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# Bad Behavior Makes Big Law: Southern Malfeasance and the Expansion of Federal Judicial Power, 1954–1968

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# ARTICLES

# BAD BEHAVIOR MAKES BIG LAW: SOUTHERN MALFEASANCE AND THE EXPANSION OF FEDERAL JUDICIAL POWER, 1954–1968*

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The story of the Warren Court's impact on the U.S. South is of course far larger and more wide-ranging than just the direct legacy of *Brown v. Board of Education*.[1] Indeed, this is a question of not just "Beyond *Brown*," or, better yet, "Beyond *Brown* and *Baker*,"[2] but of appreciating how the obstructive behavior of the South, in the face of Warren Court rulings, affected the wider judicial decision-making of the Court just as much as the Court's holdings altered so many aspects of southern life, both public and private.

*Brown* is a major part of that story, as is *Baker* and its decisive, Deep South progeny, *Reynolds v. Sims*.[3] Yet there are at least four other important and often-overlooked chapters in this story as well: first, the Court's own frightful and halting behavior in other, little-known and sometimes tragic race cases in the immediate wake of *Brown*;[4] second, the ways in which the Court's belief in racial equality significantly spurred its efforts to reform criminal justice procedures nationwide;[5] third, the tremendously under-appreciated manner in which the activism of

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1 347 U.S. 483 (1954).

2 Baker v. Carr, 369 U.S. 186 (1962).

3 377 U.S. 533 (1964).

4 *See* Florida *ex rel.* Hawkins v. Bd. of Control, 355 U.S. 839 (1957); Naim v. Naim, 350 U.S. 985 (1956); Williams v. Georgia, 350 U.S. 950 (1956); Jackson v. Alabama, 348 U.S. 888 (1954).

5 *See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

the southern Black freedom struggle stimulated the Court to vastly expand federal judicial jurisdiction in ways that helped protect the constitutional rights of any citizen prosecuted in a southern state court;[6] and fourth, the degrees to which even ostensibly unrelated areas of substantive federal law, ranging from First Amendment rights of association,[7] to the law of libel,[8] to the procedural protections afforded public aid recipients,[9] all were likewise transformed on account of the collision between the Warren Court and white public authorities in the South. All told, that larger story is one whose scope far exceeds the standard narrative about *Brown* and race, or even the more expansive one about *Brown* and *Baker*'s explicitly shared grounding in the fundamental guarantees of the Equal Protection Clause.[10]

## PART I

But the story of the Warren Court and the South begins not with *Brown*, nor even with the other very important, yet far lesser known *Brown* decision that preceded Earl Warren's arrival at the Court by a mere eight months.[11] Instead it begins with the South's long-troubled relationship to the rule of law, reaching

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[6] *See* Dombrowski v. Pfister, 380 U.S. 479 (1965); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Monroe v. Pape, 365 U.S. 167 (1961), *overruled by* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978) (overruling *Monroe* to the extent it held municipalities are immune from § 1983 claims). *Keeney v. Tamayo-Reyes* overruled in part both *Townsend* and *Fay*. 504 U.S. 1 (1992) (rejecting the "deliberate bypass" standard for habeas relief in state procedural default cases), *superceded by statute as stated in* Evans v. Thompson, 465 F. Supp. 2d 62 (D. Mass. 2006) (noting that the AEDPA controls the granting of evidentiary hearings on habeas issues).

[7] *See* NAACP v. Button, 371 U.S. 415 (1963); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963).

[8] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Associated Press v. Walker, 388 U.S. 130 (1967).

[9] *See* King v. Smith, 392 U.S. 309 (1968); *see also* Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974) (overruling *Shapiro* to the extent it permitted retroactive payment of withheld benefits in contravention of the Eleventh Amendment).

[10] *See* Reynolds v. Sims, 377 U.S. 483, 566 (1964) (citing Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954)); *see also* David J. Garrow, *From* Brown *to* Casey*: The U.S. Supreme Court and the Burdens of History*, *in* RACE, LAW AND CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* 74, 74–79 (Austin Sarat ed., 1997); Michal R. Belknap, *The Real Significance of* Brown v. Board of Education*: The Genesis of the Warren Court's Quest for Equality*, 50 WAYNE L. REV. 863, 887–88 (2004) [hereinafter Belknap, *The Real Significance of* Brown].

[11] Brown v. Allen, 344 U.S. 443 (1953).

back to the antebellum era before the Civil War, Emancipation, and the adoption of the 13th, 14th, and 15th Amendments to the Constitution. Writing almost seventy years ago, Charles Sydnor argued that the South's difficulty in accepting the rule of law was rooted in the very nature of a slave-owning society. "[R]uralness, slavery, the plantation system, and the existence of a strong unwritten code operated in the plantation areas of the Old South to restrict the power of ordinary law and to enlarge the area of life in which man acts without reference to legal guidance. This is to say that the segment of life that was controlled by law was reduced in these dominant regions of the Old South."[12]

Sydnor believed that "ruralness lightens the weight of the law" and that "the countryman is something of an individualist who shapes his actions according to local custom and his own notions of how he should behave rather than according to the dictates of law books." In significant part this was so simply because "he is physically remote from law-enforcing agencies." But rural isolation was only one causative factor. Slavery itself was another, Sydnor suggested. "Slavery must have affected the planter's attitude toward law, for in a measure slavery put him above the law. On his own estate he was lawgiver, executive, and judge," and "[he] possessed power normally exercised by the state."[13]

Sydnor appreciated that the geographical aspects of slavery were not central to a slaveowner's behavior. Oftentimes "[l]aw books gave him no guidance," Sydnor observed, "[b]ut this silence of the law does not seem to have disturbed him, for even when it spoke clearly the slaveowner sometimes paid no heed . . . or interpreted it with marked liberality."[14] In doing so, Sydnor noted, slave-owners were acting in full accord with the decisions of southern state courts. In 1850, the South Carolina Court of Appeals opined that "a judicious freedom in the administration of our police laws for the lower order must always have respect for the confidence which the law reposes in the discretion of the master."[15]

"[T]he social order diminished the force of law in the South," Sydnor realized, and the antebellum power structure served "to

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[12] Charles S. Sydnor, *The Southerner and the Laws*, 6 J. S. HIST. 3, 8 (1940).

[13] *Id.* at 8, 10.

[14] *Id.* at 10.

[15] State v. Boozer, 36 S.C.L. (5 Strob.) 21, 24 (S.C. Ct. App. 1850).

restrict the segment of life ruled by state law." Indeed, he added, "the extralegal . . . areas of life in the South convinced many onlookers that here was a land where law was frequently broken and commonly held in contempt."[16] Sydnor's conclusions primarily concerned the antebellum nineteenth century South, but subsequent well-informed scholars have extended his observations to the late nineteenth and early twentieth centuries as well.

In the late 1940s, Carl Swisher underscored the value of considering the South "as an isolated area, or as a collection of isolated areas," especially with regard to how southerners often exhibited "a kind of harshness of attitude toward outsiders."[17] More than a generation later, Paul Finkelman, in looking back at the entire sweep of southern legal history, reiterated both Sydnor and Swisher's analyses in highlighting not only "the tradition" but indeed "the philosophy of localism" across the South. "Southern localism sometimes emerged as hostility toward the federal government," Finkelman noted, but "Southern localism has not been directed at the federal government alone. It also has produced xenophobia toward other states and their citizens."[18]

Much like Sydnor, Finkelman too drew a direct connection between geography and race: "[T]he localism of southern legal history perpetuated the fundamental institutions of the South: slavery and racial discrimination. Localism reflected a belief that no one . . . should interfere with the institutions of the South." One upshot of that long-term pattern was "the existence of fewer and weaker legal institutions [in the South] than in the North;" another was the general scholarly consensus that the South has always been "more lawless than the rest of the Nation."[19]

The late nineteenth century featured the rare racial equality victory such as *Strauder v. West Virginia*,[20] but only in the early

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[16] Sydnor, *supra* note 12, at 12–13.

[17] Carl Brent Swisher, *The Supreme Court and the South*, 10 J. POL. 282, 294, 305 (1948).

[18] Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 100, 110, 115 (1985).

[19] *Id.* at 103, 109, 116; *see also* Sheldon Hackney, *Southern Violence*, 74 AM. HIST. REV. 906, 906 (1969); John Shelton Reed, *To Live—and Die—in Dixie: A Contribution to the Study of Southern Violence*, 86 POL. SCI. Q. 429, 430 (1971).

[20] 100 U.S. 303 (1880).

twentieth century did the Supreme Court begin to exercise the sort of critical review of southern legal misconduct that gradually began to point towards the types of criminal justice holdings that would define the post-*Brown* era.[21] Michael Klarman has traced the Court's progression from *Moore v. Dempsey*[22] in 1923 to the successive pair of Scottsboro cases, *Powell v. Alabama*[23] and *Norris v. Alabama*,[24] in 1932 and 1935, to *Brown v. Mississippi*[25] in 1936. All four cases concerned black defendants, and while Klarman rightly observes that "the linkage between the birth of modern criminal procedure and southern black defendants is no fortuity," he also correctly notes that "none of these rulings had a very significant direct impact on Jim Crow justice" in the South.[26]

The fact that "these Supreme Court decisions made little practical difference to southern blacks enmeshed in the Jim Crow legal system" says less about the power of the Supreme Court than it does about the disinterest and defiance with which southern state judges responded to federal constitutional mandates. *Norris*, Klarman observes, "was defied without repercussion for an entire generation" in the South and exemplified how "a state judiciary determined to have its way and willing to dissemble in doing so possessed a wide variety of means for frustrating federal court intervention."[27]

Gerald Rosenberg, like Klarman, emphasizes the important point that *Brown v. Board of Education* actually did not fundamentally alter the South's pre-existing attitude toward the U.S. Supreme Court: "The white South had been ignoring Court decisions throughout the twentieth century" from well before

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[21] *See* Buchanan v. Warley, 245 U.S. 60 (1917); Myers v. Anderson, 238 U.S. 368 (1915); Guinn v. United States, 238 U.S. 347 (1915); Bailey v. Alabama, 219 U.S. 219 (1911).

[22] 261 U.S. 86 (1923).

[23] 287 U.S. 45 (1932).

[24] 294 U.S. 587 (1935).

[25] 297 U.S. 278 (1936).

[26] Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48–49 (2000); *see also* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1305–06 (1982) (observing that "there can be little doubt that" those cases "made new criminal procedure law in part because the notorious facts of each case exemplified the national scandal of racist southern justice").

