

HOWARD LAW JOURNAL

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VOLUME 61 • ISSUE 1 • FALL 2017

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HOWARD LAW JOURNAL

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LETTER FROM THE EDITOR-IN-CHIEF

In the 61st year of the *Howard Law Journal*, Issue 1 of Volume 61 continues academic discussions surrounding social justice in areas suffered by marginalized groups. The first set of articles reflect on past social justice triumphs, while the latter set of articles address hardships that negatively impact groups who historically have been targets of discrimination. Collectively, these articles remind us not only that justice can be achieved, but that our quest for justice and equality is not over. Our hope is that this issue will spark discussion in the legal community and serve as motivation to create change. In fact, after events such as those that occurred in Charlottesville, Virginia in 2017 and other cities across the nation, there may be no better time to create awareness of issues that have plagued America, and continue to do so.

The first Article focuses on black identity and the African American experience in the early 1970s. In particular, Professor Alfred L. Brophy focuses on a list of ninety books regarding the black experience that were added to the Marion, Ohio Correctional Institution in 1972 in his article, "Black Power in a Prison Library." Brophy's article reasons that, together, the ninety books illustrate Black writers' evaluation of law and the effects the claims made by such authors caused to historical, sociological, and civil rights literature.

James H. Johnston then discusses the battle to desegregate a library maintained by the Bar Association of the District of Columbia. In his article, "Segregation in the Federal Courthouse in Washington D.C. Before and After *Brown v. Topeka Board*," he demonstrates to the reader that after countless lawsuits, votes by members of the association, and a failed effort to remedy the situation, the Bar Association library was finally fully integrated. Johnston argues that this fight stands out because the initial vote to integrate the library, in 1941, could have been precedent-setting, thirteen years before the Supreme Court ended segregation, and because this battle may be considered judicially-sanctioned segregation prevailing in the federal courthouse.

Next, we see a discussion on what Professor Jonathan Zasloff calls the "last major legislation of the Civil Rights Movement." In his article entitled, "Between Resistance and Embrace: American Realtors, the Justice Department, and the Uncertain Triumph of the Fair Housing Act, 1968-1978," Professor Zasloff presents evidence that the Fair Housing Act of 1968's success can be attributed to aggressive litigation by federal civil rights law enforcement. The striking success of the Fair Housing Act of 1968 directly

challenges the scholarly consensus, which usually derides the Fair Housing Act as tepid, toothless, and ineffective.

In his article, “Religious Freedom: The Original Civil Liberty,” Professor Loren E. Mulraine guides the reader through a comprehensive review of religious freedom in the United States, and illustrates the cultural and legal motives behind the development of religious freedom. He then discusses the necessity of a renewed vigilance to protect religious freedom in America. He believes America has currently entered into a period of deep geopolitical unrest and a foreseeable disagreement between diverse faiths calls for us to combat forces that threaten to weaken the foundation of freedom this nation was built upon.

The final work discusses the use of misdemeanors, such as traffic violations, for the purpose of collecting substantial portions of the annual operating budgets in municipalities in St. Louis County, Missouri. In Professor Henry Ordower, Professor J.S. Onésimo Sandoval, and Professor Kenneth Warren’s article, “Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution and Constitutional Limitations,” they argue that the the quest for revenue has displaced public safety and traffic regulations. As a result, this change suggests that governing laws are no longer efficient exercises of policing power, and therefore, must be reformed under the taxing power in order to remain valid.

On behalf of the *Howard Law Journal*, I thank you for your support and readership. It is our hope that this issue will inform your judgment on the current social climate and encourage you to continue or start these academic discussions in your community.

MATTHEW WELLINGTON BURNS
EDITOR-IN-CHIEF
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Black Power in a Prison Library

ALFRED L. BROPHY*

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I would like to thank my favorite librarian, Barbara F. Thompson, for her help and inspiration. I would also like to thank Adjoa Aiyetoro, Autumn Barrett, Adrienne Davis, Damon Freeman, David Garrow, Anne Klinefelter, Utz McKnight, and Donald Tibbs for comments and advice on the primary and secondary literature; Donna Nixon for her help with archival sources, as always; Niki Schwartz, Vincent Nathan, and Rhoda L. Berkowitz for sharing their recollections about *Taylor v. Perini*, Kellie Corbett and Jason Ilieve for their research assistance and Elijah Jenkins for his editorial help.

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ABSTRACT

“Black Power in a Prison Library” focuses on a list of ninety books on the black experience in America that were added to the Marion, Ohio Correctional Institution in 1972. It uses the list as a way of gauging what books the plaintiffs (and thus the court) thought were essential to telling the African American experience. And in that way, we can use the list to reconstruct the contours of the bibliographic world of the African American experience in the early 1970s. The list reflects an interest in the history of slavery, the eras of Reconstruction and Jim Crow, literature of the Harlem Renaissance, the 1960s Civil Rights Movement, and contemporary works on Black Power. Notably thin is prison literature. Together, the books help form a picture of the critique of law made by Black Power writers and the ways those claims built on historical, sociological, and Civil Rights literature. The book list, thus, suggests some of the ways that books propagated and gave definition to Black Power claims.

INTRODUCTION

Prison officials in the 1960s, apparently concerned with the growth of Black Power, sought to limit the access of prisoners to those ideas.¹ That action demonstrates, yet again, that books are both important ways of transmitting ideas and important signifiers of the ideas readers find important.² It is not just law enforcement, however, that is interested in reading habits. Historians are turning to the project of *the history of the books* to understand the role of books as vehicles of change such as how books contribute to changes in society

1. See, e.g., Etheridge Knight, *The Day the Young Blacks Came*, in *BLACK VOICES FROM PRISON* 161, 161 (1970) (“A few months ago, several blacks . . . were placed in isolation for reading literature written by black authors.”).

2. See generally HERBERT N. FOERSTEL, *SURVEILLANCE IN THE STACKS: THE FBI’S LIBRARY AWARENESS PROGRAM* (1991) (discussing the FBI’s surveillance of libraries); WILLIAM J. MAXWELL, *F.B. EYES: HOW J. EDGAR HOOVER’S GHOSTREADERS FRAMED AFRICAN AMERICAN LITERATURE* (2015) (discussing the FBI’s surveillance of African American authors).

and how books help to create and sustain identity.³ Often historians turn to books to measure a culture. They ask questions like: how did W.E.B. DuBois' critique of Jim Crow affect the development of the idea of equality over the course of the twentieth century;⁴ and what did Ralph Ellison's *Invisible Man* say about the culture of the United States on the eve of *Brown*.⁵

At other times, historians draw inferences about readers from their libraries.⁶ We use the books lawyers cite to measure their intellectual horizons.⁷ Similarly, the books in a school's library can also tell us about intellectual horizons, though there are wide confidence intervals for such speculation.⁸ A central question regarding the history of the book is how the contents can be used to reconstruct culture from what people are reading or seeking to read. And while often the history of the book project looks to elite culture,⁹ the questions can be asked of all sorts of libraries and all sorts of readers.

3. See generally Robert Darnton, *What is the History of Books?*, 111 *DAEDALUS* 65–83 (1982); Alfred L. Brophy, *The Law Book in Colonial America: A History of the Book in America: The Colonial Book in the Atlantic World*, 51 *BUFF. L. REV.* 1119, 1143 (2003); Jane Rhodes, *The Black Press and Racial Print Culture*, in 5 *THE ENDURING BOOK: PRINT CULTURE IN POSTWAR AMERICA* 286 (David Paul Nord et al. eds., 2009).

4. See generally DAVID LEVERING LEWIS, *W. E. B. DU BOIS: BIOGRAPHY OF A RACE, 1868–1919* (1993) (discussing Du Bois and his influence over Americans' view of equality).

5. See Alfred L. Brophy, *Invisible Man as Literary Analog to Brown v. Board of Education*, in *RALPH ELLISON AND THE RAFT OF HOPE: A POLITICAL COMPANION TO Invisible Man* 119–33 (Lucas Morel ed., 2004).

6. See generally DAVID D. HALL, *CULTURES OF PRINT: ESSAYS IN THE HISTORY OF THE BOOK* (1996) (examining the reciprocal relationship between learned cultures and the practice of reading and writing); KEVIN J. HAYES, *THE ROAD TO MONTICELLO: THE LIFE AND MIND OF THOMAS JEFFERSON* (2008) (reviewing Jefferson's spiritual and intellectual development through his book collection).

7. See generally Mary Sarah Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 *YALE J. L. & HUM.* 47 (1999) (reviewing the shift of the legal profession based upon a perceived need for a university education as opposed to legal literacy through self-help and observation); John Langbein, *Chancellor Kent and the History of Legal Literature*, 93 *COLUM. L. REV.* 547 (1993) (discussing the altering state of the American legal education due to the flux of American legal literature).

8. See Guy Hubbs, *The First University of Alabama Library, 1831–1865*, 27 *LIBR. & CULTURE* 20–35 (1992) (discussing content of the University of Alabama's pre-Civil War library based on two published catalogs).

9. See generally MICHAEL O'BRIEN, *CONJECTURES OF ORDER: INTELLECTUAL LIFE AND THE AMERICAN SOUTH, 1810–1860* (2005) (discussing library catalogs from the slave-owning south); ALFRED L. BROPHY, *UNIVERSITY, COURT, AND SLAVE: PRO-SLAVERY THOUGHT IN SOUTHERN COLLEGES AND COURTS AND THE COMING OF CIVIL WAR* 87–95 (2016) (discussing the status of American University libraries before the Civil War).

I. A PRISON LIBRARY AND PRISON LITIGATION REFORM

Books in a prison library invite a particular set of questions related to the history of the book.¹⁰ How does the book in prison help sustain a culture and in some cases, build towards a different future? For prisoners, as for so many of us, books are their only way to travel and are a primary way to expand their minds. This essay returns to a list of books on “black experience, culture, history, and art”¹¹ that United States District Judge Don Young ordered to be placed into the Marion, Ohio prison library in 1972.¹² The case began with inmate J.B. Taylor complaining that his mail was being opened.¹³ When Taylor’s lawyer, Niki Schwartz, began to investigate he found other issues, resulting in three years of discovery.¹⁴ The order sought to improve conditions across a broad spectrum, including the addition of law and other books to the prison library, and to govern the printed materials that prison officials took away from inmates.¹⁵ Four years later in 1976 Judge Young issued another opinion in *Taylor v. Perini* that addressed the Marion prison’s compliance (or non-compliance) with his 1972 order.¹⁶ Special master Vincent Nathan, a professor at the University of Toledo College of Law, had been appointed, in December 1975, to review and report on the prison’s compliance.¹⁷ Nathan’s report, which was published as an appendix to one of the *Taylor* opin-

10. See generally SHEILA CLARK & ERICA MACCREAIGH, LIBRARY SERVICES TO THE INCARCERATED: APPLYING THE PUBLIC LIBRARY MODEL IN CORRECTIONAL FACILITY LIBRARIES (2006) (reviewing the public library model success in correctional facility libraries); JANET FYFE, BOOKS BEHIND BARS: THE ROLE OF BOOKS, READING, AND LIBRARIES IN BRITISH PRISON REFORM, 1701–1911 (1992) (discussing how and why reading materials were brought into jails and prisons and which prisoners had access to them); MEGAN SWEENEY, READING IS MY WINDOW: BOOKS AND THE ART OF READING IN WOMEN’S PRISONS (2010) (examining how incarcerated women use reading to cope with the past, present and future).

11. *Taylor v. Perini*, 413 F. Supp. 189, 215–18 (N.D. Ohio 1976).

12. *Id.* at 195 (ordering books on the “black experience” added to law library).

13. *Id.* at 201.

14. See Patrick Crowley, *Against All Odds*, ABA JOURNAL 66, 68 (Dec. 1993).

15. *Taylor*, 413 F. Supp. at 194–97. The appeal for books on the black experience was part of a larger movement. See, e.g., Lorenzo Kom’boa Ervin, *Back From Hell: Black Power and Treason to Whiteness Inside Prison Walls*, THE ANARCHIST LIBRARY (May 8, 2009), <https://theanarchistlibrary.org/library/lorenzo-kom-boa-ervin-back-from-hell-black-power-and-treason-to-whiteness-inside-prison-walls>.

16. *Taylor*, 413 F. Supp. at 198–99; Special master, Vincent B. Nathan’s, first report on the Defendants’ State of Compliance can be found in Appendix B. *Id.* at 198.

17. *Id.* at 198 (discussing Nathan’s appointment as special master). Nathan is a leading figure in prison reform. See, e.g., BEN M. CROUCH & JAMES W. MARQUART, AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS 128 (1989); Vincent M. Nathan, *Have the Courts Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?*, 24 PACE L. REV. 419, 426 (2004); Keith M. Harrison, *Law, Order, and the Consent De-*

Black Power in a Prison Library

ions, includes the list of ninety books that Judge Young ordered the prison add to the library.¹⁸ At that point, the library had only twenty-eight of the books on Judge Young's order.¹⁹ In 1976, the library was still ordering many of the books, using money from a federal grant.²⁰ Soon, however, Nathan found the prison in compliance.²¹

As with any library list, a key consideration is who composed the list. Niki Schwartz, the plaintiff's lawyer, believes that the prison's list came from a bibliography.²² The list of books can map the intellectual terrain of the black experience and show what some people thought were some of the core works. Collectively, the books listed help to fill out a key issue of the relationship of Black Power ideology to the Civil Rights movement, and it suggests how Black Power emerged from the

fense, 12 ST. LOUIS U. PUB. L. REV. 477, 503 (1993); Debra Dobray, *The Role of Masters in Court Ordered Institutional Reform*, 34 BAYLOR L. REV. 581, 603 (1982).

18. *Taylor*, 413 F. Supp. at 215–19. The special master ordered 117 volumes added to the library, but some were ordered added in duplicate or triplicate. There were only ninety unique titles. The list indicates that there were ninety-one unique titles, but it appears that two books were listed twice, so that the actual count is ninety unique titles. *Id.*

19. *Id.* at 219.

