ethics and Grievances, Formal Op 148 (1935). For a discussion of the background of this case, see Daniel R. Ernst, *Lawyers Against Labor: From Individual Rights to Corporate Liberalism* (Illinois 1995). For a discussion of the ABA's prior legal ethics opinions on related topics, which had taken a different perspective, see Carle, 20 L & Hist Rev at 1 (cited in note 1).

104. See *Gunnels v Atlanta Bar Assn*, 191 Ga 366, 12 SE2d 602 (1940).

105. *Button*, 371 US at 428-29.

106. Here Brennan is referring to ABA Formal Opinion 148, discussed in note 103 above.

107. *Button*, 371 US at 429-30.

> on behalf of the civil rights of Negro citizens.[108]

The Court stated, however, that it did not want to "reach the considerations of race or racial discrimination which are the predicate of petitioner's challenge to the statute under the Equal Protection Clause."[109] It therefore decided to rule on the alternate First Amendment ground the NAACP had proposed in its brief. That ground proposed drawing a distinction between litigation for political aims and litigation for pecuniary motives. Closely tracking the NAACP's brief and citing *Ades*, the legal ethics case Charles Houston and Thurgood Marshall had defended thirty years before, the Court announced that "regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest."[110] The Court reasoned that, since NAACP attorneys received very little compensation for their work, "there is no danger that the attorney will desert or subvert the paramount interest of his client to enrich himself or an outside sponsor."[111] Thus, the Court concluded, the NAACP's attorneys could not constitutionally be held to Virginia's anti-barratry laws because the litigation activities in which they were engaged were being conducted for political, not pecuniary, ends.

In discussing the facts in the case, the Court had accurately described the nature of the representation arrangements between the local lawyers and the NAACP's national office, noting that the national office paid modest fees to these local counsel in order to allow them to keep their legal practices afloat.[112] Despite its awareness that participating lawyers received payment for their legal work, however, the Court's ruling in *Button*, especially as interpreted in later cases, introduced a starker distinction between fee-paid and nonpaid legal work than the facts of the cases warranted—a distinction which, I have argued elsewhere, has tended to warp current conceptions of public interest law.[113]

The Court's opinion in *Button* thus contains two conceptions of public interest lawyering. One conception rests on a "representation reinforcement" model of public interest lawyering for groups disenfranchised from political processes, a model similar to Houston's legal realist conception of his work for the NAACP. The other depends on a bright line distinction between public interest and private law practice, a model based on the turn-of-the-century mind set of Storey and other early white NAACP lawyers.[114] That disjunction between

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108. Id at 435-36 (Court's footnotes omitted).

109. Id at 444. Tushnet's scrutiny of the Justices' notes from their deliberative conference on *Button* leads him to conclude that Brennan added this caveat in response to a charge Harlan intended to include in his dissent to the effect that the Court was making special rules for the NAACP. See Tushnet, *Civil Rights Law* at 280 (cited in note 3).

110. *Button*, 371 US at 440 (Court's footnote omitted).

111. Id at 443.

112. Id at 443-44.

113. See Carle, 9 Am U J Gender Soc Pol & L at 93-96 (cited in note 34).

114. See id. See also Carle, 20 L & Hist Rev at 1 (cited in note 1).

two generations' perspectives on the nature of public interest law practice presents a continuing source of confusion in *Button*'s analysis, as reflected in the arguments of *Button*'s "dissenters"—both on and off the Court.

C. *BUTTON*'S DISSENTERS

As already noted, the majority's holding in *Button* provoked a strong dissent by Justice Harlan. Joined by Justices Clark and Stewart, Harlan accused the majority of ignoring a "formidable history" underlying rules against solicitation and intervention by lay intermediaries.[115] Harlan argued that "although these professional standards may have been born in a desire to curb malice and self-aggrandizement by those who would use clients and the courts for their own pecuniary ends, they have acquired a far broader significance during their long development."[116] After citing ample case law in support of his point, Harlan concluded:

> Underlying this impressive array of relevant precedent is the widely shared conviction that avoidance of improper pecuniary gain is not the only relevant factor in determining standards of professional conduct. Running perhaps even deeper is the desire of the profession, of courts, and of legislatures to prevent any interference with the uniquely personal relationship between lawyer and client and to maintain [it] untrammeled by outside influences.[117]

Harlan's criticism in *Button* has been echoed by an unlikely commentator. In his classic article, *Serving Two Masters*, former civil rights litigator Derrick Bell has forcefully argued that the Court's exemption of public interest lawyers from certain legal ethics strictures harmed the purported beneficiaries of school desegregation litigation.[118] In words echoing Harlan's, Bell argued that "the 'divided allegiance' between client and employer which Justice Harlan feared would interfere with the civil rights lawyer's 'full compliance with his basic professional obligation' has developed in a far more idealistic and dangerous form," and that lawyers working for idealistic motives, rather than pecuniary ones, need ethical policing the most.[119] In Bell's words: "Idealism, though perhaps rarer than

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115. *Button*, 371 US at 456-57 (Harlan dissenting).