[27] Klarman, *supra* note 26, at 79, 95.

1954.[28] But essentially all of those notable criminal procedure rulings in cases from the South in the years before *Brown*, including the other *Brown*, *Brown v. Allen* from North Carolina in 1953, were ostensibly decided as holdings that did not directly or expressly concern race. As George Thomas has insightfully pointed out, "race was often the 'elephant in the room,' the unspoken reason that the Court granted certiorari and reversed state court judgments . . . . [e]ven though race was almost never the articulated reason" for the Court's decision.[29]

None of these criminal procedure cases, not even the Scottsboro duo, are anywhere near as well remembered by either civil rights scholars or most legal historians as are the much more explicitly racial cases involving the so-called "white primary" which culminated in *Smith v. Allwright*[30] in 1944, the graduate school desegregation decisions which climaxed in *Sweatt v. Painter*[31] in 1950, or even more singular pre-*Brown* rulings striking down segregated seating practices in interstate public transportation[32] and racially restrictive covenants.[33] But the criminal procedure decisions reflected a deep and continuing suspicion toward the South and southern judicial practices on the part of the Court, a suspicion that would become visible and explicit in the post-*Brown* years. *Brown* indeed represented a climax of the racial equality rulings that reached from *Gaines* to *Sweatt*, but school segregation stood far from alone in the Court's concerns about the vindication of constitutional rights throughout the South both before and after May 17, 1954.

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[28] Gerald N. Rosenberg, *Bringing Politics Back In*, 95 NW. U. L. REV. 309, 316 (2006); *see also* Klarman, *supra* note 26, at 95 ("The criminal procedure decisions of the interwar period foreshadowed the southern white response to *Brown v. Board of Education*.").

[29] George C. Thomas III, *Through a Glass Darkly: Seeing the Real Warren Court Criminal Justice Legacy*, 3 OHIO ST. J. CRIM. L. 1, 6–7 (2005).

[30] 321 U.S. 649 (1944); *see also* United States v. Classic, 313 U.S. 299 (1941); Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

[31] 339 U.S. 629 (1950); *see also* McLaurin v. Okla. State Regents, 339 U.S. 637 (1950); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

[32] *See* Morgan v. Virginia, 328 U.S. 373 (1946).

[33] *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

## PART II

*Brown v. Board of Education* itself has been the subject of such extensive discussion and analysis that only one utterly crucial truth about the *Brown I* opinion requires reiteration here. As Scot Powe has succinctly put it in his insightful and indeed landmark book on the Warren Court, the tangibly essential question of "[w]hat is school segregation?" was one that Chief Justice Warren's unanimous opinion for the Court simply "never addressed."[34] One need not fully embrace Powe's further argument that Warren's *Brown I* opinion "failed in all its functions except result," and most especially in not offering a persuasive argument to the white South regarding the constitutional necessity of desegregated schooling, in order to appreciate how very, very little *Brown I* actually said about what full compliance with its ruling should entail.[35]

It is of course even better known, to quote Powe again, that the Court's 1955 opinion in *Brown II* "read like a southern victory."[36] The inherent indeterminacy of the Court's memorable invocation of "all deliberate speed"[37] was coupled with an ongoing failure to address or explain exactly what the elimination of racially segregated schooling would require. That twice-repeated error then directly opened the door for the exceptionally influential interpretive handiwork that Chief Judge John J. Parker of the Fourth Circuit Court of Appeals applied to the two *Brown* rulings when the South Carolina case, *Briggs v. Elliott*, was remanded to its three-judge lower court panel in the wake of *Brown II*.

Parker's savvy brilliance on behalf of continued segregation did not defy the letter of *Brown* even as it appeared to contravene its spirit. The Supreme Court, Parker wrote, "has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains." Thus, Parker continued, "if the schools which

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[34] LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 50 (2000) [hereinafter POWE, THE WARREN COURT].

[35] *Id.* at 45.

[36] *Id.* at 57.

[37] Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools."[38]

Nothing in the pair of *Brown* decisions, Parker went on, "takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation."[39]

In the years immediately after Parker's judicial tour de force, the Supreme Court's most notable, and indeed justly famous, follow-up ruling on school desegregation was of course *Cooper v. Aaron*,[40] resolving the internationally notorious standoff that had occurred at Little Rock's Central High School. *Cooper*, like *Brown*, has been extensively discussed and analyzed, and its status as a landmark declaration of the Court's uppermost role in propounding the law of the Constitution is widely acknowledged. But within the narrower and more immediate or short-term context of post-*Brown* school desegregation in the South, *Cooper* was all bark, no bite. As Scot Powe has pointedly asserted, "[t]he rhetoric of *Cooper v. Aaron* was the boasting of the weak. The Court's claim of judicial supremacy, where its decisions became the Constitution, was bravado substituting for an inability to do anything."[41]

Far less well-known than *Cooper*, but far more indicative of the actual reality of southern school desegregation in the late 1950s, was *Shuttlesworth v. Birmingham Board of Education*,[42] a one-sentence per curiam Supreme Court affirmance of a lower court ruling holding that Alabama's new pupil placement law could not be presumed to be unconstitutional in advance of its actual implementation. Such "freedom of choice" plans built upon Judge Parker's distinctions in *Briggs*, but the Supreme

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[38] Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

[39] *Id.*

[40] 358 U.S. 1 (1958).

[41] L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 713–14 (2003).

[42] 358 U.S. 101 (1958).

Court's tolerance of them meant that the "constitutional rights of African-Americans could be delayed as necessary."[43]

Scot Powe accurately represents the scholarly consensus when he observes that "the great victory in *Brown* had little follow-up" because "the Court was missing in action" for almost a full decade apart from *Cooper* and *Shuttlesworth*.[44] But while that conclusion is well-known across a great sweep of historiography, the full extent of the Court's nervous evasion of any further potential confrontations with southern legal norms and southern state courts in the years immediately after *Brown* is not widely appreciated or understood. Four separate cases illuminate the depth and extent of that High Court evasiveness, and each one of them merits a succinct characterization. Cumulatively, they highlight how exceptionally hesitant and deferential the Warren Court was toward post-*Brown* southern legal malfeasance until the Black freedom struggle gathered full force in 1960 and 1961.

Linnie Jackson was an Alabama black woman who was sentenced to five years' imprisonment for the crime of marrying A.C. Burcham, a man who happened to be white. The Alabama Court of Appeals affirmed her conviction, and the Alabama Supreme Court denied review.[45] When her petition arrived at the U.S. Supreme Court in the fall of 1954, less than six months after *Brown I*, Justice William O. Douglas's law clerk, Harvey M. Grossman, told the Justice that "[i]t seems clear that the statute involved is unconstitutional," pursuant to *Brown*. However, Grossman added, "review at the present time would probably increase the tensions growing out of the school segregation cases and perhaps impede solution to that problem, and therefore the Court may wish to defer action until a future time." Nonetheless, Grossman went on, considering the "serious consequences to the petitioner" if the High Court failed to act, "review is probably warranted even though action might be postponed until the school segregation problem is solved."[46]

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[43] POWE, THE WARREN COURT, *supra* note 34, at 164.

[44] *Id.* at 171, 177.

[45] *See* Jackson v. State, 72 So. 2d 114 (Ala. Ct. App.), *cert. denied*, 72 So. 2d 116 (Ala. 1954).

[46] Memorandum from Harvey M. Grossman, Law Clerk, to Justice William O. Douglas (Nov. 3, 1954) (on file with Library of Congress, Justice William O. Douglas Papers, Box 1156), *quoted in* Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 CHI.-KENT L. REV. 371, 416

Douglas agreed that the Court should grant Jackson's petition for review, as did Chief Justice Warren and Justice Hugo L. Black,[47] but three votes was one fewer than necessary for certiorari to be granted, and when her petition was denied, none of the Justices publicly dissented.[48] Linnie Jackson went to prison for five years for the crime of interracial marriage.[49]

Jackson's penalty was not the worst that would befall black victims of the Warren Court's pusillanimous conflict avoidance. Aubry Williams was a black Georgian whose 1953 conviction for murdering an Atlanta liquor store owner came at the hands of an all-white jury whose selection procedure was held unconstitutional in a separate case decided by the U.S. Supreme Court less than three months later.[50] Notwithstanding that ruling, the Georgia Supreme Court subsequently affirmed both Williams's conviction and his sentence of death by execution.[51] When Williams's attorneys lodged a further appeal, the Georgia court again rejected it.[52]

Williams then petitioned the U.S. Supreme Court, which granted certiorari in October 1954.[53] The Court heard argument the following April, and in early June 1955, by a six-to-three vote, the Justices announced that Williams was entitled to a new trial but held back from formally ordering one.[54] Complicated

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(1994); *see also* PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 179–80 (2002) [hereinafter WALLENSTEIN, TELL THE COURT I LOVE MY WIFE].

[47] *See* Gregory Michael Dorr, *Principled Expediency: Eugenics,* Naim v. Naim, *and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 153 n.148 (1998) (citing Cover Sheet to Memorandum from Grossman to Douglas, *supra* note 46).

[48] Jackson v. Alabama, 348 U.S. 888 (1954). Six months later, when a five-Justice majority dismissed a case from Iowa challenging the constitutionality of racially segregated cemeteries, Black, Warren, and Douglas dissented publicly, asserting that the issue should be decided. *See* Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 80 (1955) (Black, J., dissenting); *see also* STEPHEN L. WASBY ET AL., DESEGREGATION FROM *BROWN* TO *ALEXANDER* 132–35 (1977).

[49] *See* Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority:* Williams v. Georgia *Revisited*, 103 YALE L.J. 1423, 1475 (1994); *see also* POWE, THE WARREN COURT, *supra* note 34, at 71.

[50] *See* Avery v. Georgia, 345 U.S. 559, 561–63 (1953); Dickson, *supra* note 49, at 1427–29.

[51] Williams v. State, 78 S.E.2d 521, 524 (Ga. 1953). *But see* Coleman v. State, 523 S.E.2d 852 (Ga. 1999) (disapproving of the language that the trial court used to instruct the jury on reasonable doubt).

[52] Williams v. State, 82 S.E.2d 217 (Ga. 1954).

[53] Williams v. Georgia, 348 U.S. 854 (1954).