20. *Id.*

21. *Taylor v. Perini*, 421 F. Supp. 740, 745, 747 (N.D. Ohio 1976) (special master finds compliance with the order regarding books when eighty-seven volumes were on the institution's library).

22. Niki Schwartz suggested that the bibliography was Vivian R. Johnson's *A Selected Bibliography of the Black Experience* (1971). Telephone Interview with Niki Schwartz, Plaintiff's Lawyer in *Taylor v. Perini* (Dec. 15, 2015). It is also possible that the source was a bibliography with a similar title to Johnson's, which was compiled by University of Toledo librarian Phillip Podlish. See PHILLIP PODLISH, *THE BLACK EXPERIENCE: THE NEGRO IN AMERICA, AFRICA, AND THE WORLD; A COMPREHENSIVE, ANNOTATED, SUBJECT BIBLIOGRAPHY OF WORKS IN THE UNIVERSITY OF TOLEDO LIBRARIES* (1969), available at <http://files.eric.ed.gov/fulltext/ED101724.pdf>.

The special master in *Taylor v. Perini*, Vincent Nathan, was kind enough to correspond with me about how the list of books was assembled. He remembers that it came from a group of law librarians. Email from Vincent Nathan, Professor, University of Toledo, to Alfred L. Brophy, Professor, University of Alabama (Nov. 9, 2006) (on file with author). Rhoda L. Berkowitz, of the University of Toledo Law Library had an important role in reviewing compliance. See *Taylor v. Perini*, 477 F. Supp. 1289, 1295 (N.D. Ohio 1979). See also *Taylor v. Perini*, 446 F. Supp. 1184, 1205 (N.D. Ohio 1977) (mentioning Rhoda L. Berkowitz' suggestions for additions to the prison library). Both Nathan and Berkowitz may have been referring to lists of law books, which were also part of later litigation in the case.

Nevertheless, the list may say more about the intellectual interests of librarians than about the needs or attitudes of the plaintiff class. One would hope that it springs from the desires of the inmates. Berkowitz believed that the inmates were likely involved and helpful in the composition of the list. Telephone Interview with Rhoda L. Berkowitz, Assoc. Law Librarian, University of Toledo (December 8, 2015). That it is as comprehensive as it is, suggests that the court took seriously the demand for books. From those books – and a few other key works in Black Power that were not on the list – we can construct a picture of the Black Power critique of law. Therefore, it is worth thinking about the list as one way that inmate-plaintiffs sought more literature on the black experience. And it gives us a good sense of the bibliography of Black Power. Reading the books on that list reveals how Black Power built on the foundation of other works in African American history, sociology, and culture – and how it moved beyond that literature.

literature of Civil Rights and African American literature. Thus, the books help link the evolution of ideas in the African American community. The list is particularly important when juxtaposed with an alternative list that prison officials provided of books already in their library on the black experience.²³ And it should also be used in conjunction with the smaller list of books (and other printed material) that prison officials banned. The list, which is reprinted in Appendix A of this article, can help map the sources of black identity in the late 1960s and early 1970s.

II. CATEGORIZING THE BOOKS ON THE BLACK EXPERIENCE, CULTURE, HISTORY AND ART

One initial way of assessing the list is to divide the books into broad categories, such as the Harlem Renaissance; histories; fictional literature; analysis of contemporary black culture; the contemporary Civil Rights movement and its possibilities; and the Black Power movement.

A. Harlem Renaissance

The Harlem renaissance and its leaders are well represented. There are Richard Wright's *Native Son* (1940)²⁴ and *Uncle Tom's Children* (1936);²⁵ James Weldon Johnson's *Autobiography of an Ex-Colored Man* (1912);²⁶ Claude McKay's *Home to Harlem* (1928),²⁷ along with some other Renaissance-era literature, like Rudolph Fisher's *Conjure Man Dies: A Mystery Tale of Harlem* (1932) and *Walls of Jericho* (1928).²⁸ Other included works that collect culture are Miles Mark Fisher, *Negro Slave Songs in the United States* (1953)²⁹

23. *Taylor*, 413 F. Supp. at 219–21 (listing books that relate to the black experience that were already in the prison library).

24. *See generally* RICHARD WRIGHT, *NATIVE SON* (1940) (incorporating ideas from the Harlem Renaissance with political and social ideals about communism and racism).

25. *See generally* RICHARD WRIGHT, *UNCLE TOM'S CHILDREN* (1936) (examining the lives of individuals living through Jim Crow in several fictional yet realistic depictions).

26. *See generally* JAMES WELDON JOHNSON, *AUTOBIOGRAPHY OF AN EX-COLORED MAN* (1912) (discussing a biracial man's life in post-Reconstruction America).

27. *See generally* CLAUDE MCKAY, *HOME TO HARLEM* (1928) (depicting central themes of the Harlem Renaissance such as the urgent need for unity among blacks).

28. *See generally* RUDOLPH FISHER, *THE CONJURE-MAN DIES: A MYSTERY TALE OF DARK HARLEM* (1932) (first known mystery written by an African American set in 1930s Harlem); RUDOLPH FISHER, *THE WALLS OF JERICHO* (1928) (focusing on the idea of unity as portrayed through a negro society set in 1920s Harlem).

29. *See generally* MILES MARK FISHER, *NEGRO SLAVE SONGS IN THE UNITED STATES* (1953) (reviewing songs and spirituals of the American Negro as the historical documents of a people).

and Arna Bontemps, *American Negro Poetry* (1963).³⁰ Situated between the renaissance and the 1960s are *Invisible Man* (1952) and Julian Mayfield's 1957 novel *The Hit*. *The Hit* explores a subset of the ideas in *Invisible Man* that African Americans continue to cling to the dreams of equality and freedom in the United States, even as they are repeatedly shown the emptiness of that hope.³¹ Yet, books from the 1950s, other than histories, which appear separately in the next section, are remarkably scarce in the list.

B. Histories

There are a lot of histories included on the list. The books are W.E.B. DuBois' *Black Reconstruction* (1935);³² John Hope Franklin's *From Slavery to Freedom: A History of American Negroes* (1947) and Franklin's *The Emancipation Proclamation* (1963);³³ E. Franklin Frazier's *Negro Family in the United States* (1968);³⁴ Frederick Broderick's *W.E.B. DuBois: Negro Leader in a Time of Crisis* (1959);³⁵ Edward Cronon, *Black Moses: Marcus Garvey* (1960);³⁶ David Levering Lewis' *King: A Critical Biography* (1970);³⁷ Benjamin Quarels' *Black Abolitionists* (1969);³⁸ *Lincoln and the Negro* and *The Negro in the Civil War* (1953);³⁹ Kenneth Stampp's *The Peculiar Institution*

30. See generally ARNA BONTEMPS, *AMERICAN NEGRO POETRY* (1963) (providing a collection of prominent African American voices during and after the Harlem Renaissance).

31. See generally RALPH ELLISON, *INVISIBLE MAN* (1952) (depicting a model black citizen's struggle to be seen in an American society); JULIAN MAYFIELD, *THE HIT* (1957) (depicting a black man's desperate hope to win the lottery to alter his reality only to be left empty handed when the win occurs).

32. See generally W. E. B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (1935) (discussing the historic role African Americans played in the attempt to reconstruct democracy).

33. See generally JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES* (1947) (exploring various experiences of African Americans plight for equality); JOHN HOPE FRANKLIN, *THE EMANCIPATION PROCLAMATION* (1963) (discussing the evolution of the Emancipation Proclamation through Lincoln's perspective).

34. See generally E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (1939) (reviewing the family life of African Americans in colonial-era slavery through the early twentieth century).

35. See generally FREDERICK BRODERICK, *W.E.B. DUBOIS: NEGRO LEADER IN A TIME OF CRISIS* (1959) (discussing history and the life of W. E. B. Du Bois).

36. See generally EDWARD CRONON, *BLACK MOSES: MARCUS GARVEY* (1955) (discussing Marcus Garvey and the Universal Negro Improvement Association).

37. See generally DAVID LEVERING LEWIS, *KING: A CRITICAL BIOGRAPHY* (1970) (examining the life of Dr. Martin Luther King Jr.).

38. See generally BENJAMIN QUARELS, *BLACK ABOLITIONISTS* (1969) (emphasizing the importance of black abolitionists).

39. See generally BENJAMIN QUARELS, *LINCOLN AND THE NEGRO* (1962) (discussing Lincoln's thoughts in relation to the African American); BENJAMIN QUARELS, *THE NEGRO IN THE CIVIL WAR* (1953) (discussing the active participation of blacks in their own emancipation).

(1956);⁴⁰ C. Vann Woodward's *The Strange Career of Jim Crow* (1955);⁴¹ Arthur I. Waskow, *From Race Riot to Sit-In* (1966);⁴² Herbert Aptheker's *American Negro Slave Revolts* (1943);⁴³ John Spears *The American Slave Trade: An Account of Its Origin, Growth and Suppression* (1900);⁴⁴ and Marshall Stearns, *The Story of Jazz* (1956).⁴⁵

C. Civil Rights Literature

There are the 1960s literary works that captured the possibilities of the Civil Rights movement or that asked for the possibilities to be realized: Claude Brown, *Manchild in the Promised Land* (1965);⁴⁶ Maya Angelou's *I Know Why the Caged Bird Sings* (1969);⁴⁷ King's *Where Do We Go From Here* (1968);⁴⁸ *The Trumpet of Conscience* (1968);⁴⁹ *Stride Toward Freedom* (1958);⁵⁰ and *Why We Can't Wait* (1964);⁵¹ Merrill Proudfoot, *Diary of a Sit-In* (1962);⁵² Sally Belfrage, *Freedom Summer* (1965);⁵³ Elizabeth Sutherland's *Letters from Mis-*

40. See generally KENNETH STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* (1956) (analyzing the origins of slavery and its impact on American society).

41. See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955) (discussing the origins of Jim Crow).

42. See generally ARTHUR I. WASKOW, *FROM RACE TO RIOT TO SIT-IN, 1919 AND THE 1960s* (1966) (discussing the history of African American resistance).

43. See generally HERBERT APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS* (1943) (discussing Negro slave revolts in the United States).

44. See generally JOHN SPEARS, *THE AMERICAN SLAVE TRADE* (1900) (examining the origins of slavery).

45. See generally MARSHALL STEARNS, *THE STORY OF JAZZ* (1956) (examining Jazz culture and its impact).

46. See generally CLAUDE BROWN, *MANCHILD IN THE PROMISED LAND* (1965) (depicting Harlem youth in the 1940s and 1950s).

47. See generally MAYA ANGELOU, *I KNOW WHY THE CAGED BIRD SINGS* (1969) (detailing the early years of American writer and Poet Maya Angelou).

48. See generally MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (1968) (discussing Dr. King's thoughts, plans, and dreams for America's future, including the need for better jobs, higher wages, decent housing, and quality education).

49. See generally MARTIN LUTHER KING, JR., *THE TRUMPET OF CONSCIENCE* (1968) (featuring the five lectures Martin Luther King Jr. gave at the Massey lecture series riddled with anti-war sentiments).

50. See generally MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* (1958) (detailing the Montgomery bus boycott).

51. See generally MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* (1964) (describing the social climate of 1963 and the importance of racial equality).

52. See generally MERRILL PROUDFOOT, *DIARY OF A SIT-IN* (1962) (describing the 1960s sit-in of Knoxville, Tennessee).

53. See generally SALLY BELFRAGE, *FREEDOM SUMMER* (1965) (a richly detailed account of a young white woman who participated in the Student Nonviolent Coordinating Committee's summer project in Mississippi in 1964).

Mississippi (1965);⁵⁴ Alan Westin's edited collection *Freedom Now! The Civil-Rights Struggle in America* (1964);⁵⁵ and Howard Zinn's *SNCC: The New Abolitionists* (1964).⁵⁶

The order also included fictional literature from the Civil Rights movement, such as John Killen's *And Then We Heard the Thunder* (1962);⁵⁷ James Baldwin's *Tell Me How Long the Train's Been Gone* (1968);⁵⁸ John Alfred Williams' *The Man Who Cried I Am* (1967);⁵⁹ Ed Bullins' *Five Plays* (1968),⁶⁰ and Louise Meriwether's *Daddy was a Numbers Runner* (1970) in that category.⁶¹ They are situated in a place between the optimism of the Civil Rights era and the later separatism. They ask, with King, what now?

D. Sociology and Contemporary Black Culture

Along with the histories are other scholarly works that describe and analyze black culture, such as the foundational text W.E.B. DuBois' *Souls of Black Folk*;⁶² as well as more recent works like C. Eric Lincoln's *Black Muslims in America* (1961);⁶³ Harry A. Ploski's *Afro USA* (1971);⁶⁴ and Joseph R. Washington's *Black Religion* (1964).⁶⁵

54. See generally ELIZABETH SUTHERLAND, *LETTERS FROM MISSISSIPPI* (1965) (details personal impressions of conditions and events in the summer of 1964 told in selections from letters home by workers in the Civil Rights movement in that area).

55. See generally ALAN WESTIN, *FREEDOM NOW! THE CIVIL-RIGHTS STRUGGLE IN AMERICA* (1964) (depicting the black experience in the Civil Rights struggle).

56. See generally HOWARD ZINN, *SNCC: THE NEW ABOLITIONISTS* (1964) (detailing the relationship between the new abolitionists and their influence on a generation of activists struggling for Civil Rights and seeking to learn from the successes and failures).

57. See generally JOHN KILLEN, *AND THEN WE HEARD THE THUNDER* (1962) (portraying real racial tensions that occurred during World War II through fictional characters).

58. See generally JAMES BALDWIN, *TELL ME HOW LONG THE TRAIN'S BEEN GONE* (1968) (following the final hours of a fictional African American actor, Leo Proudhammer, after suffering a heart attack on stage).

59. See generally JOHN ALFRED WILLIAMS, *THE MAN WHO CRIED I AM* (1967) (discussing the harsh era of segregation that presaged the expatriation of African American intellectuals).