116. Id at 457.

117. Id at 460.

118. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L J 470, 504-05 (1976). Bell makes a persuasive case that civil rights lawyers took the wrong track in the post-*Brown* era in insisting on schools' racial balance over other goals related to improving African-American children's educational experiences. Bell claims that, if the "real" clients in these cases—the parents and children in whose names the cases were filed—had decided case strategy, they would have made very different decisions about remedial priorities than did the NAACP's national office, which directed a uniform, coordinated litigation plan insisting on full desegregation as the only permissible remedy.

119. Id at 505, quoting *Button*, 371 US at 460-62 (Harlan dissenting).

greed, is harder to control."[120]

Bell's article has in turn spawned a thoughtful literature on the ethics of public interest practice.[121] That literature has lost sight, however, of Bell's identification of *Button* as a juncture at which American conceptions of public interest law may have gotten on the wrong track. Instead, both that literature and the United States Supreme Court have continued to adhere to a rigid distinction between lawyering for "the public interest" and lawyering for private concerns. I have elsewhere criticized the rigidity of this distinction between "public" and "private" interest law practice in the post-*Button* line of cases—a distinction that underlies much contemporary thinking about public interest law practice, even though it relies on the same rigid, binary dichotomies that critical scholars have been debunking in many other fields.[122] I will not belabor this criticism here, since my purposes here are more descriptive than prescriptive. It is worth noting, however, that none other than Justice Marshall voiced similar concerns in writing separately in post-*Button* cases.[123]

D. POST-*BUTTON* CASES

The *Button* distinction between protected attorney conduct engaged in to

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120. Bell, *Serving Two Masters* at 504 (cited in note 118).

121. Classics in this genre include Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 Stan L Rev 1183 (1982); David Luban, *Lawyers and Justice: An Ethical Study* 341-57 (Princeton 1988); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L Rev 1101 (1990); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va L Rev 1103 (1992); Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Westview 1992); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U Miami L Rev 1099 (1994); Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 Cal L Rev 61 (1996); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L J 1623 (1997); Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 Fordham L Rev 2339 (1999). A related literature on the ethics of individual client representation in the poverty law context has also emphasized the need for "collaborative" or "client-centered" lawyering that is sensitive to the expressed interests of clients and engages in a process of dialogue in lieu of lawyer domination. See, for example, Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 Ariz L J 501 (1990); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich L Rev 485 (1994); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Meaning of Mrs. G.*, 38 Buff L Rev 1 (1990).

122. See Carle, 9 Am U J Gender Soc Pol & L at 95-96 (cited in note 34). For work criticizing the public/private distinction in other contexts, see, for example, Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 Stan L Rev 221, 223-24 (1999) (showing how private law played at least as significant a role as did public law in defining race and sex relationships in the antebellum period); Jody Freeman, *The Private Role in Public Governance*, 75 NYU L Rev 543, 544 (2000) (pointing out the public/private interdependence in administrative law); Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 Md L Rev 4 (1984) (criticizing use of the public/private distinction to curtail free speech rights in the labor context); Frances Olson, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 Const Comm 319 (1993) (presenting a basic feminist critique of the public/private distinction). See also, *Symposium on the Public/Private Distinction*, 130 U Pa L Rev 1289 (1982).

123. Thanks to Judith Maute for reminding me of this connection.

further political interests worthy of First Amendment protection and unprotected conduct of the same type engaged in for pecuniary aims continues to drive the Supreme Court's legal ethics jurisprudence. In 1978, the Court reinforced the *Button* distinction in two companion cases decided on the same day. In *Ohralik v Ohio State Bar Association*,[124] the Court upheld the state bar's prosecution of a personal injury lawyer for having engaged in unseemly behavior in aggressively soliciting two teenage clients involved in a car accident in violation of state bar rules prohibiting lawyers from soliciting clients. In *In re Primus*,[125] the Court invalidated South Carolina's prosecution, under disciplinary rules almost identical to those of Ohio, of an ACLU lawyer who had offered her services for free to a woman who had undergone involuntary sterilization. Distinguishing *Ohralik*, the Court in *Primus* explained, "This was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance . . . [a]nd her actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain."[126] The Court's analysis further relied on the parallels between the objectives, methods, and organizational structure of the ACLU and the NAACP, noting, for example, that in both cases the lawyers at issue were not expecting to obtain any personal financial reward from having taken the cases, but were instead "organized as a staff and paid" by the organization.[127]

Most recently, the Court continued to adhere to this rationale in *Florida Bar v Went For It, Inc*,[128] in which it rejected a challenge to the constitutionality of state bar rules that prohibited lawyers from soliciting personal injury clients by mail within thirty days of an accident. Applying the standards applicable under its commercial speech doctrines, which accord lower levels of constitutional scrutiny to restrictions on commercial, as opposed to political, speech, the Court upheld the state bar rules on the ground that the harms the rules sought to prevent outweighed the infringement on attorneys' First Amendment rights.

In short, under the line of cases originating in *Button*, state bar rules against client solicitation cannot constitutionally be applied against lawyers organized into nonprofit "public interest" organizations pursuing social or political objectives, but continue to be enforceable against individual lawyers who represent clients—even, presumably, the same clients in the same cases—under contingency fee or fee for service arrangements.