[54] Williams v. Georgia, 349 U.S. 375, 389–91 (1955); *see also* Jerry K. Beatty,

and worthy doctrinal considerations underlay the majority's decision to remand the case in the manner that was chosen,[55] but just two days later the Georgia Supreme Court responded with a defiantly unanimous opinion declaring that the U.S. High Court lacked jurisdiction to issue the decision that it had.[56]

As Del Dickson recounts in his impressively detailed and original account of *Williams*, the following month the board of governors of the Georgia Bar Association unanimously approved a resolution congratulating the Georgia court for its response.[57] Amongst the Justices on the U.S. Court, discussion shifted away from Williams's right to a new trial and "debate began to focus instead on how to limit the potential harm to the Court" itself from the Georgia court's defiance.[58] Following almost two full months of further private deliberations about Williams's case,[59] in mid-January 1956 the Justices voted unanimously against any further grant of certiorari.[60] On March 30, 1956, Aubry Williams was electrocuted at Reidsville State Prison.[61]

Linnie Jackson's unsuccessful appeal of her five-year sentence for committing the crime of interracial marriage may have passed almost without public notice, but *Williams v. Georgia* attracted widespread attention all across the South. Dickson argues that *Williams* "was widely seen" as an "outright capitulation in the face of determined state resistance" and indicated "that the Warren Court was likely to retreat when confronted by determined state resistance."[62]

And *Williams* was not alone. At the very same time that the Justices were mulling whether to retreat in full in the face of the Georgia Supreme Court's defiance, they were confronted with a

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*State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U. L. REV. 260, 283 (1972) (noting "the reluctance of the Supreme Court to summarily reverse a state court decision on first appeal" even in the 1960s).

[55] See Dickson, *supra* note 49, at 1432–56, for a detailed and comprehensive narration of the Supreme Court's private discussions and deliberations leading up to the *Williams* decision.

[56] Williams v. State, 88 S.E.2d 376 (Ga. 1955).

[57] Dickson, *supra* note 49, at 1470.

[58] *Id.* at 1459.

[59] *Id.* at 1459–64.

[60] Williams v. Georgia, 350 U.S. 950 (1956).

[61] *See* Dickson, *supra* note 49, at 1465; *see also* Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1021 (1959).

[62] Dickson, *supra* note 49, at 1426, 1480.

direct appeal of a Virginia case, *Naim v. Naim*, which posed the same fundamental question they had refused to address in *Jackson*. In *Naim*, Virginia's courts had cited their state's anti-miscegenation law in siding with a white woman, Ruby Elaine Naim, who sought an annulment of her out-of-state marriage to a Chinese man, Ham Say Naim, who could be deported if his marital status was voided.[63] In early November, 1955, Justice Felix Frankfurter wrote his colleagues to underscore " 'the Court's responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases' " by its handling of *Naim*. More pointedly, Frankfurter said that " 'to throw a decision of this Court other than validating this legislation into the vortex of the present disquietude would . . . seriously, I believe very seriously, embarrass the carrying out of the Court's decree of last May' " in *Brown II*.[64]

After some uncertainty and confusion among the Justices, including at least initial tentative acceptance of the case by Chief Justice Warren and Justices Douglas, Black, and Stanley F. Reed,[65] the Court unanimously remanded *Naim v. Naim* to the Virginia Supreme Court in an unsigned per curiam opinion that purported to assert that the factual record in the case was insufficiently clear enough to allow a decision.[66] Virginia's high court, however, understandably responded that the necessary facts were quite clear,[67] and the case then again returned to the U.S. Supreme Court. On March 12, 1956, the Justices, having already resolved the necessity of ducking the constitutional contradiction that *Naim* directly presented, dismissed the appeal for supposedly lacking "a properly presented federal question."[68] The available historical record is silent as to whether Ham Say Naim was indeed then deported to China.[69]

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[63] Naim v. Naim, 87 S.E.2d 749, 750–51, 756 (Va. 1955), *vacated by* 350 U.S. 891 (1956).

[64] Memorandum from Justice Felix Frankfurter to Other Supreme Court Justices (Nov. 4, 1955) (on file with Princeton University, Mudd Library, John Marshall Harlan Papers, Box 11), *quoted in* WALLENSTEIN, TELL THE COURT I LOVE MY WIFE, *supra* note 46, at 182.

[65] *See* Dorr, *supra* note 47, at 153–55.

[66] Naim v. Naim, 350 U.S. 891 (1956).

[67] Naim v. Naim, 90 S.E.2d 849 (Ga. 1956).

[68] Naim v. Naim, 350 U.S. 985 (1956).

[69] *See* POWE, THE WARREN COURT, *supra* note 34, at 71–73; *see also* WASBY ET AL., *supra* note 48, at 140–41.

*Naim* was an embarrassing dodge explainable, at least in the Justices' eyes, by the perceived sensitivity of the particular subject matter. Virgil Hawkins's case from Florida involved no such sensitivity, and indeed presented a question the Supreme Court had considered and decided more than fifteen years earlier in *Gaines*: the admission of a black applicant to an all-white state university law school. Hawkins began his effort to enroll in 1949, and after several fruitless trips to the Florida Supreme Court,[70] his petition reached the Supreme Court while *Brown v. Board of Education* was under consideration. One week after *Brown I* was announced, the High Court remanded Hawkins's case to the Florida Supreme Court "in the light of the Segregation Cases decided May 17, 1954 . . . and conditions that now prevail."[71]

However, the Florida court, after failing to act for more than sixteen months, then refused to order Hawkins's admission to the still-segregated state university law school on the grounds that the intervening opinion in *Brown II* authorized local courts to decide the best time for initial desegregation.[72] Hawkins again returned to the U.S. Supreme Court, and on March 12, 1956, the Justices issued a brief ruling citing *Sweatt*, *Sipuel*, and *McLaurin* and noting that *Brown* "did not imply that decrees involving graduate study present the problems of public elementary and secondary schools." More particularly, they informed the Florida court that *Brown II* "had no application to a case involving a Negro applying for admission to a state law school." They instructed that in the case at hand, "there is no reason for delay. He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates."[73]

But the Florida court still refused to relent. After another delay of almost an entire year, a majority of the Florida justices again spurned Hawkins's appeal for immediate admission.[74]

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[70] *See* State *ex rel.* Hawkins v. Bd. of Control, 53 So. 2d 116 (Fla.), *cert. denied*, 342 U.S. 877 (1951); State *ex rel.* Hawkins v. Bd. of Control, 60 So. 2d 162 (Fla. 1952); *see also* Darryl Paulson & Paul Hawkes, *Desegregating the University of Florida Law School:* Virgil Hawkins v. The Florida Board of Control, 12 FLA. ST. U. L. REV. 59, 59–62 (1984).

[71] State *ex rel.* Hawkins v. Bd. of Control, 347 U.S. 971 (1954).

[72] State *ex rel.* Hawkins v. Bd. of Control, 83 So. 2d 20, 24 (Fla. 1955); *see also* Paulson & Hawkes, *supra* note 70, at 62–64.

[73] State *ex rel.* Hawkins v. Bd. of Control, 350 U.S. 413, 413–14 (1956).

[74] State *ex rel.* Hawkins v. Bd. of Control, 93 So. 2d 354 (Fla. 1957); *see also* Beatty, *supra* note 54, at 264 (noting especially "the evasiveness of southern supreme courts"); Paulson & Hawkes, *supra* note 70, at 64–68.

Back to the U.S. Supreme Court went Hawkins once more, but this time the Justices quietly washed their hands of the matter in a brief order that denied certiorari "without prejudice to the petitioner's seeking relief in an appropriate United States District Court" in Florida.[75] Hawkins followed that path, but was initially rebuffed by U.S. District Judge Dozier DeVane, whom the Fifth Circuit Court of Appeals quickly reversed.[76] Florida then altered and toughened the law school's previous admissions standards so as to make Hawkins ineligible, and when the case returned to the district court, Judge DeVane finally issued an injunction prohibiting the law school from admitting only white students. Virgil Hawkins entered a graduate program at Boston University in Massachusetts, but another black applicant became Florida's first black law student in September 1958.[77]

*Hawkins* was a judicial embarrassment of the highest order: even three years after *Brown*, the U.S. Supreme Court was unable to desegregate the University of Florida Law School by securing the admission of a black student who had been attempting to enroll for over eight years. As Robert J. Glennon has argued, *Hawkins* demonstrated how "[a] determined state court could find ways to evade a higher court's rulings," for "even explicit directions from the Supreme Court did not deflect the Florida court from its efforts to maintain an all-white university."[78] Hawkins's personal misfortune may not have equaled that of Aubry Williams, Linnie Jackson, or presumably Ham Say Naim, but all four individuals can rightly be seen as victims of *Brown*—unfortunate people whose personal fates had to be sacrificed as part of the far more momentous institutional task of protecting *Brown* from outright defiance or evisceration.

Del Dickson has made the overview argument more strongly and cogently than anyone else: "[T]he Warren Court sought to protect its own authority and the integrity of *Brown* by attempting to avoid potentially damaging confrontations with

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[75] State *ex rel.* Hawkins v. Bd. of Control, 355 U.S. 839 (1957).

[76] Hawkins v. Bd. of Control, 253 F.2d 752 (5th Cir. 1958).

[77] Hawkins v. Bd. of Control, 162 F. Supp. 851 (N.D. Fla. 1958); *see also* Murphy, *supra* note 61, at 1020–21, 1030–31 n.62; Paulson & Hawkes, *supra* note 70, at 68–70; MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 235–38 (1994); POWE, THE WARREN COURT, *supra* note 34, at 63–65.

[78] Robert J. Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 883 (1994).

Southern governments over ancillary racial issues, even when serious individual injustices resulted." In *Williams*, just as in *Jackson*, *Naim*, and *Hawkins*, "the Justices feared that a showdown with the Southern states over this case would cost the Court too dearly in terms of image and authority, undermining the Court's efforts to secure Southern compliance with *Brown*."[79]

But Dickson further argues that the Court's strategy was not only costly, but a failure. The stand-down in *Williams*, he writes, "helped to spark a Southern backlash against the Warren Court and inspired increased opposition to the Court's desegregation policies." To "Southern elites—especially government officials and lawyers," Dickson explains, *Williams* (and *Hawkins* even moreso) demonstrated "that it was possible for the South to stand up to the Warren Court on issues of race and get away with it," and showed how "the costs of noncompliance with the Court's desegregation decisions were likely to be quite low."[80]

## PART III

But the Court's efforts to minimize further open conflict with southern courts and officialdom made perfect judicial sense. William Ross's superb and under-appreciated study of political attacks on the Warren Court stresses how even before *Brown*, and before Warren's own arrival, there had been a "growing antagonism toward the Court by a broad range of conservatives during the period between 1937 and 1954." Starting a full decade before *Brown*, high-impact rulings such as *Smith v. Allwright*, which struck down the politically-decisive all-white Democratic primary, had "particularly antagonized many Southerners."[81] The most thorough and careful histories of the mid-1950s also point out how neither *Brown I* nor *Brown II* generated any immediately highstrung southern backlash.[82] Indeed, only as the Montgomery Bus Boycott began to attract

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[79] Dickson, *supra* note 49, at 1426, 1478.