60. See generally ED BULLINS, *FIVE PLAYS* (1969) (depicting the disdain towards political rhetoric that conceals social changes).

61. See generally LOUISE MERIWETHER, *DADDY WAS A NUMBERS RUNNER* (1970) (depiction of a young black heroine and the hardships in her family).

62. See generally W.E.B. DUBOIS, *SOULS OF BLACK FOLK* (2007) (analyzing what it means to be black in the twentieth century).

63. See generally C. ERIC LINCOLN, *BLACK MUSLIMS IN AMERICA* (1961) (detailing the formation and development of the Black Muslim movement through its wide-ranging expressions in America today).

64. See generally HARRY A. PLOSKI, *AFRO USA: A REFERENCE WORK ON THE BLACK EXPERIENCE* (1971) (identifying the complexity of the black experience).

65. See generally JOSEPH R. WASHINGTON, *BLACK RELIGION* (1964) (examining mid-twentieth century black culture and folk religion, community and church, values and virtues, politics and polity, leaders and leadership, integration and segregation).

Relatedly, the list includes literature that provides a popular, sociological critique of 1960s society, like Charles Silberman, *Crisis in Black and White* (1963)⁶⁶ and James Silver's *Mississippi: The Closed Society* (1964).⁶⁷ And there is the literature that continued in the late 1960s and early 1970s to seek an answer in more traditional places, like Kenneth Clark's *Dark Ghetto* (1965)⁶⁸ and Whitney Young's *Beyond Racism: Building an Open Society* (1969).⁶⁹

E. Theory of Disillusionment

One might break out a separate group of sociology books that provide a theoretical treatment of disillusionment. Then there are books that anticipate and announce the transition to Black Power, as well as disillusionment with the Civil Rights movement or western society more generally, such as Franz Fanon's *Wretched of the Earth* (1961)⁷⁰ and *White Skin, Black Mask* (1952);⁷¹ Tom Hayden, *Rebellion in Newark* (1967),⁷² Louis H. Masotti and Don Bowen, *Riots and Rebellion: Civil Violence in the Urban Communities* (1968);⁷³ Benjamin Muse, *American Negro Revolution: From Non-Violence to Black Power, 1963-1967* (1968),⁷⁴ Chuck Stone, *Black Political Power in*

66. See generally CHARLES SILBERMAN, *CRISIS IN BLACK AND WHITE* (1964) (analyzing "the Negro problem" in America).

67. See generally JAMES SILVER, *MISSISSIPPI: THE CLOSED SOCIETY* (1964) (outlining the issues surrounding the black experience).

68. See generally KENNETH CLARK, *DARK GHETTO* (1965) (describing how the ghetto separates blacks not only from white people, but also from opportunities and resources).

69. See generally WHITNEY YOUNG, *BEYOND RACISM: BUILDING AN OPEN SOCIETY* (1969) (dispelling the myths and misunderstandings that cloud our view of Marica's racial problems, and providing an action program that could enable Americans to move beyond racism to an open society of justice and equality).

70. See generally FRANZ FANON, *WRETCHED OF THE EARTH* (1961) (providing a psychiatric and psychological analysis of the dehumanizing effects of colonization upon the individual and the nation).

71. See generally FRANZ FANON, *WHITE SKIN, BLACK MASK* (1952) (applying historical interpretation, and the concomitant underlying social indictment, to understand the complex ways in which identity, particularly blackness is constructed and produced).

72. See generally TOM HAYDEN, *REBELLION IN NEWARK* (1967) (describing the urban crisis in Newark, New Jersey).

73. See generally LOUIS H. MASOTTI & DON BOWEN, *RIOTS AND REBELLION: CIVIL VIOLENCE IN THE URBAN COMMUNITIES* (1968) (describing civil unrest in urban communities).

74. See generally BENJAMIN MUSE, *AMERICAN NEGRO REVOLUTION: FROM NON-VIOLENCE TO BLACK POWER* (1968) (depicting the rise of the Black Power movement).

America (1970);⁷⁵ Harold Cruse, *The Crisis of the Negro Intellectual* (1967).⁷⁶

F. Black Power

As one would expect, there are some books on Black Power in the *Taylor v. Perini* order, including Eldridge Cleaver's *Soul on Ice* (1968)⁷⁷; Alex Haley, *Autobiography of Malcolm X* (1965)⁷⁸; H. Rap Brown, *Die Nigger Die! A Political Autobiography* (1969);⁷⁹ Julius Lester, *Look Out Whitey! Black Power's Gon Get Your Mama* (1970),⁸⁰ and Bobby Seale, *Seize the Time: The Story of the Black Panther Party and Huey P. Newton* (1970).⁸¹ One might put Angela Davis', *If They Come in the Morning* (1971),⁸² Amiri Baraka, *Home: Social Essays* (1966),⁸³ and perhaps Cecil Brown, *The Life and Loves of Mr. Jiveass Nigger* (1969)⁸⁴ in this category, too. There is also some secondary literature that studies the emerging Black Power movement, such as Arthur L. Smith's [Molefi Asante's] *Rhetoric of Black Revolution* (1969).⁸⁵ And there are works that deal with the forerunners of Black Power, such as E.U. Essien-Udom's *Black Nationalism* (1962).⁸⁶

There is only a small amount of prison literature in this collection. The most prominent work of prison literature on the list is Eldridge

75. See generally CHUCK STONE, *BLACK POLITICAL POWER IN AMERICA* (1970) (discussing the "non-history" of black political power).

76. See generally HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* (1967) (detailing the Crisis of the Negro Intellectual which electrified a generation of activists and intellectuals).

77. See generally ELDRIDGE CLEAVER, *SOUL ON ICE* (1968) (discussing the memoirs of Eldridge Cleaver in order to demonstrate his unique place in American history).

78. See generally ALEX HALEY & MALCOLM X, *AUTOBIOGRAPHY OF MALCOLM X* (1965) (offering a fresh outlook on the life of Malcolm X).

79. See generally H. RAP BROWN, *DIE NIGGER DIE* (1969) (calling to arms the black community to be the vanguard force in the struggle of oppressed people).

80. See generally JULIUS LESTER, *LOOK OUT WHITEY! BLACK POWER'S GON GET YOUR MAMA* (1970) (explaining Black Power).

81. See generally BOBBY SEALE, *SEIZE THE TIME: THE STORY OF THE BLACK PANTHER PARTY AND HUEY P. NEWTON* (1970) (depicting the evolution of the black panther party and Huey P. Newton).

82. See generally ANGELA DAVIS, *IF THEY COME IN THE MORNING* (1971) (identifying the arrest of Angela Davis and the issues surrounding it).

83. See generally AMIRI BARAKA, *HOME: SOCIAL ESSAYS* (1966) (documenting a critical time in Civil Rights history through autobiographical essays).

84. See generally CECIL BROWN, *THE LIFE AND LOVES OF MR. JIVEASS NIGGER* (1969) (depicting 1960s Black American culture).

85. See generally ARTHUR L. SMITH, *RHETORIC OF BLACK REVOLUTION* (1969) (emphasizing the importance of a black revolution).

86. See generally E.U. ESSIEN -UDOM, *BLACK NATIONALISM* (1962) (discussing the importance of black nationalism).

Cleaver's *Soul on Ice*, which is about his experience in prison and his transformation from prison inmate to Black Power advocate.⁸⁷ It had the potential to draw the attention of many readers at the Marion Ohio library. The other explicit prison literature includes George L. Jackson's *Blood in My Eye* (1972),⁸⁸ Angela Davis' edited collection of prison writings, *If They Come in the Morning* (1971),⁸⁹ and Robert J. Minton's edited volume, *Inside: Prison American Style* (1971).⁹⁰

G. What is Missing?

The list is rich and comprehensive, although there are some surprising omissions. For instance, missing are James Baldwin's *The Fire Next Time* (1963),⁹¹ Richard Wright's *Black Power: A Record of Reactions in a Land of Pathos* (1954),⁹² Richard Wright, *White Men, Listen!* (1957),⁹³ and other literature and literary criticism, such as Ralph Ellison's *Shadow and Act* (1953).⁹⁴ Among the histories that are missing are Winthrop Jordan's *White Over Black* (1968).⁹⁵ The sociology that one might expect to see here includes Kerner Commission Report, Harold Cruse, *Rebellion or Revolution?* (1968),⁹⁶ James A. Geschwender, *The Black Revolt: The Civil Rights Movement, Ghetto Uprisings, and Separatism* (1971),⁹⁷ Paul Jacobs, *Prelude to a Riot: View of Urban America from the Bottom* (1968),⁹⁸ and Sara Black-

87. See generally CLEAVER, *supra* note 77.

88. See generally GEORGE L. JACKSON, *BLOOD IN MY EYE* (1972) (analyzing the sociopolitical history of racism).

89. See generally DAVIS, *supra* note 82.

90. See generally ROBERT J. MINTON, *INSIDE: PRISON AMERICAN STYLE* (1971) (describing the life of a prison inmate).

91. See generally JAMES BALDWIN, *THE FIRE NEXT TIME* (1963) (depicting James Baldwin's early life in Harlem and a disturbing examination of the consequences of racial injustice). The book is an intensely personal and provocative document.

92. See generally RICHARD WRIGHT, *BLACK POWER: A RECORD OF REACTIONS IN A LAND OF PATHOS* (1954) (providing reports on the revolution of Africa's Gold Coast).

93. See generally RICHARD WRIGHT, *WHITE MEN, LISTEN!* (1957) (revealing Wright as a challenging spokesman for the colored people of Asia and Africa).

94. See generally RALPH ELLISON, *SHADOW AND ACT* (1953) (encompassing the two decades that began with Ellison's involvement with African American political activism and print media in Harlem).

95. See generally WINTHROP JORDAN, *WHITE OVER BLACK* (1968) (detailing the evolution of white Englishmen's and Anglo Americans' perceptions of blacks, perceptions of difference used to justify race-based slavery, and liberty and justice for whites only).

96. See generally HAROLD CRUSE, *REBELLION OR REVOLUTION* (1968) (opinionated and deeply informed critique of both integrationism and black nationalism).

97. See generally JAMES A. GESCHWENDER, *THE BLACK REVOLT: THE CIVIL RIGHTS MOVEMENT, GHETTO UPRISINGS, AND SEPARATISM* (1971) (analyzing the Civil Rights movement and its multifaceted impact).

98. See generally PAUL JACOBS, *PRELUDE TO A RIOT, A VIEW OF URBAN AMERICA FROM THE BOTTOM* (1968) (analyzing urban America).

burn's edited *White Justice: Black Experience Today in America's Courtrooms* (1971).⁹⁹

There are literary works from the leaders of the Black Power movement that are conspicuously absent, including *Malcolm X Speaks* (1965),¹⁰⁰ Stokely Carmichael, *Stokely Speaks* (1971),¹⁰¹ Eldridge Cleaver, *Post-Prison Writings* (1967),¹⁰² Huey Newton, *To Die for the People* (1972),¹⁰³ especially Robert F. Williams, *Negroes with Guns* (1962),¹⁰⁴ and George Jackson, *Soledad Brother* (1970).¹⁰⁵ There is secondary literature on Black Power that might reasonably have been included, such as Haig Bosmajian and Hamida Bosmajian, *The Rhetoric of the Civil Rights Movement* (1969),¹⁰⁶ Robert Scott and Wayne Brockriede, *The Rhetoric of Black Power* (1969),¹⁰⁷ Floyd Barbour's *The Black Power Revolt* (1968)¹⁰⁸ and *The Black Seventies* (1970),¹⁰⁹ and Ernest G. Bormann's *Forerunners of Black Power: The Rhetoric of Abolition* (1971).¹¹⁰

99. See generally SARA BLACKBURN, *WHITE JUSTICE: BLACK EXPERIENCE TODAY IN AMERICA'S COURTROOMS* (1971) (reviewing the struggles faced by black Americans in the courtroom).

100. See generally MALCOLM X, *MALCOLM X SPEAKS* (1965) (presenting the major ideas expounded by the legendary leader of the black revolution in America through selected speeches delivered from 1963 to his assassination in 1965).

101. See generally STOKELY CARMICHAEL, *STOKELY SPEAKS* (1971) (tracing the dramatic changes in his own consciousness and that of black Americans).

102. See generally ELDRIDGE CLEAVER, *POST-PRISON WRITINGS* (1967) (depicting the thoughts and ideals of Eldridge Cleaver after his release from prison).

103. See generally HUEY NEWTON, *TO DIE FOR THE PEOPLE* (1972) (detailing the development of Huey Newton's personal and political thinking, as well as the radical changes that took place in the formative years of the Black Panther Party).

104. See generally ROBERT F. WILLIAMS, *NEGROES WITH GUNS* (1962) (presenting two essays by Dr. Martin Luther King Jr. concerning the role of violence in the Civil Rights movement).

105. See generally GEORGE JACKSON, *SOLEDAD BROTHER* (1970) (condemning the racism of white America and a powerful appraisal of the prison system that failed to break his spirit).

106. See generally HAIG BOSMAJIAN & HAMIDA BOSMAJIAN, *THE RHETORIC OF THE CIVIL RIGHTS MOVEMENT* (1969) (depicting the themes of the Civil Rights Movement).

107. See generally ROBERT SCOTT AND WAYNE BROCKRIEDE, *THE RHETORIC OF BLACK POWER* (1969) (discussing the importance and the themes of the Black Power movement).

108. See generally FLOYD BARBOUR, *THE BLACK POWER REVOLT* (1968) (collection of essays encouraging black people to resist).

109. See generally FLOYD BARBOUR, *THE BLACK SEVENTIES* (1970) (depiction of black lifestyle in the 1970s).

110. See generally ERNEST BORMANN, *FORERUNNERS OF BLACK POWERS OF BLACK POWER: THE RHETORIC OF ABOLITION* (1970) (emphasizing the impact of the abolitionists on the Black Power movement of the 1970s).