It surely is no coincidence that former NAACP advocate Thurgood Marshall, writing as a concurring Justice in *In re Primus* and *Ohralik*, took issue with the Court's application of *NAACP v Button*. Reviving the history underlying *Button*, including its reliance on *In re Ades*, Marshall argued that the conduct that

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124. 436 US 447, 468 (1978).
125. 436 US 412 (1978).
126. Id at 422.
127. Id at 429, quoting *Button*, 371 US at 434 (Harlan dissenting).
128. 515 US 618, 635 (1995).

should be prohibited in *Ohralik* and like cases is not solicitation per se but the abusive and unprofessional form that solicitation took in *Ohralik*.[129] Marshall cautioned against the Court's use of a restrictive test for permissible solicitation, noting that "rules against solicitation substantially impede the flow of important information to consumers" and that "[t]he provision of such information about legal rights and remedies is an important function, even where the rights and remedies are of a private and commercial nature involving no constitutional or political overtones."[130] Marshall further criticized the Court's application of the commercial speech doctrine in *Ohralik*, arguing that "[t]he First Amendment informational interests served by solicitation, whether or not it occurs in a purely commercial context, are substantial."[131]

Even more tellingly, Marshall criticized the outdated model of lawyering underlying the Court's approach in the *Button* line of cases. Marshall argued that this model rested on "rules of 'etiquette'" based on "the notion that a lawyer's reputation in his community would spread by word of mouth," which was in turn based on images "of the small, cohesive, and homogenous community."[132] These images, Marshall noted, were "anachronistic" and "valid only with respect to those persons who move in . . . relatively elite social and educational circles."[133] Thus, Marshall concluded, "Just as the persons who suffer most from lack of knowledge about lawyers' availability belong to the less privileged classes of society, so the Disciplinary Rules against solicitation fall most heavily on those attorneys engaged in a single-practitioner or small-partnership form of practice."[134]

It is surely an ironic twist that it is one of the NAACP's chief advocates, having assumed a seat on the U.S. Supreme Court, who must write to remind the Court—and us today—of the original permeability of the line between "public interest" lawyering and the kind of small firm, fee-for-service practice arrangements that characterized the local counsel involved in the NAACP's public impact litigation campaigns. My research into the history underlying *Button*'s conception of the relationship between legal ethics law and public interest law practice suggests questions similar to those Marshall raised, especially with respect to the possible class and race implications of excluding all forms of fee-for-service representation from the definition of public interest law. This symposium and paper, focusing on the history of legal ethics law, are not the places to undertake a full examination of these issues as they concern us today, but some of the questions one might ask include: Does the *Button* exclusion of all fee-for-service arrangements from the definition of public interest practice cre-

129. See *Ohralik*, 436 US at 470 (Marshall concurring in part and concurring in judgment).
130. Id at 473.
131. Id at 474.
132. Id at 474-75.
133. Id at 475.
134. Id (citations and footnotes omitted).

ate a system dominated by those whose elite education, class, and other resources provide a safety net making employment at minimal compensation in nonprofit organizations feasible? Put otherwise, does the rigid distinction *Button* draws between public and private interest promote the practice of public interest law by the Moorfield Storeys of our profession, but not by local grassroots lawyers struggling to make ends meet in the mold of Scipio Jones? Finally, if client exploitation is the core concern underlying the *Button* line of Supreme Court cases, why not focus on that issue directly rather than carve a distinction based on pecuniary versus nonpecuniary intent, yet another variant on the public/private distinction that has proved so unsatisfactory in other areas?[135] All of these are provocative, difficult questions raised by an examination of the ways in which legacies of class and professional power are embedded in our contemporary legal ethics norms—including our conceptions of public interest law practice.

IV. CONCLUSION: FROM *BUCHANAN* TO *BUTTON*

In this article I have contrasted the professional identities, experiences, and jurisprudential commitments of two chief NAACP legal advocates of different generations and linked these factors to these lawyers' correspondingly different approaches to the organization's legal ethics challenges. I have explored how a complex interplay of variables, including race and, relatedly, insider versus outsider status within the legal profession; political and social context, including especially the southern backlash against the NAACP; and jurisprudential commitments, especially the move from notions of natural law to sociological jurisprudence, all played a part in the transition from *Buchanan* to *Button*. Finally, I have suggested that these factors in turn played a part in changing conceptions of public interest law and, relatedly, in changing conceptions of the ethical norms that govern public interest law practice.

In an era that viewed "the public interest" as unitary and nonproblematic, Supreme Court advocates such as Moorfield Storey—and the Justices themselves—displayed seemingly little sensitivity to the potentially problematic nature of test case litigation strategies, at least in cases handled by members of the bar's governing elite. But in an era characterized by greater awareness of the problems of defining the public interest in a pluralistic society, the NAACP's legal advocates and the United States Supreme Court were required to confront and struggle head on with the tensions between traditional legal ethics strictures and the NAACP's public impact litigation campaigns. That process produced new legal ethics doctrines embodying conceptions of public interest law that display a curious mix of early and later twentieth-century thinking.

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135. See the literature cited in note 122.