[80] *Id.* at 1426, 1469, 1479.

[81] William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 487, 489 (2002).

[82] *See* FRANCIS M. WILHOIT, THE POLITICS OF MASSIVE RESISTANCE 27, 40 (1973); MICHAL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER 29 (1987); *see also* David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151, 158–59 (1994) [hereinafter Garrow, *Hopelessly Hollow History*] (surveying and summarizing the historiography).

regional attention in the early weeks of 1956, and as Autherine Lucy's short-lived desegregation of the University of Alabama generated intense segregationist turmoil,[83] did "massive resistance" objections to *Brown*'s promise of widespread school desegregation finally build to a white-hot glow.[84]

The symbolic leading edge of that resistance, the so-called "Southern Manifesto," signed by one hundred southern members of the U.S. Congress, was issued on March 12, 1956—perchance the very same day that the U.S. Supreme Court refused to decide *Naim v. Naim* and unsuccessfully attempted to instruct the Florida Supreme Court to order Virgil Hawkins's admission to the University of Florida School of Law![85] As Anthony Lewis wrote a decade later, the "true meaning of the Manifesto was to make defiance of the Supreme Court and the Constitution socially acceptable in the South—to give resistance to the law the approval of the Southern Establishment."[86]

But the "Manifesto" was more a prolegomena, and not the crest, of the increasingly vituperative attacks on the Warren Court. As both Scot Powe and William Ross cogently emphasize, the intensifying southern anger at the prospects of real desegregation resulting from the new upsurge in Deep South Black activism was soon augmented and amplified by more widespread anger over a pair of new anti-subversion decisions by the Court. The particulars of *Pennsylvania v. Nelson*[87] and *Slochower v. Board of Education*[88] need not be recounted here, but in the political context of the day, just three weeks after the "Manifesto," both rulings were easily susceptible to simple-minded categorization as "pro-Communist." As Powe writes, "*Nelson* and *Slochower* were a godsend to southerners. The decisions gave them allies against the Court—national security conservatives," and also gave white southerners "an opening to legitimize their criticisms" that were grounded in race—"an opening they gladly took."[89]

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[83] *See* Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala.), *aff'd*, 350 U.S. 1 (1955); Adams v. Lucy, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1956); *see also* WASBY ET AL., *supra* note 48, at 164.

[84] *See* Garrow, *Hopelessly Hollow History*, *supra* note 82, at 158–59.

[85] *See supra* notes 67, 72.

[86] ANTHONY LEWIS & N.Y. TIMES, PORTRAIT OF A DECADE 45 (1964).

[87] 350 U.S. 497 (1956).

[88] 350 U.S. 551 (1956).

[89] POWE, THE WARREN COURT, *supra* note 34, at 84–85.

Ross observes that "the already intense controversy over the Supreme Court suddenly escalated and greatly broadened during the spring of 1956,"[90] but the temperature rose even further during the next term of Court. A dozen cases involving communism were on the docket, and as the term progressed, each successive ruling sided with those alleged to have subversive affiliations. Then, on June 17, 1957, which critics soon labeled "Red Monday," the Court issued four more decisions, each of which struck down one or another form of prosecution or persecution of supposed Communists.[91] As Powe comments, the rulings were "nothing short of astounding," for "[o]ver the entire term, the communist position had been sustained every time."[92]

One week later, in *Mallory v. United States*, the Court overturned a criminal conviction and death sentence for a brutal rape on the grounds that the defendant's confession was improperly secured.[93] That decision added yet more fuel to the fire.[94] As Ross observes, "[t]he Court's decisions on subversion and crime rapidly transformed organized opposition to the Court from an isolated southern phenomenon into a nationwide movement" that saw more Court-curbing legislative proposals receive "serious consideration during 1957–58 than at any time in the nation's history."[95] In addition, the Court's critics received the public blessing of U.S. Circuit Judge Learned Hand, arguably the nation's most respected jurist, in a trio of lectures Hand delivered at Harvard University in early 1958.[96] Nonetheless, the Court-curbing movement began to lose steam, and then

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[90] Ross, *supra* note 81, at 497.

[91] *See* Watkins v. United States, 354 U.S. 178 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Yates v. United States, 354 U.S. 298 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978) (overruling prior cases to the extent that they recognized appellate courts' authority to order a new trial following a finding that the prosecution's evidence was legally insufficient); Service v. Dulles, 354 U.S. 363 (1957); *see also* ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY 138–72 (1999).

[92] POWE, THE WARREN COURT, *supra* note 34, at 98.

[93] 354 U.S. 449, 455 (1957).

[94] *See* CLIFFORD M. LYTLE, THE WARREN COURT & ITS CRITICS 43–44, 73–76 (1968); *see also* Murphy, *supra* note 61, at 1023–25.

[95] Ross, *supra* note 81, at 499, 502; *see also* LYTLE, *supra* note 94, at 6–7, 15–18, 25, 29–42.

[96] *See* LEARNED HAND, THE BILL OF RIGHTS (1958); *see also* POWE, THE WARREN COURT, *supra* note 34, at 129–30 (commenting that in Hand, "[t]he South had acquired an ally of unquestioned and unquestionable stature").

sputtered badly, at the very end of the 1950s,[97] yet as the new decade dawned, southern animus towards the Warren Court could draw on a reservoir of support that reached well beyond expressly segregationist critics of *Brown*.

## PART IV

Next to *Brown* in the pantheon of Warren Court rulings there is of course *Baker v. Carr*. As Robert McCloskey wrote just months after *Baker* came down, with the sole exception of *Brown I* "it is hard to recall a decision in modern history which has had such an immediate and significant effect on the practical course of events."[98] *Baker* came from the South, from Tennessee, and although it did not directly involve race,[99] its core, landmark holding that challenges to representational apportionments alleging violations of the Fourteenth Amendment's Equal Protection Clause are indeed justiciable,[100] was greatly aided and informed by, if not explicitly based upon,[101] the Court's previous vindication of black citizens' municipal right to vote in Tuskegee, Alabama, just sixteen months earlier in *Gomillion v. Lightfoot*.[102] Additionally, even though gross malapportionment was not a problem exclusive to southern states—Illinois, for instance, was notoriously imbalanced[103]—most southern states, including particularly Alabama, Georgia, and South Carolina[104]—suffered from districting schemes that gave vastly exaggerated representation to rural counties and truncated the potential political power of city and suburban voters.

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[97] *See* C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT 1957–1960, at 13 (1961); *see also* WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS (1962).

[98] Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 56 (1962).

[99] *See* GENE GRAHAM, ONE MAN, ONE VOTE: *BAKER V. CARR* AND THE AMERICAN LEVELLERS 14 (1972) (stating that the legislative apportionment issue in *Baker v. Carr* had its earliest roots in the disparate opinions of Tennessee citizens concerning the abolition of slavery).

[100] Baker v. Carr, 369 U.S. 186, 237 (1962).

[101] *Id.* at 229–31.

[102] 364 U.S. 339 (1960).

[103] *See* Colegrove v. Green, 328 U.S. 549 (1946).

[104] *See generally* Bryant Simon, *The Devaluation of the Vote: Legislative Apportionment and Inequality in South Carolina, 1890–1962*, S.C. HIST. MAG., July 1996, at 227–45; *cf.* POWE, THE WARREN COURT, *supra* note 34, at 493 ("[T]he South had some of the most starkly malapportioned legislatures.").

As Stephen Ansolabehere and Sam Issacharoff have rightly said, *Baker* "marked a profound transformation in American democracy."[105] Indeed, no doubt the single best-known and most widely-quoted characterization of *Baker* is that of Earl Warren himself, who termed it—and not *Brown*—"the most important case of my tenure on the Court."[106] William Ross recounts how *Baker* too quickly became a "lightning rod for criticism of the Court,"[107] but, unlike the Court's hesitation and uncertainty in the wake of both *Brown I* and *II*, the Justices quickly followed up on and extended the meaning and application of *Baker*'s holding with alacrity. First came *Gray v. Sanders* in 1963, striking down Georgia's notorious "county unit system" for electing statewide officials,[108] then *Wesberry v. Sanders*, voiding Georgia's malapportioned congressional districts, in early 1964.[109]

But the crowning shock was *Reynolds v. Sims* in June, 1964, which constitutionally mandated equipopulous districting for both houses of bicameral state legislatures, and not just the lower chambers. *Reynolds*'s Equal Protection holding cited first and foremost to *Brown v. Board of Education* rather than to earlier voting cases,[110] and as Michal Belknap has emphasized, "[t]he Warren Court saw its reapportionment rulings as based on the same constitutional guarantee as *Brown v. Board of Education* and perceived a close relationship between the two."[111]

Writing in the *New York Times* a few days after *Reynolds* and its five companion cases came down,[112] Anthony Lewis said that the breadth of *Reynolds*'s holding left even sympathetic observers "stunned."[113] Ansolabehere and Issacharoff, looking back forty years later, called *Reynolds* "an earth-shattering decision, going well beyond what anyone could have anticipated

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[105] Stephen Ansolabehere & Samuel Issacharoff, *The Story of* Baker v. Carr, *in* CONSTITUTIONAL LAW STORIES 297, 297 (Michael C. Dorf ed., 2004).

[106] EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977).

[107] Ross, *supra* note 81, at 532; *see also* LYTLE, *supra* note 94, at 8–9.

[108] 372 U.S. 368, 381 (1963).

[109] 376 U.S. 1 (1964).

[110] *See* Reynolds v. Sims, 377 U.S. 533, 566 (1964).

[111] Belknap, *The Real Significance of* Brown, *supra* note 10, at 887–88.

[112] *See* WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) (New York); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964) (Maryland); Davis v. Mann, 377 U.S. 678, 690 (1964) (Virginia); Roman v. Sincock, 377 U.S. 695 (1964) (Delaware); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964) (Colorado).