III. THE PRISON RESPONDS

A. The Administration's Alternative List of the Black Experience

Prison officials, faced with the charge that they had not done enough, responded that they already had a lot of literature on the black experience in America in their collection.¹¹¹ In 1976, they provided a list of fifty-eight titles on the black experience that were already in the prison's library,¹¹² which appears in appendix B. The special master cited the list as evidence of the prison's good faith.¹¹³

A comparison of the lists is instructive, for it suggests that the prison administration had a different image of the literature that prisoners should be reading – and of what the prison administration thought represented the black experience. Perhaps most notably, Booker T. Washington's *Up From Slavery* appears on the prison's list. Washington, whose message was to go along in place and do not directly challenge the Jim Crow system of segregation, was embraced by the white community in the early twentieth century for that message – and by the white community for decades afterwards.¹¹⁴

Nothing like Washington's *Up from Slavery* is found on the court's list of books to be added.¹¹⁵ Instead, there is Washington's chief critic in the African American community, in the early twentieth century, W.E.B. DuBois.¹¹⁶ The Prison Administration's list also contained books on sports heroes, such as Joe Louis, and on African American cowboys.¹¹⁷

There were books on the library's list that might have appeared on the court's ordered list. Those include works of fiction, such as James Baldwin's *Blues for Mister Charlie* and *If Beale Street Could Talk*, Langston Hughes, *An African Treasury*, Richard Wright's *The Outsider*, and Nikki Giovanni's *The Women and the Men*. This also included histories such as August Meier and Elliott Rudwick, *CORE: A Study in the Civil Rights Movement* and Charles Duncan Rice, *The Rise and Fall of Black Slavery*; work on contemporary sociology, such as Allen Ballare's *The Education of Black Folk: The Afro-American*

111. *Taylor*, 413 F. Supp. at 215–19.

112. *Id.*

113. *Id.* at 221.

114. See generally ROBERT NORELL, *UP FROM HISTORY: THE LIFE OF BOOKER T. WASHINGTON* (2011) (describing the life of Booker T. Washington).

115. *Taylor*, 413 F. Supp. at 215–19.

116. *Id.*

117. *Id.* at 219–21.

Struggle for Knowledge in White America (1973), on African American politics and law, such as Carl Rowan's *South of Freedom* (1952), and a number of books on Africa, such as Peter Ritner's *The Death of Africa* (1960) and Mark Ross, *Grass Roots in an African City: Political Behavior in Nairobi* (1975).

B. Banning Books

We can tell the books that prisoners most clearly wanted to read by looking at the list of books that the Prison Administration banned, describing them as inflammatory.¹¹⁸ In the first published opinion in *Taylor v. Perini*, there was controversy over including previously banned books in the order.¹¹⁹ The prison administration did not want radical books in the prison, especially books about prisons.¹²⁰ The inflammatory list included: *Newsletter of National Political Prisoners*, *Free Martin Sostre*, and *We are Aware*.¹²¹ The works that were explicitly permitted included *Jailhouse Lawyers Manual*, *Prison Letters of George Jackson*, *Socialist Revolution*, the Mohawk Nation's *Akwesasne Notes* and *Vietnam Veterans Against the War*.¹²²

The books that were banned are Knight's *Black Voices from Prison*; *Malcolm X Talks with Young People*; *Revolutionary Dynamics of Women's Liberation* and *Why Women Need the Equal Rights Amendment*.¹²³ A few years later, *Black Voices from Prison* and *Malcolm X Talks with Young People* were still banned and still the subject of controversy.¹²⁴ Another radical book, *Lesbianism and the Women's Movement*, had been banned.¹²⁵ This may suggest where the real interest was – what was banned and what was permitted.

118. Fourth Report of Special Master, *Taylor v. Perini*, 446 F. Supp. 1184, 1206 (N.D. Ohio 1977). The special master listed books that were banned because they posed a “clear and present danger,” including Knight's *Black Voices from Prison*; *Malcolm X Talks with Young People*; *Revolutionary Dynamics of Women's Liberation* and *Why Women Need the Equal Rights Amendment*. The special master found, however, that they “clearly fall within the scope of legitimate political expression.” *Id.* at 1206.

119. *Taylor*, 413 F. Supp. at 195.

120. *Id.*

121. Special Master Report in *Taylor*, 413 F. Supp. at 277–78, Appendix E (publications not permitted).

122. *Id.* at 273–76 (publications permitted). See also *Taylor v. Perini*, 446 F. Supp. 1184, 1225 (N.D. Ohio 1977) (listing “additional recommended purchases” to prison library, compiled by University of Toledo Law Librarian Rhoda L. Berkowitz).

123. *Taylor*, 446 F. Supp. at 1206.

124. *Taylor v. Perini*, 477 F. Supp. 1289, 1298–99 (N.D. Ohio 1979).

125. Issues of prohibition of publications continued to arise until the final opinion. *Id.* at 1298. The Ohio Prison System's Director of Social Services, who serves as chair of the department's Publication Screening Committee, distributed a list of “not permitted” books, which in-

Prison officials also did not want books they deemed obscene. And there were a lot of those, which they banned as well.¹²⁶ Eldridge Cleaver's *Soul on Ice* reflects some of this.¹²⁷ Cleaver talks about prison library where:

The warden says no sex. You can have Reader's Digest but Playboy? not a chance. I have long wanted to file suit in Federal Court for the right to receive Playboy magazine. Do you think Hugh Hefner would finance such an action? I think some very nice ideas would be liberated.¹²⁸

There was another list of materials that were specifically allowed.¹²⁹

IV. BLACK POWER BOOKS IN THE PRISON LIBRARY

The list of books to be added reminds us how rich the literature developed by African Americans (and about African American history and culture) was. In many instances, history books written by African American historians reverse course from the dominant interpretations of white historians. The best example of this is W. E. B. Du Bois' *Black Reconstruction*.¹³⁰ DuBois presented a counter-history to white historian's dominant view of Reconstruction (then referred to as the period of "redemption"), which often characterized the period by discussing corrupt Yankees and recently freed slaves controlling southern governments.¹³¹ There are books on Reconstruction by and for white people¹³² and books on Reconstruction by and for black people.¹³³ Jim Crow separated people intellectually, as well as physically and socially. There are also compelling, popular sociology text

cluded Knight's *Black Voices from Prison*, The Social Workers Party's *Freedom Now*, *Malcolm X Talks with Young People*, and *Lesbianism and the Women's Movement*. The "not permitted" list was found inconsistent with a previous order and was to be destroyed on arrival in the Marion Correctional Institution. *Id.* at 1299. The special master found this a "fitting if somewhat ironic denouement." *Id.* The final order included a form for notification and waiver of rights of inmates for publications that had been screened as they arrived in the mail. *Id.* at 1392.

126. *Taylor*, 446 F. Supp. at 1206-07 (discussing bans due to obscenity, including *Adam*, *Penthouse*, *Playgirl*, and *Playgirl Advisor*).

127. CLEAVER, *supra* note 77, at 47-49.

128. *Id.* at 48.

129. *Taylor v. Perini*, 413 F. Supp. 189, 273-76 (N.D. Ohio 1976).

130. See generally DU BOIS, *supra* note 32.

131. See Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 524, 525 (1989) (reviewing ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988)).

132. See, e.g., CLAUDE BOWERS, *THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN* (1929).

133. See generally DU BOIS, *supra* note 32.

by white authors, such as Tom Hayden's *Rebellion in Newark* and Charles Silberman's *Crisis in Black and White*. There are several white historian authors on this list such as: Herbert Aptheker, Kenneth Stampp, Arthur Waskow, C. Vann Woodward, and Howard Zinn.¹³⁴

These works invite some speculation on how books might be used to shape and sustain a sense of black identity, and in particular how those books might be helpful in a prison.¹³⁵ The identity is of a rich fictional literature that suggests the ways that African Americans created a life independent of the constraints of segregation; and it focuses on the brutality as well as triumphs of the enslaved.¹³⁶ Then, when it switches to the Civil Rights era, there is a large focus on the claims made by the movement and the obstacles the movement faced from American society.¹³⁷ The limits of the Civil Rights movement and the bold, sometimes violent response of the Black Power movement¹³⁸ provide the capstone to the identity that emerges from those ninety books.

A. The Book-Made Radical and The Experiential Radical

Black Power writers often explain the origins of their ideas in their experience. Some of the literature was concerned with books and the way that books might propagate black identity or failed to. H. Rap Brown thought that books were relatively unimportant: "Books don't make revolutionaries I contend that the people who burned down Watts and Detroit don't have to read These cats have lived more than the intellectual has read So they are political by having learned from their existence Oppression made these cats political."¹³⁹ Brown saw complicity between such radicals

134. *Taylor*, 413 F. Supp. at 215–19.

135. See generally ERIC CUMMINS, *THE RISE AND FALL OF CALIFORNIA'S RADICAL PRISON MOVEMENT* (1994); Roberta Ann Johnson, *The Prison Birth of Black Power*, 5 J. BLACK STUD. 395–14 (1975); LISA M. CORRIGAN, *PRISON POWER: HOW PRISON INFLUENCED THE MOVEMENT FOR BLACK LIBERATION* (2016).

136. LISA M. CORRIGAN, *PRISON POWER: HOW PRISON INFLUENCED THE MOVEMENT FOR BLACK LIBERATION* 63–64 (2016)

137. *Id.*

138. See, e.g., James T. Campbell, *The Panthers and Local History*, in *IN SEARCH OF THE BLACK PANTHER PARTY: NEW PERSPECTIVES ON A REVOLUTIONARY MOVEMENT* 97, 101 (Jama Lazerow & Yohuru Williams, eds., 2006); David Garrow, *Picking Up the Books: The New Historiography of the Black Panther Party*, 35 REV. AM. HIST. 650–70 (2007).

139. BROWN, *supra* note 79, at 104.

and white society.¹⁴⁰ Brown's book is reminiscent of Ralph Waldo Emerson's "American Scholar," which urged scholars to learn from experience rather than from reading about other people's experience in books.¹⁴¹

Where government commissions and academics studied urban discontent, Black Power writers frequently critiqued such books and scholarship. Julius Lester observed that President Johnson spent money to find out what any black person sleeping in LaFayette park across from the White House could tell him: that there was a lack of justice.¹⁴² H. Rap Brown and Lester Julius were certainly correct that much of Black Power was born in the experience of injustice and it was worked out through active engagement in politics, often in the street, rather than literature. And action in the streets taught lessons books could not.¹⁴³ "The violence [of riots] did what all the books, speeches, petitions, and nonviolent demonstrations had been unable to do."¹⁴⁴ It made the ghetto visible,¹⁴⁵ despite substantial literature on Black Power being promulgated through the schools.¹⁴⁶

Peniel Joseph, a leading historian of Black Power, has phrased Black Power's relationship to action in discussion of H. Rap Brown, as "when [B]lack [P]ower came to town, so did trouble."¹⁴⁷ Or, as Stokely Carmichael said, Black Power seized tactics ranging from spitting to killing.¹⁴⁸ And maybe most illuminating is that profits from the sale of books at Berkeley University were invested in guns.¹⁴⁹ As Bobby

140. *Id.* ("The militants spend all their time trying to program white people into giving them some money.").

141. Ralph Waldo Emerson, *The American Scholar*, in RALPH WALDO EMERSON: ESSAYS & LECTURES 51, 64 (Joel Porte ed., 1983) (1837).

142. LESTER JULIUS, LOOK OUT WHITEY: BLACK POWER'S GON GET YOUR MOMMA 115 (1969).

143. *See generally id.*

144. *Id.* at 113.

145. *Id.*

146. *See generally, e.g.,* MARTHA BIONDI, THE BLACK REVOLUTION ON CAMPUS (2012); RACE AND HEGEMONIC STRUGGLE IN THE UNITED STATES: POP CULTURE, POLITICS, AND PROTEST (Michael G. Lacy et al. eds., 2014); FABIO ROJAS, FROM BLACK POWER TO BLACK STUDIES: HOW A RADICAL SOCIAL MOVEMENT BECAME AN ACADEMIC DISCIPLINE (2007).

147. PENIEL E. JOSPEH, WAITING TIL THE MIDNIGHT HOUR: A NARRATIVE HISTORY OF BLACK POWER 188 (2006).

148. *Id.* at 240 (quoting Carmichael). *See also* Stokely Carmichael, *What We Want*, N.Y. REV. BOOKS (Sept. 22, 1966), <http://www.nybooks.com/articles/1966/09/22/what-we-want/>. Carmichael's essay was widely reprinted. *See, e.g.,* Stokely Carmichael, *Power and Racism*, in THE BLACK POWER REVOLT 62–71 (1968); Stokely Carmichael, *Power and Racism*, in JUSTICE DENIED: THE BLACK MAN IN WHITE AMERICA 501–10 (William Chace & Peter Collier eds., 1970).

149. BOBBY SEALE, SEIZE THE TIME 79–85 (1968) (discussing sale of Chairman Mao's Little Red Book to students at Berkeley to raise money to purchase guns). *See also* JOSEPH, *supra* note 147, at 176.

Seale memorably phrased it, “all I could think of was books, dollars, then guns for us motherfuckers.”¹⁵⁰

B. Books, Ideas, and the Origins of Black Power

Despite H. Rap Brown’s skepticism of them, books – and libraries – often appear in the literature of Black Power. Books were central to the genesis and propagation of Black Power.¹⁵¹ For books were an important source of ideas of liberation and vehicles for the propagation of those ideas.¹⁵² *The Autobiography of Malcolm X* is the best example. Malcolm X, one ought to recall, told a British reporter his alma mater was “books.”¹⁵³ X writes of how he read widely in the enormous library of the Norfolk Prison Library.¹⁵⁴ His readings, often in history, convinced X that the teachings of Mr. Muhammad stressed how history had been “whitened;” “when white men had written history books, the black man simply had been left out.”¹⁵⁵ X read a number of histories, including Will Durant’s *Story of Civilization*, H. G. Wells’ *Outline of History*, DuBois’ *Souls Of Black Folk*, Carter Woodson’s *Negro History*, and J. A. Rogers’ *Sex and Race*.¹⁵⁶ “Book after book,” X wrote, “showed me how the white man had brought upon the world’s black, brown, red, and yellow peoples every variety of the sufferings of exploitation.” He continued:

I saw how since the sixteenth century, the so-called “Christian trader” white man began to ply the seas in his lust for Asian and African empires, and plunder, and power. I read, I saw, how the white man never has gone among the non-white peoples bearing the Cross in the true manner and spirit of Christ’s teachings—meek, humble, and Christ-like.¹⁵⁷

X extracted, from the books he read, evidence that fit with his thesis about how white people had distorted or erased the history of Africa and people of African ancestry.¹⁵⁸ This confirmed in his mind the slogan he used to recruit converts: that the white man is the devil.