[113] Anthony Lewis, *Supreme Court Moves Again to Exert Its Powerful Influence*, N.Y. TIMES, June 21, 1964, at E3.

from the Court's holding in *Baker v. Carr*."[114] Scot Powe agrees, saying that *Reynolds* went "far beyond what anyone thought that *Baker* had foretold." Recalling Earl Warren's characterization of *Baker* as his Court's most important case, Powe adds that "when he said *Baker* he meant *Reynolds*."[115]

William Ross recounts how the hostile conservative reaction to *Reynolds* eclipsed the earlier criticism of *Baker*. Indeed, it's fascinating to appreciate how almost completely the historiography of the 1960s has forgotten just how intense the negative response to *Reynolds* was. For example, two months after the ruling, the House of Representatives, by a floor vote of 218 to 175, approved a bill eliminating federal courts' jurisdiction over all pending, and future, complaints challenging the apportionment of state legislatures.[116] The measure had no chance of passage in the Senate, but a year later a decisive majority of senators voted in favor of a proposed constitutional amendment that would allow states with bicameral legislatures to apportion one house on a basis other than population equality. That margin of fifty-seven to thirty-nine fell short of the two-thirds majority required for a constitutional amendment,[117] and a year later a repeat attempt secured another insufficient fifty-five to thirty-eight majority.[118] In addition, a constitutional convention to consider such an amendment could be called at the request of two-thirds of state legislatures, and although a total of thirty-three state legislatures did approve such a call between 1964 and 1969, that figure fell one state short of the thirty-four required.[119]

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[114] Ansolabehere & Issacharoff, *supra* note 105, at 322.

[115] POWE, THE WARREN COURT, *supra* note 34, at 247.

[116] E.W. Kenworthy, *House Votes Ban on Court Power to Reapportion*, N.Y. TIMES, Aug. 20, 1964, at 1.

[117] E.W. Kenworthy, *Dirksen Proposal on Redistricting Beaten in Senate*, N.Y. TIMES, Aug. 5, 1965, at 1.

[118] E.W. Kenworthy, *Senate Again Balks Dirksen by Seven Votes in Districting Fight*, N.Y. TIMES, Apr. 21, 1966, at 1.

[119] *See Wisconsin Refuses to Become 34th State to Adopt Dirksen Plan*, N.Y. TIMES, Nov. 5, 1969, at 37; *Constitutional Convention Drive Gets Mixed Response in Nation*, N.Y. TIMES, June 28, 1969, at 17; Warren Weaver, Jr., *Senators Take Up Charter Parley*, N.Y. TIMES, June 14, 1969, at 27; *Foes Losing Fight on One Man, One Vote*, N.Y. TIMES, Oct. 26, 1965, at 27; E.W. Kenworthy, *Dirksen Hopeful on Apportioning*, N.Y. TIMES, May 23, 1965, at 39. Twenty-eight of those thirty-three states approved their resolutions prior to 1967; four did so in 1967. Fred P. Graham, *Efforts to Amend the Constitution on Districts Gain*, N.Y. TIMES, Mar. 18, 1967, at 1. One state, Iowa, approved the resolution in 1969. Fred P. Graham, *Thirty-Third*

Yet just as fascinating as the historical amnesia about the scope of hostile response to *Baker* and *Reynolds* is the speed with which that hostility dissolved and disappeared. Ross writes that after 1966, opposition to equipopulous representation "quickly withered away,"[120] and Powe remarks that "*Reynolds* went from debatable in 1964 to unquestionable in 1968."[121] Yet the historiography is remarkably incurious and silent as to why this bout of opposition to the Warren Court—arguably for a time the strongest counterattack that occurred—melted away so quickly and quietly. Ross suggests that "the prominence of segregationists among proponents of Court-curbing helped to stigmatize efforts to curb the Court even among many advocates of states' rights," but further exploration would be desirable.[122]

## PART V

One of the least appreciated aspects of the Warren Court's jurisprudence concerns what Powe has called "[t]he [g]eography of [c]onstitutional [v]iolations."[123] Powe indeed argues further that "the dominant motif of the Warren Court is an assault on the South as a unique legal and cultural region."[124] Yet beyond the panoply of de jure segregation statutes and ordinances, and

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*State Backs Dirksen Proposal*, N.Y. TIMES, May 1, 1969, at 60.

120 Ross, *supra* note 81, at 585.

121 POWE, THE WARREN COURT, *supra* note 34, at 255.

122 Ross, *supra* note 81, at 611; *see also* Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985, 966 (1990) (reporting, without further discussion, that based on the retrospective analysis of contemporary opinion polling, "the issue of reapportionment was almost invisible to the national public in 1964 and 1966 and generated no recollections among those re-interviewed in 1975"); Warren Weaver, Jr., *Support Is Found for Redistricting*, N.Y. TIMES, July 17, 1969, at 55 (reporting that only twenty-three percent of respondents to a June Gallup Poll survey endorsed an anti-reapportionment view, as opposed to fifty-two percent who supported equal districting, with twenty-five percent undecided).

123 POWE, THE WARREN COURT, *supra* note 34, at 489; *see also* Karen O'Connor, *The Supreme Court and the South*, 63 J. POL. 701, 711 (2001) ("[T]he South . . . is the source of a disproportionate amount of litigation that results in a full hearing before the U.S. Supreme Court."); Swisher, *supra* note 17, at 282 ("Because of the peculiar economic and social problems of the South, certain groups of constitutional and statutory issues are raised primarily in cases which arise in that environment."). It is crucial to appreciate that O'Connor's definition of the South encompasses not only the traditional eleven states, but also the District of Columbia, a definition that may call into serious question her data concerning "the neglected role of the South in setting the agenda of the Supreme Court." O'Connor, *supra*, at 702, 708.

124 POWE, THE WARREN COURT, *supra* note 34, at 490.

the widespread discriminatory application of ostensibly nonracial voter registration tests and devices, which were finally swept aside not by Supreme Court rulings but only by the executive and Congress's enactment of the Voting Rights Act of 1965,[125] lies a further crucial arena in which race and region were powerful and perhaps decisive subtexts in a set of rulings "that remade the entire American system of criminal justice."[126]

Of the Warren Court's four most landmark criminal procedure holdings—*Mapp*, *Gideon*, *Escobedo*, and *Miranda*—only one, *Gideon*, came from the South—Panama City, Florida—and Clarence Earl Gideon was of course white, not black. Dollree Mapp, of Cleveland, Ohio, was black, however, and there is a widespread consensus indeed that *Mapp v. Ohio* "set in motion the criminal procedure revolution of the 1960s."[127] Mapp suffered a warrantless home invasion and forceful physical restraint at the hands of a small army of city policemen, and, as the U.S. Commission on Civil Rights observed in a report issued within months of the *Mapp* decision, "statistics suggest that Negroes feel the brunt of official brutality proportionately more than any other group in American society."[128]

Powe contends that "[f]or the quarter-century prior to *Mapp v. Ohio*, the Court's criminal procedure cases were thinly disguised race cases," for, much as the Civil Rights Commission observed, "African-Americans were disproportionately affected by whatever abuses or inequities there were in the criminal justice system."[129] Corinna Lain agrees, saying that as of 1961 the Justices "knew from prior cases that the most egregious abuses of police power were perpetrated against blacks." She adds that "[p]articularly in the Deep South . . . defendants were routinely treated like pieces of meat to be processed and then forwarded for proper packaging."[130]

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[125] *See generally* DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 (1978); STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969 (1976); *see also* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the constitutionality of the Voting Rights Act of 1965); *cf.* Louisiana v. United States, 380 U.S. 145 (1965).

[126] POWE, THE WARREN COURT, *supra* note 34, at 412.

[127] *Id.* at 195.

[128] 5 U.S. COMM'N ON CIVIL RIGHTS, JUSTICE: 1961 U.S. COMMISSION ON CIVIL RIGHTS REPORT 27 (1961).

[129] POWE, THE WARREN COURT, *supra* note 34, at 386, 492.

[130] Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361,

Robert Glennon makes the point that "[b]efore the civil rights movement, the Supreme Court appeared extremely reluctant to interfere with state criminal proceedings," and as late as "the early 1950s, the Supreme Court displayed enormous deference to state courts," "even in cases involving claims of African-American civil rights violations."[131] In the early 1960s that suddenly began to change, and virtually every scholar of the criminal justice revolution believes that the contemporaneous Black freedom struggle was a major spur underlying the Warren Court's decisions.

Herbert Packer was seemingly the first observer to make that argument, in 1966. "Perhaps the most powerful propellant" towards recognizing the human dignity of criminal suspects, Packer said, "has been provided by the Negro's struggle for his civil rights and the response to that struggle by law enforcement in the Southern states."[132] Kenneth Pye seconded that conclusion two years later, writing that "[t]he Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights."[133]

But that conclusion has more than held up over time. Writing four decades after Packer, Corinna Lain observed that "one thing the burgeoning civil rights movement did was give the Supreme Court a reason to distrust the states, especially on matters of criminal procedure."[134] That same year, Michal Belknap stated that "firm opposition to racial discrimination also underlay the Warren Court's famous and controversial criminal justice decisions," for "there was a close link between imposing national standards on law enforcement and promoting the

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1371, 1388 (2004); *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones. Warren-era constitutional criminal procedure began as a kind of antidiscrimination law.").

131 Glennon, *supra* note 78, at 884, 889, 924.

132 Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. LAW, CRIMINOLOGY & POLICE SCI. 238, 240 (1966). Packer added that "[w]hat we have seen in the South is the perversion of the criminal process into an instrument of official oppression," and "the experience in the South during the last decade has driven home the lesson that law enforcement unchecked by law is tyrannous." *Id.*

133 A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1969).

134 Lain, *supra* note 130, at 1388.

equality, particularly racial equality, to which the Warren Court . . . was so deeply committed."[135]

Belknap's point about the Court's desire to impose and expand national standards is an important one that criminal justice scholars underscore. "[T]he thrust of the Court's landmark cases," Ronald Wright notes, "was to centralize, to push state systems toward a more uniform criminal process." It was also a dual-pronged effort, for the Warren Court "unified criminal justice," Wright says, both "by restricting the discretion of police officers operating in the field and of trial judges" in state courtrooms.[136]

*Mapp* was an important example of the former; *Gideon*, for all its fame, was a less important reflection of the latter. Powe calls *Gideon* "the last important purely southern criminal procedure case" in a lineage that reached back to the Scottsboro appeals in the 1930s.[137] It also was of modest practical import, for as Yale Kamisar has emphasized, even "prior to *Gideon*, most states provided indigent defendants with assigned counsel in all serious criminal cases as a matter of state law."[138] Kamisar also notes that "*Gideon* is the only major Warren Court criminal procedure ruling in favor of the defense that met widespread applause," rather than criticism.[139] Indeed it was the only one that mandated the presence of lawyers in a courtroom, rather than particular behavior for police officers on the streets. It brought a small number of "outlier" states into full compliance with national norms, and, as Powe observes, "cases that did not implicitly single out the South were always far more controversial than cases attacking southern backwardness," as with *Gideon*.[140]

The Warren Court's two other landmark criminal procedure rulings, *Escobedo v. Illinois* and *Miranda v. Arizona*, epitomized

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[135] Belknap, *The Real Significance of* Brown, *supra* note 10, at 888–89; *see also* Donald Braman, *Criminal Law and the Pursuit of Equality*, 84 TEX. L. REV. 2097, 2106 (2006).

[136] Ronald F. Wright, *How the Supreme Court Delivers Fire and Ice to State Criminal Justice*, 59 WASH. & LEE L. REV. 1429, 1430 (2002).

[137] POWE, THE WARREN COURT, *supra* note 34, at 386.

[138] Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 OHIO ST. J. CRIM. L. 11, 20 (2005); *see also* Wright, *supra* note 136, at 1435 ("Some of the Warren Court's most celebrated cases, such as *Gideon v. Wainwright*, impacted a surprisingly small number of states.").

[139] Kamisar, *supra* note 138, at 23.

[140] POWE, THE WARREN COURT, *supra* note 34, at 386.

the Court's shift toward the imposition of per se rules in place of the discretionary, case-by-case reasonableness or "balancing" analysis that had characterized pre-1960 decisions.[141] Corinna Lain has noted that "in *Miranda*, racial concerns were just beneath the surface of the Supreme Court's opinion,"[142] and as George Thomas has explained, once an inflexible universal rule was imposed, "there was no need to think about race in deciding interrogation cases" by probing the particular context of police behavior.[143] But underlying that shift from particularized reasonableness to rule-bound formalism was the Justices' own evolving view of how racially-discriminatory the criminal justice system could be: "[T]he Court gradually lost confidence in the integrity of Southern state judges."[144]

## PART VI

Yet the famous criminal procedure rulings like *Mapp*, *Gideon*, and *Miranda* are only one-half of the South's double-barreled contribution to the Warren Court's criminal justice revolution. The other, far less heralded portion involves the family of cases governing state criminal defendants' access to the federal courts both before, and after, convictions against them have been obtained. Much, though not all, of the latter falls within the bounds of federal habeas jurisdiction; much, though not all, of the former, hinges on the concepts of exhaustion and abstention. Both arenas involve complex and highly technical questions of law where attempts at simple summary and interpretation run a far higher than normal risk of unintended error and imprecision, but the practical import of these decisions, and the extent to which they were direct byproducts of southern malfeasance and Black agency, requires that technical complexity not preclude their discussion.

The modern story begins with "the other *Brown*," *Brown v. Allen*, decided just months before Earl Warren's arrival as Chief Justice. As Robert Glennon explains, "*Brown* authorized habeas corpus review of all issues of federal constitutional law alleged to have been erroneously decided by the state courts" that imposed

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141 *See* Glennon, *supra* note 78, at 903.

142 Lain, *supra* note 130, at 1444.

143 Thomas, *supra* note 29, at 7.

144 Glennon, *supra* note 78, at 902.

and upheld a criminal defendant's conviction.[145] *Brown* itself "involved a claim of race discrimination in the selection of the grand jury that indicted the defendant" for rape in Forsyth County, North Carolina, and following conviction the defendant was sentenced to death.[146] But as important as *Brown* was when it was decided,[147] it had even great potential impact in the future, for, as Scot Powe has put it, if and when constitutional rights themselves expanded, "then there would be an equal expansion of issues that could be raised on habeas" in petitions to federal courts.[148]

The opening salvo in the Warren Court's access to federal courts revolution came in 1961 in *Monroe v. Pape*, decided just a few months before *Mapp*. Like *Mapp*, *Monroe* too came from a northern urban setting—this time Chicago—where black householders—James and Flossie Monroe and their six children—had suffered a warrantless early morning police invasion accompanied by gratuitous racial epithets and casual physical assault.[149] The Monroes brought a federal suit for damages against the offending police officers, and, after suffering dismissal in the lower courts, won a landmark reversal allowing them to proceed from the Supreme Court.[150] The explicitly racial context of the case was clear beyond any shadow of a doubt. Glennon rightly observes that "the Court accomplished its goal of giving civil rights plaintiffs a hearing before a federal judge,"[151] and Powe, quickly counterbalancing the difference between short-term obscurity and long-term impact, rues how *Monroe*, "so important for the past three decades, remained an obscure case until after the Warren era."[152]

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145 *Id.* at 908.

146 *Id.*

147 *Cf.* David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES, Oct. 6, 1996, § 6 (Magazine), at 65 (recounting how future Chief Justice William H. Rehnquist, as a law clerk to Justice Robert H. Jackson at the time of *Brown*, privately inveighed against the decision).

148 POWE, THE WARREN COURT, *supra* note 34, at 421.

149 *See* Monroe v. Pape, 272 F.2d 365, 365–66 (7th Cir. 1959); *see also* Myriam Gilles, *Police, Race and Crime in 1950s Chicago:* Monroe v. Pape *as Legal Noir*, *in* CIVIL RIGHTS STORIES (Risa Goluboff & Myriam Gilles eds., forthcoming 2007) (manuscript at 59, *available at* http://ssrn.com/abstract=984929).

150 *See* Monroe v. Pape, 365 U.S. 167, 187, 192 (1961).

151 Glennon, *supra* note 78, at 923.

152 POWE, THE WARREN COURT, *supra* note 34, at 230–31.

In early 1963, ten years after *Brown v. Allen*, came *Fay v. Noia* and *Townsend v. Sain*, decided the very same day as *Gideon*. *Noia*, Glennon writes, was a "landmark ruling" that "profoundly altered the habeas corpus landscape"[153] and, as Lain explains, in tandem with *Townsend* "allowed federal courts to more easily scrutinize the treatment of black defendants by Southern criminal justice systems."[154] The practical upshot, as Glennon succinctly summarizes, was that "during the civil rights movement, the Court created the redundant and repetitive system of habeas corpus as a response to the flood of cases coming from state courts and arising out of the civil rights movement. Expanding the scope of federal habeas corpus channeled literally thousands of sit-in and other public demonstration cases into federal courts for federal judicial decisions," and thus out of the hands of southern state jurists whose racial fairmindedness the Justices had learned to doubt and distrust.[155]

Scot Powe recounts how "*Noia*, because it seemed like a technical issue of federal jurisdiction, initially passed unnoticed by the press."[156] However, since it held "that any state prisoner claiming his constitutional rights had been violated could go to federal court to challenge his conviction once state remedies were first exhausted," the issue of "exhaustion" then became front and center for many civil rights defendants facing prosecution, or sometimes serial persecution, in southern state courts.[157] As Glennon writes, "[e]xhaustion postpones the exercise of federal jurisdiction until after a state court or agency has ruled," but, he quips, given the behavior of white southern authorities during the civil rights era, "the exhaustion requirement seemed more likely to exhaust civil rights activists and their lawyers."[158]

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153 Glennon, *supra* note 78, at 910.

154 Lain, *supra* note 130, at 1396–97.

155 Glennon, *supra* note 78, at 918; *see also* Kenneth N. Vines, *Southern State Supreme Courts and Race Relations*, 18 W. POL. Q. 5, 17 (1965) ("The decision record of state courts justifies the unfavorable perceptions which led Negroes in large part to avoid them.").

156 POWE, THE WARREN COURT, *supra* note 34, at 424.

157 *Id.* at 422.

158 Glennon, *supra* note 78, at 920, 919; *see also* Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965).

In response to that problem, the Warren Court in 1965 issued one of its most radical, if nonetheless eventually shortlived, decisions. *Dombrowski v. Pfister* "profoundly changed" defense attorneys' opportunities to 'remove' pending prosecutions of civil rights defendants from state to federal courts.[159] As Glennon rightly observes, *Dombrowski* rested on "a latent presumption of bad faith among state judges,"[160] but it also reflected the Warren Court's profoundly hostile attitude toward federalism, an attitude the South had insistently nurtured for all of the preceding decade. Powe articulates that attitude acerbically but accurately: "Federalism served no ascertainable purpose except to authorize local—and typically southern—oligarchies to impose their backwards and often arbitrary views on those unfortunate enough to live within their jurisdictions."[161]

Another 1965 exemplar of the Justices' profound doubts about southern justice came in the now little-remembered case of *Henry v. Mississippi*.[162] The case may be all but forgotten, but its defendant-appellant was well-known and justly famous: Aaron Henry, at that time Mississippi's most important—and bisexual—black civil rights activist.[163] Henry had been arrested for propositioning a young hitch-hiker, and the key dispute following Henry's conviction for disturbing the peace was whether his attorney's failure to object at trial to the admission of some seized evidence precluded a claim of constitutional error in that regard from being raised on appeal. The Mississippi Supreme Court answered affirmatively,[164] and the U.S. Supreme Court had to judge whether adequate state grounds underlay that ruling.

The specific details the U.S. Court relied upon in reversing and remanding Henry's conviction need not concern us here, but the Supreme Court's "confusing"[165] opinion immediately led legal

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159 Glennon, *supra* note 78, at 925.

160 *Id.* at 927.

161 POWE, THE WARREN COURT, *supra* note 34, at 494.

162 379 U.S. 443 (1965).

163 *See* JOHN HOWARD, MEN LIKE THAT: A SOUTHERN QUEER HISTORY, at xvi–xvii, 158–66 (1999).

164 *See* Henry v. State, 154 So. 2d 289 (Miss. 1963).