150. SEALE, *supra* note 81, at 84.

151. See Ernest Kaiser, *The Crisis of the Negro Intellectual*, 9 FREEDOMWAYS 24–41 (1969).

152. *Id.*

153. HALEY, *supra* note 78, at 183.

154. *Id.* at 172–94

155. *Id.* at 177.

156. *Id.* at 178.

157. *Id.* at 180.

158. *Id.*

Books were vehicles of liberation for many Black Power writers.¹⁵⁹ “Whenever I had liberated enough cash to give me a stretch of free time,” wrote Huey Newton, “I stayed home reading books like . . . Franz Kafka’s *The Trial* and Thomas Wolfe, *Look Homeward Angel*.”¹⁶⁰ Jean Genet’s introduction to George Jackson’s *Soledad Brother* made the point that “here is a book, tough and sure, both a weapon of liberation and a love poem.”¹⁶¹ Law books in particular contained power. Huey Newton’s autobiography tells how he learned the law as a way of beating a rap.¹⁶² But later it empowered him and other African Americans in Oakland in other ways.¹⁶³ Sometimes Newton stood close to where police were stopping African Americans and read from the California penal code, as a way of alerting both the police and those they had stopped about their duties and rights.¹⁶⁴

C. Black Power’s Agenda in Books: The Critique of Property, Constitution, and Law

But what were the ideas that the Black Power literature sought to propagate? The literature of Black Power – much of which was published by major trade presses – sought to indict the system, to demystify the power behind the curtain, and to help clear the way for a redistribution of political power.¹⁶⁵ One might take the Black Panther Party’s Ten-Point Program as further evidence of the agenda of Black

159. See generally HUEY NEWTON, *REVOLUTIONARY SUICIDE* (1973).

160. *Id.* at 81.

161. Jean Genet, *Introduction*, in SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON (1970). The *New York Review of Books* also offered a critique of Black Power by the white historian Christopher Lasch. See Christopher Lasch, *A Special Supplement: The Trouble with Black Power*, N.Y. REV. BOOKS (Feb. 29, 1968), <http://www.nybooks.com/articles/1968/02/29/a-special-supplement-the-trouble-with-black-power/> (“Violent hatred fills the vacuum left by the lack of an ideology and a program.”).

162. See generally NEWTON, *supra* note 159.

163. *Id.*

164. *Id.* at 120–21 (discussing Huey Newton giving legal advice).

I always carried law books in my car. Sometimes, when a policeman was harassing a citizen, I would stand off a little and read the relevant portions of the penal code in a loud voice to all within hearing distance. In doing this, we were helping to educate those who gathered to observe these incidents . . . we were, proud Black men, armed with guns and knowledge of the law.

JOSEPH, *supra* note 147, at 209 (discussing Newton’s reading statutes).

165. Recent literature reveals just how many different directions Black Power thought pointed, including toward ownership and development of agricultural land. See generally Russell Rickford, “We Can’t Grow Food on All This Concrete”: *The Land Question, Agrarianism, and Black Nationalist Thought in the Late 1960s and 1970s*, 103 J. AM. HIST. 956 (2017); Brian D. Goldstein, *The Search for New Forms: Black Power and the Making of the Postmodern City*, 103 J. AM. HIST. 375 (2016).

Power.¹⁶⁶ Much was about self-determination, such as having blacks freed from prison, increased employment, and an end to police brutality.¹⁶⁷ However, one part was about education, which could be continued – or at least started – in the prison library.¹⁶⁸ “We want education for our people that exposes the true nature of this decadent American society We want education that teaches us our true history and our role in the present-day society.”¹⁶⁹ There were a wide variety of critiques in the Black Power literature. Some were that the United States owed blacks and had not followed its own laws, and others sought to critique law and suggest what law should look like.¹⁷⁰

Black Power literature had a lot to say about property, the Constitution, and the law, as have reformers throughout American history. Just as H. Rap Brown sounded like Ralph Waldo Emerson’s “American Scholar,” other Black Power writers also paralleled Emerson’s work, perhaps because Emerson and the Transcendentalists and the Black Power movement had similar techniques to challenge the status quo. They were skeptical of private property and of authority based on tradition rather than reason. Eldridge Cleaver’s *Soul on Ice* shared the skepticism of Emerson in regards to private property. Where Emerson said in his lecture “The Conservative,” that he could not occupy the bleakest crag of the White Hills without someone – or some corporation – stepping up to claim ownership,¹⁷¹ Cleaver had a similar, if more modern, formulation of the same principle.¹⁷² “Everything is held as private property Someone has a brand on everything There is nothing left over,” he wrote.¹⁷³ Cleaver noted the explicitly racial aspects of property:

Until recently, the blacks themselves were counted as part of somebody’s private property, along with the chickens and goats. The blacks have not forgotten this, principally because they are still treated as if they are part of someone’s inventory of assets or perhaps, in this day of rage against the costs of welfare, blacks are listed among the nation’s liabilities.¹⁷⁴

166. HUEY NEWTON, *TO DIE FOR THE PEOPLE* 3–6 (1966).

167. *Id.*

168. *Id.*

169. *Id.*

170. *See, e.g., id.*

171. RALPH WALDO EMERSON, *THE CONSERVATIVE* 173, 180 (1882).

172. CLEAVER, *supra* note 77, at 134.

173. *Id.*

174. *Id.*

There was one other way that Cleaver paralleled Emerson. They both called the institution of property into question, and they did it by questioning whether there was some natural right to property. “The mystique of the deed of ownership is melting away,” Cleaver wrote.¹⁷⁵ “In other parts of the world, peasants rise up and expropriate the land from the former owners Blacks in America see that the deed is not eternal, that it is not signed by God, and that new deeds, making blacks the owners, can be drawn up.”¹⁷⁶ Other Black Power literature critiqued property in similar terms. Huey Newton recalled in *Revolutionary Suicide* that “the laws exist to defend those who possess property They protect the possessors who should share but do not.”¹⁷⁷ Charles Hamilton, a political science professor, explained the 1970 Black Power attack on property rights and law more generally.¹⁷⁸

The entire value structure which supports property rights over human rights, which *sanctions* the intolerable conditions in which black people have been *forced* to live is questioned. There are revolts because the black people are saying that they no longer intend to abide by an oppressive notion of “law and order.” That law and that order meant the perpetuation of an *intolerable* status quo.¹⁷⁹

The Black Power critique of law went well beyond property rights. The critique took on law and the Constitution more generally. They questioned the fairness of the legal system and of the Constitution. The wide-ranging critique of white society also revealed skepticism of the motives of white voters. Julius Lester’s 1968 book, *Look Out Whitey! Black Power’s Gon’ Get Your Mama*, provided an early formulation of what Derrick Bell has made a foundational principle of Critical Race theory: “[w]hite folks do nothing that they think is not to their advantage.”¹⁸⁰ This has come to be known as the interest-convergence theory: that white people will only act in their perceived best interest.¹⁸¹

175. *Id.* at 135.

176. *Id.*

177. NEWTON, *supra* note 160, at 82. See also DAVID RAY PAPKE, HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION’S LEGAL FAITH 124 (1998).

178. See generally Charles Hamilton, *Riots, Revolts, and Reluctant Response*, in THE BLACK POWER REVOLT (1968) (discussing Black Power and property rights.)

179. *Id.* at 174.

180. LESTER, *supra* note 80, at 57; Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

181. Bell, *supra* note 180, at 523 (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”).

Even more critically, Lester offered a broad critique of American society about the division between the rhetoric of equality and the reality of exclusion.¹⁸²

America has the rhetoric of freedom and the reality of slavery. It talks of peace while dropping bombs. It speaks of self-determination for all people while moving to control the means of production on which self-determination depends. It passes civil rights bills for black people, ostensibly, and does nothing to enforce such bills Power maintains itself through rhetoric and force.¹⁸³

Frequently, Black Power writers expressed no confidence in white government¹⁸⁴ and they critiqued the Constitution in particular.¹⁸⁵ Harold Cruse's *The Crisis of the Negro Intellectual* explained the problems with the Constitution, which so frequently protected property rather than equality.¹⁸⁶ The opposition to the Civil Rights Act of 1964, which was then recent history, was one of Cruse's examples of how the Constitution's protection for property stood in the way of African American equality.¹⁸⁷

Whatever the case, it has to be noted that the most vocal opponents of the Civil Rights Act of 1964 *cite* the American Constitution and object to measures aimed at enforcing the Fourteenth and Fifteenth Amendments as violations of the rights of individuals and private property privileges which are guaranteed by the same Constitution. This emotional and legal conflict over the interpretation of the Constitution, in the slow and painfully bitter struggle towards the enforcement of the constitutional guarantees of racial equality, points up a very real dilemma inherent in the Negro's position in America.¹⁸⁸

There is a tension in law and African American equality. So much of our nation's stride towards equality is at its core about the Fourteenth Amendment's equal protection principle.¹⁸⁹ But the law

182. See generally LESTER, *supra* note 80.

183. *Id.* at 120.

184. SMITH, *supra* note 85, at 54, 56–57.

185. CRUSE, *supra* note 76, at 7, 394 (discussing limits of the US Constitution). Here, I am eliding some of the differences between Cruse and the most radical Black Power writers, such as Malcolm X. See HALEY, *supra* note 78, at 183 (criticizing “negro ‘intellectuals’” like Cruse for focusing on irrelevant issues); cf. Peniel Joseph, *Harold Cruse, Black Nationalism, and the Black Power Movement*, in HAROLD CRUSE'S *The Crisis of the Negro Intellectual Revisited* 241–62 (Jerry Watts ed., 2004).

186. See generally CRUSE, *supra* note 76.

187. See generally *id.*

188. *Id.* at 7 (emphasis in original).

189. See generally Alfred L. Brophy, *The Great Constitutional Dreambook*, in *ENCYCLOPEDIA OF THE SUPREME COURT* 360 (David Tanenhaus ed., 2008).

has also been at the center of the denial of African American rights and justice. So just as African Americans are appealing to law and justice, they are writing about the law's abandonment of them. Complaints about basic issues of justice, which were central to the black experience, were felt as well as read about. The issue was that law and order has meant only oppression for African Americans.¹⁹⁰ Law, to so many, meant the deprivation of rights.

While much of Black Power critiqued law, there was a constructive aspect to this as well. Black Power writers had a different sense of what the rule of law meant. Justice meant to them getting some property;¹⁹¹ alleviation of poverty;¹⁹² release from prison;¹⁹³ and an end to imperialism.¹⁹⁴ Eldridge Cleaver saw the United States' engagement abroad as a parallel exploitation of racial minorities.¹⁹⁵ At their core, these separate claims for justice were about self-determination.

V. THE BIBLIOGRAPHIC ORIGINS OF BLACK POWER?

The recent literature on the origins of Black Power often locates it in the claims of the Civil Rights Movement and increasing black consciousness. This is about black peoples' control of their own destiny.¹⁹⁶ "Black consciousness is an essential part of speaking we define for ourselves. It is the foundation of Black Power," wrote Julius Lester.¹⁹⁷ There was a turn to history and to African American literature so that black people have a new understanding of history: black consciousness.¹⁹⁸ Is this part of the natural evolution from the

190. LESTER, *supra* note 80, at 23.

191. CLEAVER, *supra* note 77, at 134 ("On any account, however, blacks are in no position to respect or help maintain the institution of private property What they want is to figure out a way to get some of that property for themselves, to divert it to their own needs This is what it is all about, and this is the real brutality involved This is the source of all brutality.").

192. See generally Tommie Shelby, *Justice, Deviance, and Dark Ghetto*, 35 PHIL. & PUB. AFF. 126 (2007); TOMMIE SHELBY, *WE WHO ARE DARK: THE PHILOSOPHICAL FOUNDATIONS OF BLACK SOLIDARITY* (2005).

193. See generally, CLEAVER, *supra* note 77.

194. *Id.* at 129.

195. See generally *id.*

196. Stokely Carmichael, *Racism and Power*, in *JUSTICE DENIED: THE BLACK MAN IN WHITE AMERICA* 501, 509 (William Chace & Peter Collier eds., 1970).

197. LESTER, *supra* note 80, at 93 ("Blacks are happy to study their part, to learn those parts which have been lost, to re-erect what the white man destroyed in them, and to destroy that which the white man"). *Id.* at 91.

198. *Id.* at 91-93.

Civil Rights movement, as Lester says,¹⁹⁹ or the result of frustration at the lack of concrete action following the Civil Rights movement?²⁰⁰

Many recent histories of Black Power focus on the experience of Black Power advocates at the local level.²⁰¹ Peniel Joseph's *Waiting 'Til the Midnight Hour*, which focuses on key players and their ideas and actions from the 1940s to the early 1970s, is styled as a narrative history of Black Power.²⁰² Alternatively, the list of books on the black experience for the Marion Correctional Institute presents a bibliographic history of Black Power. The bibliographic history tells us that Black Power is about consciousness, as supported by history and literature, and a special vision of how blacks had been treated by law. The bibliographic history tells, in some ways, a different story from the narrative history. For while a narrative history focuses on Black Power's talk about separatism and talk of violence,²⁰³ and actual violence of course,²⁰⁴ the bibliographic history can focus on aspirations. For Black Power was, in its ideal form, also about self-determination and liberation in addition to violence. The bibliographic history can see Black Power in context of other ideas such as Black Arts and Civil Rights. This movement was about liberation through education, history, art, literature, and political power.²⁰⁵ The library catalog reveals the context of Black Power: it shows the ways that history, art, and literature combined with ideas about separatism and liberation and how they fit together.

199. *Id.* at 30 ("Black Power was merely the next step in a logical progression, not the outpouring of frustration that the press tried to make us believe when they couldn't explain it away It was new in the context of the 'the movement' of the 1960s It was not new in the context of the lives of black people.").

200. *See generally* DAVID GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986) (arguing that Black Power emerged from frustration over lack of progress on Civil Rights); HETTIE V. WILLIAMS, WE SHALL OVERCOME TO WE SHALL OVERRUN: THE COLLAPSE OF THE CIVIL RIGHTS MOVEMENT AND THE BLACK POWER REVOLT (1962-1968) (2008).

201. *See generally, e.g.*, YOHURU WILLIAMS, BLACK POLITICS/WHITE POWER: CIVIL RIGHTS, BLACK POWER, AND THE BLACK PANTHERS IN NEW HAVEN (2000) (discussing Black Power advocates); MATTHEW J. COUNTRYMAN, UP SOUTH: CIVIL RIGHTS AND BLACK POWER IN PHILADELPHIA (2007) (discussing Black Power and Politics).

202. *See generally* JOSEPH, *supra* note 147.

203. *See generally, e.g.*, PEARSON, THE SHADOW OF THE PANTHER (1994) (revealing violence of Black Panthers). *See* CLEAVER, SOUL ON ICE, *supra* note 77, at 14 (writing about the rape of white women as "a revolutionary act").

204. *See generally* CAMPBELL, *supra* note 138.

205. *Cf.* Peniel E. Joseph, *Black Studies, Student Activism, and the Black Power Movement*, in THE BLACK POWER MOVEMENT: RETHINKING THE CIVIL RIGHTS-BLACK POWER ERA 251 (Peniel E. Joseph ed., 2006) (interpreting Black Studies as a dependent variable and an outgrowth of Black Power).

The books provided a picture of African American history and consciousness that linked Black Power's claims to the Civil Rights movement. This shows the agenda of Black Power and how it critiqued the exclusion of African Americans and the brutality of history in the United States. It provided an intellectual underpinning to what seemed obvious and also critiqued the meaning of "law and order."

To be sure, the book culture helped give shape to and helped to propagate the ideas of Black Power.²⁰⁶ There were more connections between Black Power and mainstream politics than we sometimes realize, as historians are increasingly telling us.²⁰⁷ The claims made by adherents of the Civil Rights and the Black Power movements were often not very distinct. This was true about books on the rhetoric of Civil Rights and Black Power as well.²⁰⁸

CONCLUSION

Books that contained the ideas of liberation and that indicted capitalism and sought to de-legitimize prisons were in circulation in the Marion Correctional Institution. Whether they found receptive readers is tough to tell, although some evidence from other prisons suggests that the ideas of Black Power were put into practice, for prisons were the places that Black Power ideas were developed and disseminated.²⁰⁹

What we can know is that prisoners had requested, and a court ordered, that they have access to books that contained the core of ideas known as Black Power.

206. JOSEPH, *supra* note 147, at 209 (discussing Huey Newton's reading in Revolutionary canon, such as Franz Fanon). *See generally* WILLIAM L. VAN DEBURG, *NEW DAY IN BABYLON: THE BLACK POWER MOVEMENT AND AMERICAN CULTURE, 1965-1975* (1992).

207. *See generally, e.g.*, DEVIN FERGUS, *LIBERALISM, BLACK POWER, AND THE MAKING OF AMERICAN POLITICS, 1965-1980* (2009); MATTHEW J. COUNTRYMAN, *UP SOUTH: CIVIL RIGHTS AND BLACK POWER IN PHILADELPHIA* (2007).

208. *See generally* HAIG BOSMAJIAN AND HAMIDA BOSMAJIAN, *THE RHETORIC OF THE CIVIL RIGHTS MOVEMENT* (1969) (providing Civil Rights and Black Power speeches in same book); ROBERT SCOTT AND WAYNE BROCKRIEDE, *THE RHETORIC OF BLACK POWER* (1979) (providing Civil Rights and Black Power speeches in same book). *See also* Keith Gilyard, *Aspects of African American Rhetoric as a Field*, in *AFRICAN AMERICAN RHETORIC(S): INTERDISCIPLINARY PERSPECTIVES* 1, 8 (2007) (noting that Black Power and Civil Rights rhetoric were connected).

209. *See generally, e.g.*, Knight, *supra* note 1.

Appendix A: Titles on Court Order

Source: *Taylor v. Perini*, 413 F. Supp. 189 (N.D. Ohio 1976). The list is repeated at *Taylor v. Perini*, 421 F. Supp. 740, 754–57 (N.D. Ohio 1976).

1. MAYA ANGELOU, *I KNOW WHY THE CAGED BIRD SINGS* (1969).
2. HERBERT APTHEKER, *NEGRO SLAVE REVOLTS IN THE UNITED STATES, 1526-1860* (1939).
3. JAMES BALDWIN, *GO TELL IT ON THE MOUNTAIN* (1953).
4. JAMES BALDWIN, *TELL ME HOW LONG THE TRAIN'S BEEN GONE: A NOVEL* (1968).
5. SALLY BELFRAGE, *FREEDOM SUMMER* (1965).
6. LERONE BENNETT, *WHAT MANNER OF MAN: A BIOGRAPHY OF MARTIN LUTHER KING, JR.* (1968).
7. *Black Scholar*. (1969). San Francisco, CA: Black World Foundation
8. *Black World*. (1970-1976). Chicago: Johnson Pub. Co.
9. ARNA BONTEMPS, *AMERICAN NEGRO POETRY* (1963).
10. FRANCIS L. BRODERICK, W. E. B. DU BOIS, *NEGRO LEADER IN A TIME OF CRISIS* (1959).
11. CECIL BROWN, *THE LIFE AND LOVES OF MR. JIVEASS NIGGER: A NOVEL* (1969).
12. CLAUDE BROWN, *MANCHILD IN THE PROMISED LAND* (1965).
13. H. RAP BROWN, *DIE, NIGGER, DIE!* (1969).
14. ED BULLINS, *FIVE PLAYS* (1969).
15. STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* (1967).
16. *MALCOLM X: THE MAN AND HIS TIMES* (John Henrik Clarke et al. eds., 1969).
17. *JUSTICE DENIED: THE BLACK MAN IN WHITE AMERICA* (William M. Chace & Peter Collier eds., 1970).
18. KENNETH B. CLARK, *DARK GHETTO: DILEMMAS OF SOCIAL POWER* (1965).
19. ELDRIDGE CLEAVER, *SOUL ON ICE* (1967).
20. JAMES H. CONE, *BLACK THEOLOGY AND BLACK POWER* (1969).

21. ROBERT E. CONOT, *RIVERS OF BLOOD, YEARS OF DARKNESS: THE UNFORGETTABLE CLASSIC ACCOUNT OF THE WATTS RIOT* (1967).
22. E. DAVID CRONON, *BLACK MOSES: THE STORY OF MARCUS GARVEY AND THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION* (1955).
23. HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* (1967).
24. ANGELA Y. DAVIS, *IF THEY COME IN THE MORNING: VOICES OF RESISTANCE* (1971).
25. W. E. B. DU BOIS, *BLACK RECONSTRUCTION: AN ESSAY TOWARD THE HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN AMERICA, 1860-1880* (1935).
26. W. E. B. DUBOIS, *THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES* (1903).
27. RALPH ELLISON, *INVISIBLE MAN* (1952).
28. E. U. ESSIEN-UDOM, *BLACK NATIONALISM: A SEARCH FOR AN IDENTITY IN AMERICA* (1962).
29. FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (1967).
30. FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1963).
31. MILES MARK FISHER, *NEGRO SLAVE SONGS IN THE UNITED STATES* (1953).
32. RUDOLPH FISHER, *THE CONJURE-MAN DIES: A MYSTERY TALE OF DARK HARLEM* (1932).
33. RUDOLPH FISHER, *THE WALLS OF JERICHO* (1928).
34. JOHN HOPE FRANKLIN, *THE EMANCIPATION PROCLAMATION* (1963).
35. JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES* (1947).
36. JOHN HOPE FRANKLIN, *RECONSTRUCTION: AFTER THE CIVIL WAR* (1961).
37. E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (1939).
38. ERNEST KAISER, *THE CRISIS OF THE NEGRO INTELLECTUAL* (1969).
39. NIKKI GIOVANNI, *BLACK FEELING, BLACK TALK, BLACK JUDGEMENT* (1970).

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40. TOM HAYDEN, *REBELLION IN NEWARK: OFFICIAL VIOLENCE AND GHETTO RESPONSE* (1967).
41. GEORGE L. JACKSON, *BLOOD IN MY EYE* (1972).
42. JAMES WELDON JOHNSON, *THE AUTOBIOGRAPHY OF AN EX-COLORED MAN* (1912).
43. LEROI JONES, *BLUES PEOPLE: NEGRO MUSIC IN WHITE AMERICA* (1963).
44. LEROI JONES, *THE DUTCHMAN AND THE SLAVE: TWO PLAYS* (1964).
45. LEROI JONES, *HOME* (1966).
46. *Journal of Negro History*.
47. JOHN OLIVER KILLENS, *AND THEN WE HEARD THE THUNDER* (1963).
48. MARTIN LUTHER KING, *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* (1958).
49. MARTIN LUTHER KING, *THE TRUMPET OF CONSCIENCE* (1968).
50. MARTIN LUTHER KING, *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (1967).
51. MARTIN LUTHER KING, *WHY WE CAN'T WAIT* (1964).
52. *AFRICAN AFFAIRS* (Kenneth Kirkwood ed., 1963).
53. JULIUS LESTER, *BLACK FOLKTALES* (1969).
54. JULIUS LESTER, *LOOK OUT, WHITEY: BLACK POWER'S GON' GET YOUR MAMA* (1968).
55. DAVID L. LEWIS, *KING: A CRITICAL BIOGRAPHY* (1970).
56. C. ERIC LINCOLN, *THE BLACK MUSLIMS IN AMERICA* (1961).
57. MALCOLM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965).
58. LOUIS H. MASOTTI & DON R. BOWEN, *RIOTS AND REBELLION: CIVIL VIOLENCE IN THE URBAN COMMUNITY* (1968).
59. JULIAN MAYFIELD, *THE HIT: A NOVEL* (1957).
60. CLAUDE MCKAY, *BANJO: A STORY WITHOUT A PLOT* (1929).
61. CLAUDE MCKAY, *HOME TO HARLEM* (1928).
62. LOUISE MERIWHETHER, *DADDY WAS A NUMBER RUNNER* (1970).
63. ROBERT J. MINTON, *INSIDE: PRISON AMERICAN STYLE* (1971).

64. BENJAMIN MUSE, *AMERICAN NEGRO REVOLUTION: FROM NONVIOLENCE TO BLACK POWER, 1963-1967* (1968).
65. GEOFFREY PARRINDER, *AFRICAN TRADITIONAL RELIGION* (1954).
66. MERRILL PROUDFOOT, *DIARY OF A SIT-IN* (1962).
67. BENJAMIN QUARLES, *BLACK ABOLITIONISTS* (1969).
68. BENJAMIN QUARLES, *LINCOLN AND THE NEGRO* (1962).
69. BENJAMIN QUARLES, *THE NEGRO IN THE CIVIL WAR* (1953).
70. RICHARD RESH, *BLACK AMERICA: ACCOMMODATION AND CONFRONTATION IN THE TWENTIETH CENTURY* (1969).
71. BOBBY SEALE, *SEIZE THE TIME: THE STORY OF THE BLACK PANTHER PARTY AND HUEY P. NEWTON* (1970).
72. CHARLES E. SILBERMAN, *CRISIS IN BLACK AND WHITE* (1964).
73. JAMES WESLEY SILVER, *MISSISSIPPI: THE CLOSED SOCIETY* (1964).
74. ARTHUR L. SMITH, *RHETORIC OF BLACK REVOLUTION* (1969).
75. JOHN RANDOLPH SPEARS, *THE AMERICAN SLAVE TRADE: AN ACCOUNT OF ITS ORIGIN, GROWTH AND SUPPRESSION* (1900).²¹⁰
76. KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1956).
77. MARSHALL WINSLOW STEARNS, *THE STORY OF JAZZ* (1956).
78. CHUCK STONE, *BLACK POLITICAL POWER IN AMERICA* (1968).
79. ELIZABETH SUTHERLAND, *LETTERS FROM MISSISSIPPI* (1965).
80. JOSEPH R. WASHINGTON, *BLACK RELIGION: THE NEGRO AND CHRISTIANITY IN THE UNITED STATES*. (1964).
81. ARTHUR OCEAN WASKOW, *FROM RACE RIOT TO SIT-IN, 1919 AND THE 1960s: A STUDY IN THE CONNECTIONS BETWEEN CONFLICT AND VIOLENCE* (1966).
82. ALAN F. WESTIN, *FREEDOM NOW! THE CIVIL RIGHTS STRUGGLE IN AMERICA* (1964).
83. JOHN ALFRED WILLIAMS, *THE MAN WHO CRIED I AM: A NOVEL* (1967).

210. Spears' book is out of place in here, because the books are usually listed in alphabetical order according to author's last name. It is possible that the book is W. E. B. Du Bois (1896). *The Suppression of the African Slave Trade to the United States of America, 1638-1870*. New York: Longman, Greens, and Co.

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84. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).
85. RICHARD WRIGHT, *NATIVE SON* (1940).
86. RICHARD WRIGHT, *UNCLE TOM'S CHILDREN: FOUR NOVELLAS* (1938).
87. SAMUEL F. YETTE, *THE CHOICE: THE ISSUE OF BLACK SURVIVAL IN AMERICA* (1971).
88. WHITNEY M. YOUNG, *BEYOND RACISM: BUILDING AN OPEN SOCIETY* (1969).
89. HOWARD ZINN, *SNCC, THE NEW ABOLITIONISTS* (1964).