165 RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 561 (5th ed. 2003); *see also* William P. Marshall, *The Supreme Court,* Bush v. Gore, *and Rough Justice*, 29 FLA. ST. U. L. REV. 787, 794–95 (2001).

commentators to ask whether the decision made sense only in light of the petitioner's identity and the fact that "the prosecution was commenced in 1962 in Mississippi and not at another time and in another place."[166] Indeed, that judgment has held up for four full decades. As Catherine Struve has observed, "*Henry* may be best explained by its facts, for the Court's willingness to suggest procedural inadequacy may have stemmed from suspicion that the Mississippi state courts were biased against Aaron Henry."[167] That interpretation draws further strength when one appreciates that the Supreme Court heard argument in Henry's case in mid-October 1964, just two months after Henry led the Mississippi Freedom Democratic Party's heavily-publicized challenge at the 1964 Democratic National Convention.[168]

Both Struve and Glennon conclude that "the context influenced Henry's outcome,"[169] and both further suggest that the Supreme Court stretched to make a ruling it otherwise would not have only because the defendant-appellant was a prominent and much-persecuted southern black activist. Indeed, the most powerful support for that interpretation, multiple commentators have explained, is the Justices' subsequent abandonment of the seemingly significant doctrinal alteration that *Henry* initially appeared to propound. Struve writes that "*Henry* itself appears to have had scant influence on the Court's subsequent practice,"[170] and William Marshall has memorably categorized *Henry* as "a rough justice decision that would eventually lead nowhere."[171]

Glennon, Powe, and Lain all emphasize how vastly different in reach and implication southern civil rights-based rulings like *Dombrowski* and *Henry* were from subsequent criminal procedure and access to federal courts decisions that the

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[166] Terrance Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 190 (1965).

[167] Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 274 (2003).

[168] Henry v. Mississippi, 379 U.S. 443, 443 (1965).

[169] Struve, *supra* note 167, at 276; *see also* Glennon, *supra* note 78, at 899.

[170] Struve, *supra* note 167, at 276.

[171] Marshall, *supra* note 165, at 794. Oddly enough, in the end Henry's criminal conviction was reinstated, and the Supreme Court declined review in a brief order echoing its suggestion in *Hawkins* that the petitioner pursue relief by means of a federal habeas petition in district court. *See* Henry v. State, 202 So. 2d 40 (Miss. 1967), *cert. denied*, 392 U.S. 931 (1968).

Supreme Court began handing down in 1967. Chief among those was *Walker v. City of Birmingham*,[172] which upheld contempt of court convictions against Martin Luther King, Jr., and other civil rights activists dating from the famous Birmingham protests of early 1963.[173] Glennon writes that "*Walker* offers a striking contrast to *Henry*, decided only two years earlier,"[174] and Powe remarks that *Dombrowski*, also a 1965 ruling, "was from the era of peaceful protests" while "*Walker* [was] from the subsequent era of riots and disorder."[175]

Lain makes a similar argument, focusing on *Terry v. Ohio*,[176] a 1968 Fourth Amendment decision that was as symbolically different from *Miranda* as *Walker* was from *Dombrowski*. "[I]n the face of clear evidence that police were using stop and frisk to harass minorities, the Supreme Court condoned the practice, breaking from an entire line of established Fourth Amendment jurisprudence to do it," writes Lain. "*Terry* was as much a blow to the civil rights movement as it was a bow to law enforcement interests," she adds, and reflected how the wave of urban riots had "dramatically" changed Black Americans' "public image" in "the course of just a few years" as a "loss of empathy for the plight of blacks" enveloped jurists as well as other whites.[177] Three years later, in *Younger v. Harris*,[178] the Court would gut, and effectively overrule, *Dombrowski*.

## PART VII

Well before that turn of events, however, the Warren Court would finally begin to attend to the two most glaring loose ends that it had purposely left unresolved in the mid- and late-1950s. In May of 1964, on the tenth anniversary of *Brown I*, the *New York Times* reported that only 1.18% of black students in the South were attending desegregated schools, many of those in Texas. In implementing and applying *Brown*, the *Times* went on, the Supreme Court "has not gone beyond the limits described by

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172 388 U.S. 307 (1967).

173 *See* DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 566, 579 (1986); *see also* ALAN F. WESTIN & BARRY MAHONEY, THE TRIAL OF MARTIN LUTHER KING (1974).

174 Glennon, *supra* note 78, at 900.

175 POWE, THE WARREN COURT, *supra* note 34, at 282.

176 392 U.S. 1 (1968).

177 Lain, *supra* note 130, at 1446–47.

178 401 U.S. 37 (1971).

[Circuit] Judge John J. Parker" in his famous and influential *Briggs* dictum.[179] One week later, just as Congress moved towards passage of the Civil Rights Act of 1964, the Court in *Griffin v. County School Board*,[180] one of the original four cases that comprised *Brown*, belatedly announced that "[t]here has been entirely too much deliberation and not enough speed in enforcing the constitutional rights" of black southern schoolchildren in the nine years since the Court employed that unfortunate phrase in *Brown II*. Indeed, the Justices said, "[t]he time for mere 'deliberate speed' has run out."[181] A year later, in a case from Richmond, the Court decreed that "[d]elays in desegregating school systems are no longer tolerable."[182]

But three more years would pass before the Warren Court, in *Green v. County School Board*, a case argued just the day before the civil rights movement, as many Americans saw it, came to an untimely end—April 3, 1968—announced that a "transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about."[183] Fourteen years late, and, in all frankness, only because of the firm and clear analytical persistence of John Minor Wisdom and his supportive colleagues on the Fifth Circuit Court of Appeals,[184] the Warren Court finally answered the question that it had failed to ask itself in either *Brown I* or *Brown II*.[185] *Green* issued the clarion call that had been absent from *Brown*, from *Cooper*, and from *Griffin*, and warned starkly that "delays are no longer tolerable."[186] A year later, in *Alexander v. Holmes County Board of Education*,[187] the South would learn that this time the Court meant what it said.

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[179] Claude Sitton, *Since the School Decree: Decade of Racial Ferment*, N.Y. TIMES, May 18, 1964, at 1.

[180] 377 U.S. 218, 229 (1964); *see also* Goss v. Bd. of Educ., 373 U.S. 683 (1963).

[181] *Griffin*, 377 U.S. at 234.

[182] Bradley v. Sch. Bd., 382 U.S. 103, 105 (1965); *see also* Rogers v. Paul, 382 U.S. 198 (1965).

[183] Green v. County Sch. Bd., 391 U.S. 430, 436 (1968); *see also* Monroe v. Bd. of Comm'rs, 391 U.S. 450 (1968).

[184] *See* David J. Garrow, *Visionaries of the Law: John Minor Wisdom and Frank M. Johnson, Jr.*, 109 YALE L.J. 1219, 1222–26 (2000); POWE, THE WARREN COURT, *supra* note 34, at 293–95; *see also* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966); Joel Wm. Friedman, *Desegregating the South: John Minor Wisdom's Role in Enforcing Brown's Mandate*, 78 TUL. L. REV. 2207 (2004).

[185] *See* POWE, THE WARREN COURT, *supra* note 34.

[186] 391 U.S. at 438.

[187] 396 U.S. 19 (1969).

The other loose end was far easier to resolve and far more susceptible to definitive resolution. In late 1964 the Court moved significantly beyond the ugly legacy of *Jackson v. Alabama* and *Naim v. Naim* when it struck down a Florida law criminalizing interracial cohabitation.[188] As Julius Chambers has perceptively emphasized, "it was not until 1964," in *McLaughlin*, "that the Warren Court expressly enunciated a rule that racial classifications, standing alone, were presumptively suspect" under the Equal Protection Clause.[189] Three years later, the Court went the rest of the way toward remedying *Jackson* and *Naim* when it struck down all remaining anti-miscegenation statutes in the best-named law case of all time, *Loving v. Virginia*.[190] With *Loving*, as with *Green* a year later, the Warren Court had tardily but eventually made full amends for its greatest failings of courage and acuity more than a decade earlier.

## PART VIII

But there remains one final, and in some respects most unusual of all, category of cases in which the impact of southern misbehavior on the Justices of the Warren Court significantly and for all time changed important and ostensibly non-racial—and non-regional—questions of law. Near the top of this category are the related and interwoven First Amendment freedom of association decisions from the late 1950s and early 1960s in which the Warren Court struck down a variety of southern attempts to put the NAACP and/or its lawyers out of business in one state after another. Most of these efforts involved statutes aimed at forcing the public disclosure of members' identities, some on the grounds that the NAACP was an out-of-state enterprise, others based on the precedent that communist infiltration could be discovered only through such public exposure.

Alabama's attacks were the best known and, for a time, the most successful, but after years of litigation, in the end the NAACP, and the Warren Court, fully prevailed.[191] Arkansas,[192]

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[188] McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

[189] Julius L. Chambers, *Race and Equality*, *in* THE WARREN COURT: A RETROSPECTIVE 21, 23 (Bernard Schwartz ed., 1996).

[190] 388 U.S. 1 (1967).

[191] *See* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 310 (1964); NAACP v.

Louisiana,[193] Virginia,[194] and Florida[195] all saw litigation over such efforts which made its way up to the Supreme Court, and the most doctrinally far-reaching of these cases, such as *Gibson* from Florida, represented significant doctrinal expansion. Glennon perceptively notes that the behavior of Alabama and the other states unintentionally served to highlight "the vacuous nature of claims that state sovereignty in the South deserved respect during the civil rights movement,"[196] a legacy that took some decades to dissipate.

Far more widely known than the NAACP cases is *New York Times Co. v. Sullivan*, the premier libel law ruling in U.S. history. *Sullivan* grew out of yet further efforts by Alabama officialdom to retaliate against civil rights activists and those who gave voice to their cause.[197] As William Marshall has written, prior to *Sullivan*, libel law "had traditionally been within the exclusive province of the states," and the Warren Court's ruling "removed a traditionally state-bound and state-defined common law action from the state courts (and state legislators) into the jurisdiction of the federal courts."[198] Indeed, as Rod Smolla has written, "[h]ad the events surrounding the *Sullivan* lawsuit not been so patently racist, in fact, it is doubtful that the Supreme Court would have bothered to hear just another libel suit at all."[199]

*Sullivan*'s "actual malice" standard[200] was, as Marshall writes, a ruling of "enormous breadth and consequence,"[201] and three years later another libel appeal stemming from a civil

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Alabama *ex rel.* Patterson, 360 U.S. 240 (1959); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); *see also* Walter Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371, 371–90 (1959); TUSHNET, *supra* note 77, at 283–300.

[192] *See* Bates v. City of Little Rock, 361 U.S. 516 (1960); Shelton v. Tucker, 364 U.S. 479 (1960).

[193] Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961).

[194] NAACP v. Button, 371 U.S. 415 (1963).

[195] Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963).

[196] Glennon, *supra* note 78, at 895.

[197] *See generally* ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT 11–14, 21–22 (1991).

[198] Marshall, *supra* note 165, at 793; *see also* Glennon, *supra* note 78, at 904 ("The civil rights movement was the first time in U.S. history that state libel judgments became subject to First Amendment limitations.").

[199] RODNEY A. SMOLLA, SUING THE PRESS 44 (1986).