Appendix B: Other Black Experience Materials in Prison Library

The court characterized the following list as “evidence of” the bona fide interest of the institution in purchasing materials which will be interest to Black inmates. *Taylor v. Perini*, 413 F. Supp. 189, 219–21 (N.D. Ohio 1976). This *bona fide* interest was subsequently used as evidence that the prison did not need to replace lost materials. *Taylor v. Perini*, 455 F. Supp. 1241, 1258 (N.D. Ohio 1978).

MUHAMMAD ALI & RICHARD DURHAM, *THE GREATEST, MY OWN STORY* (1975).

GERALD ASTOR, *AND A CREDIT TO HIS RACE: THE LIFE AND HARD TIMES OF JOSEPH LOUIS BARROW, A.K.A. JOE LOUIS* (1974).

J. E. BAKER, *THE RIGHT TO PARTICIPATE: INMATE INVOLVEMENT IN PRISON ADMINISTRATION* (1974).

JAMES BALDWIN, *BLUES FOR MISTER CHARLIE, A PLAY* (1964).

JAMES BALDWIN, *IF BEALE STREET COULD TALK* (1974).

ALLEN B. BALLARD, *THE EDUCATION OF BLACK FOLK: THE AFRO-AMERICAN STRUGGLE FOR KNOWLEDGE IN WHITE AMERICA* (1973).

CARL LOTUS BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* (1922).

HENRY BLAKELY, *WINDY PLACE* (1974).

SARAH-PATTON BOYLE, *THE DESEGREGATED HEART: A VIRGINIAN’S STAND IN TIME OF TRANSITION* (1962).

GEORGE LYNN CROSS, *BLACKS IN WHITE COLLEGES: OKLAHOMA’S LANDMARK CASES* (1975).

PETER DAVIES, *THE TRUTH ABOUT KENT STATE: A CHALLENGE TO THE AMERICAN CONSCIENCE* (1973).

ARTHUR PAUL DAVIS & MICHAEL W. PELOW, *THE NEW NEGRO RENAISSANCE: AN ANTHOLOGY* (1975).

DAVID DELMAN, *ONE MAN’S MURDER* (1975).

MICHAEL DORMAN, *WE SHALL OVERCOME* (1965).

PHILIP DURHAM & EVERETT L. JONES, *THE ADVENTURES OF THE NEGRO COWBOY* (1969).

Ebony (Ed.) *Ebony Pictorial History of Black America* Vol. 1, 2, 3 (1971).

Ebony (Ed.) *1000 Successful Blacks* Vol. 1 (1973).

Ebony (Ed.) *Career Guide* Vol. 3: *Opportunities and Resources for You* (1973).

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Ebony (Ed.) Famous Blacks Give Secrets of Success Vol. 2 (1973).

Ebony (Ed.) Pictorial History: Black America (1973).

Ebony (Ed.) The Ebony Handbook (1974).

JOHN HOPE FRANKLIN, THE EMANCIPATION PROCLAMATION (1963).

JOHN HOPE FRANKLIN, THE NEGRO IN 20TH CENTURY AMERICA: A READER ON THE STRUGGLE FOR CIVIL RIGHTS (1967).

GLADYS-MARIE FRY, NIGHT RIDERS IN BLACK FOLK HISTORY (1975).

NIKKI GIOVANNI, THE WOMEN AND THE MEN (1975).

ROBERT E. GREENE, BLACK DEFENDERS OF AMERICA: 1775-1973 (1974).

JANET HARRIS, THE LONG FREEDOM ROAD: THE CIVIL RIGHTS STORY (1967).

JIM F. HEATH, DECADE OF DISILLUSIONMENT: THE KENNEDY-JOHNSON YEARS (1975).

CHESTER HIMES, BLACK ON BLACK: BABY SISTER AND SELECTED WRITINGS (1973).

RHODA HOFF, AMERICA'S IMMIGRANTS: ADVENTURES IN EYEWITNESS HISTORY (1967).

LANGSTON HUGHES, AN AFRICAN TREASURY: ARTICLES, ESSAYS, STORIES, POEMS (1960).

LANCE JEFFERS, WHEN I KNOW THE POWER OF MY BLACK HAND (1974).

MAJOR J. JONES, CHRISTIAN ETHICS FOR BLACK THEOLOGY: THE POLITICS OF LIBERATION (1974).

ROBERT WILLIAM JULY, PRECOLONIAL AFRICA: AN ECONOMIC AND SOCIAL HISTORY (1975).

FRANCIS JOSEPH KICHAK, THE SERPENT AND THE DOVE (1975).

DANIEL J. LEAB, FROM SAMBO TO SUPERSPADE: THE BLACK EXPERIENCE IN MOTION PICTURES (1975).

LEONARD LEVITT, AN AFRICAN SEASON (1967).

JOHN S. MBITI, INTRODUCTION TO AFRICAN RELIGION (1975).

AUGUST MEIER, & ELLIOTT RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT (1973).

PETER J. PARISH, THE AMERICAN CIVIL WAR (1974).

HARRY A. PLOSKI & ERNEST KAISER, *THE NEGRO ALMANAC* (1962).

ALAN REITMAN, *THE PULSE OF FREEDOM: AMERICAN LIBERTIES 1920-1970s* (1975).

CHARLES DUNCAN RICE, *THE RISE AND FALL OF BLACK SLAVERY* (1975).

PETER RITNER, *THE DEATH OF AFRICA* (1960).

MARC HOWARD ROSS, *GRASS ROOTS IN AN AFRICAN CITY: POLITICAL BEHAVIOR IN NAIROBI* (1975).

CARL T. ROWAN, *SOUTH OF FREEDOM* (1952).

JERRY RUBIN, *DO IT: SCENARIOS OF THE REVOLUTION* (1970).

ELLIOTT P. SKINNER, *PEOPLE AND CULTURES OF AFRICA: AN ANTHROPOLOGICAL READER*. (1973).

WOLE SOYINKA, *POEMS OF BLACK AFRICA* (1975).

GRESHAM M. SYKES, *SOCIAL PROBLEMS IN AMERICA* (1971).

DARWIN T. TURNER, *BLACK AMERICAN LITERATURE: ESSAYS, POETRY, FICTION, DRAMA* (1970).

IMMANUEL WALLERSTEIN, *AFRICA: THE POLITICS OF UNITY: AN ANALYSIS OF A CONTEMPORARY SOCIAL MOVEMENT* (1967).

BOOKER T. WASHINGTON, *UP FROM SLAVERY: AN AUTOBIOGRAPHY* (1901).

ROBERT G. WEISBORD, *GENOCIDE?: BIRTH CONTROL AND THE BLACK AMERICAN* (1975).

ARTHUR WIDDER, *ADVENTURES IN BLACK* (1962).

RICHARD WRIGHT, *THE OUTSIDER* (1953).

MARGARET B. YOUNG, *MARTIN LUTHER KING JR.* (1968).

Segregation in the Federal Courthouse in Washington D.C. Before and After *Brown v. Topeka Board*

JAMES H. JOHNSTON*

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INTRODUCTION

Lawyer Huver Brown was making an argument to a federal district court judge in Washington, D.C. when the judge asked for his legal authority on a point. The Bar Association maintained a law library in the courthouse, and lawyers routinely went there to answer such questions from the bench. The Association was a “voluntary” one where lawyers were not required to join – and so was different from the current unified D.C. Bar Association. But Brown was not a member and could not use the library.¹ This was not his choice. He was African American, a graduate of Howard University School of

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1. Voluntary bars serve professional, social, and educational purposes. A lawyer does not need to join them in order to practice law. In jurisdictions with unified bars, lawyers must be members in order to practice. Unified bars also may provide assistance to the courts in admissions and discipline.

Law, and barred from the whites-only Association and its library. It was par for the course for black lawyers of his generation. Even though Brown was a lawyer, he reportedly was fired from the Internal Revenue Service merely for applying for a legal position when he worked there.² Fed up with discrimination, he filed suit against the Association on January 18, 1939, asserting that segregation by a private organization using federal facilities was unconstitutional.³

The narrow controversy was settled by allowing black lawyers to use the library. But a decade later, the civil rights movement began to challenge segregation not just in libraries but in public schools, accommodations, and indeed all aspects of life including private organizations like the Bar Association. Attempts to eliminate the Association's whites-only policy began in 1950 and included seven proposed votes by members, two lawsuits trying to integrate the Bar, two lawsuits trying to block integration, three court of appeals opinions, one federal district court opinion, and several dead cats before integration was achieved in 1958.⁴ The judiciary hardly distinguished itself. All but one of the federal judges hearing the lawsuits held honorary memberships in the segregated Association.⁵ And, two legal titans involved in settling Brown's original complaint, Robert Jackson and E. Barrett Prettyman, revisited the constitutionality of segregation in the 1950s as Supreme Court justice and Court of Appeals judge in the school cases. Both seemed to forget the precedent set in the library case. Court of Appeals Judge Prettyman saw nothing wrong with segregated schools in Washington, D.C.⁶ Supreme Court Justice Jackson struggled with the same issue before joining a unanimous Court in the landmark desegregation case *Brown v. Board of Education*.⁷

2. J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844–1944 136 (1993).

3. *Huver I. Brown Trial Advocacy Moot Court Team*, HOWARD U. SCH. OF L., <http://law.howard.edu/content/huver-i-brown-trial-advocacy-moot-court-team> (last visited July 8, 2016); *Colored Lawyer Files Suit to Make Bar Library Move*, WASH. POST, Jan. 19, 1939, at 3.

4. *Infra* Part V.

5. Four appellate judges, Bennett Clark, Wilbur Miller, Charles Fahy, and David Bazelon, comprised the panels hearing the appeals in this cases, and all four were listed as honorary members of the Association. Roster of the Members of the Bar Association of the District of Columbia, 19 J.B. ASS'N D.C. 271 (1952). *See infra* Part V.

6. *Carr v. Corning*, 182 F.2d 14 (D.C. Cir. 1950).

7. *See Brown v. Board of Education*, 347 U.S. 483 (1954).

I. SEGREGATED LIBRARIES

Libraries were obvious targets for civil rights challenges in the 1930s. A few months after Brown filed his complaint, Samuel Tucker, also a Howard University School of Law graduate, attacked segregation of the public library across the Potomac River in Alexandria, Virginia.⁸ Tucker arranged for several black men to walk into the whites-only library, choose some books from the shelves, and sit down to read.⁹ The shocked library staff immediately summoned police who arrested the men for disorderly conduct.¹⁰

Knowing what was likely to happen, Tucker sent a photographer to cover the incident and used the images to publicize the injustice. Within months, the city of Alexandria reached agreement with community leaders to settle the dispute by building a separate library for blacks.¹¹ This was consistent with the existing precedent in *Plessy v. Ferguson*; racial segregation by state and local governments was constitutional as long as separate but equal facilities were provided to African Americans.¹² Tucker, who had dropped out of the negotiations for health reasons, opposed the settlement as insufficient. When offered a library card at the new black library, he wrote back: “I refuse and will always refuse to accept a card to be used at the library to be constructed and operated at Alfred and Wythe Street [the new black library] in lieu of a card to be used at the existing [whites-only] library on Queen Street for which I have made application.”¹³

Libraries weren’t the only sites closed to blacks in the nation’s capital. With Franklin Roosevelt in the White House and sympathetic, progressive Democrats flooding into the city to work for the government, civil rights leaders found support in attacking discrimination in business establishments and federal facilities in Washington

8. Tucker was younger than Huver Brown, but Howard University School of Law was a historical breeding ground for civil rights lawyers. Tucker was practicing law in Alexandria at the time, but he later moved to Richmond and established a nation-wide Civil Rights practice. Patricia Sullivan, *Lawyer Samuel Tucker and His Historic 1939 Sit-In at Segregated Alexandria Library*, WASH. POST (Aug. 7, 2014), https://www.washingtonpost.com/local/lawyer-samuel-tucker-and-his-historic-1939-sit-in-at-segregated-alexandria-library/2014/08/05/c9c1d38e-1be8-11e4-ae54-0cfe1f974f8a_story.html?utm_term=.74e14383bdd3.

9. *Id.*

10. *Id.*

11. *1939 Library Sit-In*, ALEXANDRIA LIBR, https://www.alexandria.lib.va.us/client/en_US/home/?rm=1939+LIBRARY+S1%7C%7C%7C1%7C%7C%7C0%7C%7Ctrue&dt=list (last visited July 10, 2016).

12. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896).

13. *Letter from Samuel W. Tucker to Alexandria Library, February 13, 1940*, ALEXANDRIA LIBRARY (Feb. 2004), <https://alexlibraryva.org/custom/web/lhsc/sitin/tuckerletter/doc.html>.

where racial attitudes had traditionally been similar to those of the South. The cafeteria at the Department of the Interior was integrated in 1934 under pressure from two black employees, and opening the facilities of other agencies to African Americans followed soon thereafter.¹⁴

Insofar as the federal government was concerned, the obvious solution to racist policies barring African Americans from government facilities was simply to integrate them. Building separate but equal facilities for African Americans at the federal level was never considered – with major exceptions such as the military. The aim was to end racial discrimination, not to apply the discriminatory separate-but-equal approach of the South to the federal government.

II. BROWN'S CASE

Brown's lawsuit over the courthouse library did not settle so quickly or easily as the protest in Alexandria. Nor did it follow *Plessy*, although this was not for want of trying. A threshold problem, and one that would bedevil the Bar Association, was its By-Laws. They provided that membership was limited to: "[w]hite male members of the Bar of the Supreme Court of the District of Columbia, in good standing, in active practice . . ."¹⁵ There were also "associate" memberships for white, male nonresident lawyers admitted in other states and "honorary" memberships, which were conferred on judges and "any person of pre-eminent distinction in the legal profession."¹⁶ Although the By-Laws did not speak to the matter, honorary memberships were not extended to black judges.¹⁷ And regardless of membership in the Association, judges and their clerks and lawyers in the United States Attorney's office could use the library without charge.¹⁸

To make matters worse, an amendment to the By-Laws needed the vote of two-thirds of those eligible to vote.¹⁹ A minority, as it would prove, could block change.