[200] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[201] Marshall, *supra* note 165, at 793.

rights face-off—James Meredith's 1962 desegregation of the University of Mississippi in the face of a violent white mob led by retired Army General Edwin A. Walker—extended *Sullivan*'s protection of the news media yet further.[202] Indeed, as Scot Powe writes: "When Warren left the Court, the First Amendment was far more protective than it had ever been, and without the South it is unlikely that it could have had either such breadth or such depth . . . ."[203]

Last of all comes a little-remembered set of cases that in the end fell short of their revolutionary promise but that nonetheless provided some invaluable procedural protections to many of "the least of these"—recipients of public assistance payments. The welfare rights movement is now a largely forgotten part of late 1960s/early 1970s activism,[204] and its initial strategy of "converting welfare rights into a southern civil rights issue" is remembered only by a hardy few.[205] That movement's first signature Supreme Court case, *King v. Smith*, originated—just like *Reynolds v. Sims*—in one of the southern struggle's most storied locales: Dallas County, Alabama. There, as in some eighteen states, single-parent recipients of AFDC (Aid to Families With Dependent Children) funds could have their payments cut off if welfare caseworkers determined that a so-called "substitute father" sometimes co-habited with the children's mother. Scot Powe notes that these "man-in-the-house regulations were not exclusively southern, but well over half the states that had them" were in the South.[206] Even more notably, "of 184 welfare cases closed under the substitute father regulations in Dallas County, Alabama, from July 1964 through January 1967, 182 involved black families." Similarly, "[d]uring June 1966, in seven representative Alabama counties, every one of the more than 600 recipients cut off welfare was black."[207]

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[202] Associated Press v. Walker, 389 U.S. 28 (1967).

[203] POWE, THE WARREN COURT, *supra* note 34, at 491; *see also* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 65–67 (1965).

[204] *See generally* NICK KOTZ & MARY LYNN KOTZ, A PASSION FOR EQUALITY: GEORGE A. WILEY AND THE MOVEMENT (1977).

[205] MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 56 (1993); *see also* Robert M. Cover, Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 94 (1967).

[206] POWE, THE WARREN COURT, *supra* note 34, at 493.

[207] DAVIS, *supra* note 205, at 64.

When Alabama appealed *King v. Smith* to the Supreme Court after a lower federal court ruled against the state, the Justices unanimously struck down the "substitute father" policy on the narrow but straightforward grounds that needy children should not be denied public aid on account of maternal boyfriends who owed them no duty of support.[208] The Court did not expressly address the overtly racial context of the case, but the facts of the matter left little doubt that *King* was a profoundly southern case. Welfare rights strategists hoped to sustain their litigation campaign with further southern test cases, but when Mississippi settled rather than contest a decisive challenge to benefit terminations without recipients being accorded a fair prior hearing, the movement's legal arm "began to move away from its southern strategy."[209] Welfare rights lawyers would win that crucial guarantee in *Goldberg v. Kelly*, an important Supreme Court case from New York, but the movement's more far-reaching agenda suffered decisive rejection in a rushed set of cases that culminated with *Dandridge v. Williams* in 1970.[210]

## PART IX

On the occasion of *Brown*'s tenth anniversary in 1964, Anthony Lewis of the *New York Times* wrote that "the decision has had a profound impact on the place of the Court itself in our governmental system, on Federal-state relations, on law and politics generally." For the Supreme Court itself, "tackling the race problem gave it the courage," Lewis observed, "to take on other difficult issues," such as reapportionment and criminal justice reform. [211]

"Within the judicial system," Lewis went on, "the racial conflict has changed Federal-state relations in ways not yet sufficiently recognized. The refusal of state executives, policemen and judges to enforce the Constitution has led the Federal courts to pull away from their tradition of deference to state tribunals. Cases are before Federal judges that could not have been imagined there 10 years ago." Furthermore, Lewis added, "Southern efforts to put the N.A.A.C.P. out of business

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[208] 392 U.S. 309, 333–34 (1968).

[209] DAVIS, *supra* note 205, at 68.

[210] 397 U.S. 471 (1970); *see also* Jefferson v. Hackney, 406 U.S. 535 (1972).

[211] Anthony Lewis, *Supreme Court Enlarging Role as Instrument of Social Change*, N.Y. TIMES, May 18, 1964, at 24.

have led to Supreme Court decisions giving new protection to freedom of association," and similar attacks on other activists led directly to *Sullivan*.[212]

More than forty years later, no law professor or historian has fundamentally improved upon the insightfulness and breadth of Lewis's analysis. But Lewis noted too, even in 1964, that the Court's rulings had drawn increased attacks, yet he explained that "many of the critics are doubtless motivated, underneath, by the school decision."[213] Four years later, at the very end of the Warren era, William Beaney expanded upon that point in a most instructive way. "It cannot be overstressed," Beaney wrote, "that this violent and persistent attack on the Court by the political leaders of a substantial section of the nation has affected public reaction to other important Court decisions. For here was a large, vocal minority eager to discredit the Court in every conceivable way."[214]

Beaney's comment frames a crucially important panoptic perspective. It is of course easy for any knowledgeable scholar to affirmatively detail how the Warren Court and its rulings, from *Brown* to *Green*, from *Baker* to *Reynolds*, and from *Gideon* to *Loving* to *King*, helped fundamentally revolutionize the South. But the converse of that relationship deserves equal if not greater attention and appreciation, for at the same time that the Warren Court revolutionized the South, the long-standing southern white traditions of legal defiance and overarching racism greatly influenced and altered the judicial behavior and decisions of the Warren Court.

The public attacks are of course the easiest to appreciate and measure. At the outset, in the immediate wake of *Brown*, the Court as we have seen did everything possible—in *Jackson*, in *Williams*, in *Naim*, and in *Hawkins*—to avoid stirring further

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[212] *Id.*

[213] *Id.*; *see also* POWE, THE WARREN COURT, *supra* note 34, at 496 (commenting that for white southerners, after *Escobedo* and *Miranda*, "still hating the Court because of *Brown*, now they could publicly hate it because of coddling criminals").

[214] William M. Beaney, *The Warren Court and the Political Process*, 67 MICH. L. REV. 343, 348–49 (1968); *see also* Murphy & Tanenhaus, *supra* note 122, at 1000, 1004 (reporting that among interviewees in 1966, "the more knowledgeable Southern whites were about the Court, the less likely they were to express support for it" and adding that "[a] large share of white Southerners who were well informed were angrily nonsupportive"); *High Court Found in Disfavor, 3 to 2*, N.Y. TIMES, July 10, 1968, at 19 (reporting a Gallup Poll analysis that "Southerners are more critical of the Court than are persons living in other regions of the nation").

controversy and opposition in the South. That effort failed abysmally, in part because of "Red Monday" and *Mallory*, and *Cooper* can be viewed at least in part as reflecting a clear if tardy institutional realization that forthrightness was superior to expediency. By the time of *Baker*, and *Reynolds*, just as with *Mapp* and then *Miranda* and in time both *Loving* and *Green*, it was clear beyond doubt that the Warren Court was no longer preoccupied with the alarums of its enemies in the way that it had been in the years immediately after *Brown*.

Yet the muscular and far-reaching self-assurance that the Warren Court exhibited from 1961 until 1967 was induced not only by the malfeasance and dishonesty of white southern officialdom. It also was influenced, in equal if not greater part, by the activism and courage of newly-emboldened Black southerners. The intensity and duration of white southern sophistry and subterfuge spurred the Warren Court in manifold ways. But the Court was also animated and emboldened by the energy and breadth of the freedom struggle. *Brown*'s embrace of fundamental human equality was a doctrinal stimulus in and of itself as well, for that holding made the equal protection claim in *Baker* appear far more irresistibly powerful than had similar previous iterations in the years before 1954.[215] *Brown* also, of course, made the all-encompassing result in *Reynolds* look far more natural and preordained than would any half-a-loaf, just-one-house decision.

Michal Belknap writes that *Brown* "initiated a quest for equality by the Warren Court that over the next fifteen years . . . transformed and reoriented American constitutional law."[216] That is certainly correct, as is Belknap's further suggestion that *Brown*'s embrace of equality served to commit the Court "to that principle in all aspects of its jurisprudence."[217] But it is imperative to appreciate that that doctrinal element is just one-third of a tripartite story in which southern white intransigence and Black civil rights activism played equally crucial roles. In the criminal procedure cases, as with the decisions expanding defendants' access to federal courts, and as with the NAACP freedom of association rulings and *Sullivan*, the interactive combination of southern bad behavior and Black

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[215] *See, e.g.*, South v. Peters, 339 U.S. 276 (1950).

[216] Belknap, *The Real Significance of* Brown, *supra* note 10, at 878–79.

[217] *Id.* at 891.

activism pressed the Court to revolutionize the entire federal-state judicial template. Distrust of southern police and southern courts directly underlay *Gideon*, *Henry*, and *Dombrowski*, and certainly informed *Mapp*, *Monroe*, and *Miranda*, but it also fundamentally inclined the Justices to make the federal courts a ready refuge for victims of pernicious southern process in ways that were simply unimaginable in the pre-*Brown* era. The NAACP cases and *Sullivan* are further remarkable evidence of that metamorphosis.

As Robert Glennon has written, "[t]he substantial changes in federal courts doctrine that occurred in the 1950s and 1960s can be fully understood only by seeing them as the Supreme Court's response to the actions of Southern state courts during the civil rights movement."[218] That is an historically-informed restatement of the fundamental truth that Anthony Lewis grasped so clearly and cogently in 1964. Furthermore, a historical appreciation that the far-reaching legacy of the South's collision with the Warren Court was in later years trimmed back by subsequent decisions such as *Walker* and *Younger* underscores the necessary caveat that not all southern-inspired changes in "non-desegregative" areas of the law have held up over time. *Henry*'s message was supplanted by *Walker*'s, and *Dombrowski* gave way to *Younger*.

But *Sullivan*, *Gideon*, and *King* have without question endured, on top of the obvious revolutions that sprang from *Brown* and then from *Baker*. *Brown*'s tangible legacy, especially in southern public schoolrooms, may look less vibrant today than was anticipated at the time of *Green* or *Swann*,[219] but *Baker*'s, like *Mapp*'s and *Miranda*'s, lives on in full flower. The Warren Court's reach was lengthier and broader than many historians appreciate, and had it not been for white southern bad behavior and Black courage, the Warren Court never would have reached as far and as firmly as it did.

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[218] Glennon, *supra* note 78, at 930.

[219] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).