14. Wendell E. Pritchett, *Fifty Years After Bolling v. Sharpe: A National Issue: Segregation in the District of Columbia and the Civil Rights Movement at Mid-Century*, 93 GEO. L.J. 1321, 1322–23 (2005).

15. *By-Laws of the Bar Association of the District of Columbia: Article I: Classes of Membership*, 6 J.B. ASS'N D.C. 425, 457 (1939).

16. *Id.*

17. *Infra* Part V.

18. *Supra* note 15, at 464.

19. *Id.* at 465.

Segregation in the Federal Courthouse

Letting private bar associations have libraries in federal courthouses was unique to Washington D.C. One Association member proposed solving Brown's complaint by moving the library out of the courthouse to a location closer to where most lawyers had their offices and then snidely added that this would force the federal government to bear the expense of providing a library in the courthouse just as it did elsewhere.²⁰

III. THE FAILED SEPARATE-BUT-EQUAL SOLUTION

Brown's case dragged on for more than a year until newly-appointed Attorney General Robert Jackson became involved. He was the third Attorney General to deal with the matter. As Professor William R. Casto observes in a recent article on the subject, Jackson's predecessors gave Brown "the runaround."²¹ Attorney General Homer Cummings had avoided the issue, claiming he "had no control" over the library, and Attorney General Frank Murphy likewise denied responsibility.²² But in fact, the Attorney General and the Chief Justice of the Supreme Court were charged by law with responsibility for federal court buildings.²³

Robert Jackson was not as timid. Once Jackson became Attorney General, he told Bar Association President Francis Hill in April 1940 that exclusion of black lawyers from the library was unconstitutional.²⁴ Jackson did not cite any authority for this conclusion; he must have thought it was obvious. The Bar President appointed a committee to settle the lawsuit.²⁵ The Committee's solution was to amend the By-Laws to provide that nonmembers, e.g., African American and female lawyers, could use the library for an annual fee of eight dollars. This compared with membership dues of twelve dollars.²⁶ A vote was scheduled for the October 1940 meeting.

20. H. K. McCook, *Should the Bar Library Be Moved?*, 6 J.B. Ass'n D.C. 509, 510 (1939).

21. William R. Casto, *A Post of Great Legal Power and Even Greater Moral Influence*, 19 GREEN BAG 2D 27, 31 (2015).

22. *Id.*

23. See Robert H. Jackson, *Letter from Attorney General to Mr. Hill*, 8 J.B. Ass'n D.C. 106, 106 (1941).

24. Casto, *supra* note 21, at 31.

25. Francis W. Hill, Jr., *The Bar Library Problem*, 8 J.B. Ass'n D.C. 95, 95 (1941).

26. *By-Laws of the Bar Association of the District of Columbia*, 6 J.B. Ass'n D.C. 457, 460 (1939). The eight-dollar charge seems exorbitant. For example, the Treasurer's Report for 1943 gave member revenue of \$15,185. At \$12 per member, the Association would have had roughly 1,265 members at that time. However, the library expenses, not including salary for the librarian, totaled \$3,400. Thus, the direct cost of the library was \$2.68 per member per year, not even

However, there was a significant condition in the proposed amendment. Black and female lawyers could not sit in the same room with white men; they would have to work in reading rooms segregated by race and gender.²⁷ “Privileges granted hereunder shall entitle male holders, e.g., African Americans, to use the separate room provided for them, and female holders to use the separate room provided for them, and all holders to have access to other rooms of the Association housing its library for the purpose of securing books to be taken to their separate rooms for use or to the court rooms, provided that holders of this privilege shall be subject to all the restrictions as to the removal and use of books to which members are subject.”²⁸

This solution would apply the separate-but-equal approach of the South, *Plessy*, to a federal facility. Yet, according to the chairman of the Association’s library committee, the Attorney General’s representative said this was agreeable to the African American lawyers supporting Brown.²⁹ In his article, Professor Casto speculates that Jackson probably did not like the idea of segregated reading rooms, but was willing to accept it if the others were.³⁰

The Association failed to resolve the matter at its October 1940 meeting, and so F. Regis Noel, a past president, penned the lead article in the December issue of the Association’s journal to address the library controversy. His aim was to maintain the status quo, and his comments probably reflect the views of many members. He denied any racial animus, saying that his firm had once donated 2,000 law books to Howard University School of Law and that friends of his best friends were black.³¹ Nonetheless, his language had both blatant and coded racial overtones. Noel wrote, “members could ‘smell an Ethiopian in the woodpile.’”³² He also repeatedly referred to Brown and other black lawyers as “super-intellectual Negro members of the Bar.”³³ He broadly attacked Attorney General Jackson, the Roosevelt Administration in general, and Bar Association members

close to the eight dollars being charged for nonmembers. Lowry N. Coe, *Annual Report of the Treasurer*, 11 J.B. Ass’n D.C. 358, 361 (1944).

27. Wm. E. Richardson et al., *Proposal to Amend By-Laws*, 7 J.B. Ass’n D.C. 467, 468 (1940).

28. *Id.*

29. Wm. E. Richardson et al., *Report of Committee on Extension of Library Privileges*, 8 J.B. Ass’n D.C. 100, 101 (1941).

30. Casto, *supra* note 21, at 33.

31. F. Regis Noel, *Another I.Q. Test*, 7 J.B. Ass’n D.C. 539, 543 (1940).

32. *Id.* at 539.

33. *Id.* at 539–40.

Segregation in the Federal Courthouse

who supported Brown's case only because they were seeking government jobs.³⁴ If Jackson was so eager for black lawyers to have access to a law library, Noel asked caustically, why didn't he make the Justice Department law library available to them? (It was a few blocks away). But Noel made a clever and effective argument against the plan. He said that separate reading rooms for African Americans smacked of Jim Crowism. Of course, he wanted to block the plan in its entirety, but he hoped to pick up support from progressives by pointing out the plan applied the *Plessy* solution to a federal facility. Moreover, he noted that there were "several female colored members of the Bar" and asked, "[i]nto which room would they be segregated or concentrated."³⁵ His essay then rambled into an implied warning that integration of the Bar Association library would lead to further advancements by African Americans, such as appointment of a "colored Justice of the Supreme Court," funding for "a colored airplane pilot training center at Tuskegee University," and federal funding of "professional training for colored persons at Howard University."³⁶ He concluded by telling Association members they should get "mad" and move the library out of the courthouse into space of its own.³⁷

IV. AN INTEGRATED LIBRARY

Progressives took the bait. The separate-but-equal approach was a fatal flaw in the proposed By-Laws amendment. According to *The Washington Post*, this was the main bone of contention at the Association's December meeting. Henry Quinn, another past president of the Association, moved to strike the requirement of separate reading rooms, saying "I stand against any proposal that is against American principles and gives the slightest endorsement to racial prejudice Don't give your sanction to anything so un-American as Jim Crowism in that old courthouse of ours."³⁸ Paul Lesh, identified by the *Post* as "chairman of the Republican State committee," countered that if the members adopted Quinn's reasoning, then they should "go the whole hog" and admit African Americans and women to membership.³⁹

34. *Id.* at 540.

35. *Id.* at 540-44.

36. *Id.*

37. *Id.* at 544.

38. *Bar Voted Down Plan to Widen Library Use*, WASH. POST, Dec. 18, 1940, at 21.

39. *Id.*

Lesh didn't think members were prepared for this eventuality, nor was he, although he was soon proved wrong with respect to admitting women. Another member accused Quinn of trying to torpedo the By-Laws amendment because his motion to strike only needed a majority vote whereas the amendment required two-thirds.⁴⁰ In the event, the motion to eliminate the provision for separate rooms carried on a voice vote, but the resulting proposal to integrate the whole library failed to gain two-thirds.⁴¹ Proponents then called for a vote on the original amendment for separate rooms, but it also fell short.⁴² This was the third meeting to consider the question.⁴³

Further, fewer than ten percent of Bar Association members attended the meeting.⁴⁴ There were an estimated 6,600 lawyers in Washington in 1940.⁴⁵ About 3,000 lawyers could not join the Association because they were not admitted to the Supreme Court of the District of Columbia.⁴⁶ These were mainly government lawyers who were not required to be admitted to the Court unless they appeared before it.⁴⁷ As for the remaining 3,600 eligible lawyers, only 1,350 were members of the Association and of those just 119 were at the December meeting.⁴⁸ The forty-five who voted against the final proposal were three percent of the membership and about one-half of one percent of the lawyers in the city.⁴⁹

The racism of the times was evident in the comments of William Richardson – the chair of the Association's committee that dealt with Brown's lawsuit and a participant in meetings with Brown and other black lawyers. Although Richardson favored letting black lawyers use the library if they were in a separate reading room, he confessed he

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* Although the vote to integrate the library carried seventy-three to forty-six, this wasn't the required two-thirds. The vote on the separate reading rooms carried sixty-three to forty-five, but again this wasn't enough.

44. *See generally id.*

45. Louis B. Arnold, *Message From The Membership Committee*, 7 J.B. ASS'N D.C. 239, 248-49 (1940).

46. *Id.*

47. *Id.*

48. *Id.*; *Bar Voted Down Plan to Widen Library Use*, *supra* note 38, at 21.

49. Admittedly, a number of Bar Association members who did not attend the meeting probably opposed the plan. For example, in 1958, before it held the meeting that finally integrated the Association, a vote had been taken by mail, but it failed to get the necessary two-thirds, 1,240 to 810. Letter from Bill Gold to Ben Gilbert (October 6, 1958), available at Bar Association files, Email from Evonne Edmonds to James H. Johnston (July 15, 2016).

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wouldn't sit at a dinner table with African Americans.⁵⁰ When the committee report was submitted to the members, Richardson wrote separately.⁵¹ He began by saying that the Association had held the space since 1874.⁵² He then pointed out sarcastically that while the Women's Bar Association too had space in the courthouse with comfortable chairs and a sculpture of Susan B. Anthony, men were not demanding the right to use the women's space.⁵³ He bragged about his own charitable instincts saying that when he tried a case against a black lawyer who needed books from the library, he would use his membership to get the lawyer the books.⁵⁴ But Richardson's charity had limits.⁵⁵ "My personal reaction to the [library] situation was this: [i]f any man, white or black, came to my house needing food, I would not turn him away However, I would certainly not invite him to sit at my table, and he would probably eat in the kitchen or back porch."⁵⁶

Attorney General Jackson was exasperated. His deputy, Francis Shea, had spent months working to settle the lawsuit, but the effort was stymied by a minority in the Association. Since persuasion and patience didn't work, Jackson invoked his power under the law to manage the courthouse building. On February 12, 1941, Lincoln's birthday, he wrote Association President Francis Hill to say he could no longer countenance discrimination in a federal courthouse.⁵⁷ If the library were not integrated, it would have to move out by April 1st.⁵⁸ Jackson explained that while there might be technical defenses to Brown's lawsuit, invoking them did "not justify me in perpetuating a denial of equal privilege in a Federal Court Building on grounds of race, of color, of religion, or of sex."⁵⁹ An order appended to the letter directed that:

[I]f any space or facilities in the Federal District Court Building shall be made available to any bar association or to any member or group of members of the bar, such space and facilities shall be avail-

50. Wm. E. Richardson, *Comment by Mr. Richardson*, 8 J.B. Ass'n D.C. 93, 105 (1941).

51. *Id.* at 104-06.

52. *Id.* at 104.

53. *Id.* at 105-06.

54. *Id.* at 105.

55. *See generally id.* (explaining that although Mr. Richardson was unopposed to providing the non-members with the necessary books, he was nonetheless against them using those books in the same space as the actual members).

56. *Id.*

57. Jackson, *supra* note 23, at 106-07.

58. *Id.*

59. *Id.*

able to all members of the bar in good standing without discrimination on account of race, color, religion, or sex.⁶⁰

The same day, the predominantly black Washington Bar Association met and passed a resolution vowing to oppose the nomination of any Association lawyer to a position in the government of the District of Columbia or the United States if the lawyer voted to exclude blacks from the library.⁶¹ The resolution did not mince words:

Whereas, it is a fact that all of the United States District courts have libraries furnished to and used by members of the bar without regard to color or race throughout the Nation, except here in the District of Columbia, and

Whereas, those members of the District of Columbia Bar Association who opposed and denied the use of the “lily-white” library now in the District Court Building to colored attorneys showed by their narrowness, prejudice and hatred that they are utterly unfit to fill any position of honor and trust, judicial or otherwise.⁶²

Association President Hill supported the settlement.⁶³ In the lead article of the March 1941 issue of the *Journal*, he made a powerful, empathetic argument for integrating the library: “[i]f we – the members of our Association – were not eligible for membership in an association which occupied space in the Court House, and said association denied us the privilege of using its books, there can be no question but that we would feel aggrieved and would charge the Attorney General with discrimination if he continued to permit such supposed organization to occupy public space without making its books available to us.”⁶⁴ Nonetheless, he took umbrage with the characterization by critics that the Association was getting the space “rent-free.”⁶⁵ The Association was spending \$6,734.77 per year to maintaining the library, he wrote, but a part of this might be thought of as rent since judges of all the courts in the District of Columbia could use the library for free as could the United States Attorney and his assistants.⁶⁶

60. Order to Integrate the Federal District Court Building, Robert H. Jackson, Attorney Gen., Dist. of Columbia (Feb. 12, 1941).

61. *Negro Lawyers Oppose D.C. Bar Aides as Judges*, WASH. POST, Feb 21, 1941, at 21.

62. *Id.*

63. See generally Hill, *supra* note 25, at 97 (agreeing with the resolution by recognizing that had the members of his Association received the same treatment, they would challenge the Attorney General with discrimination).

64. *Id.* at 97.

65. *Id.*

66. *Id.* A year earlier, Hill, as President, had given a luncheon speech to the Federal Bar Association, another volunteer bar in the city, advocating an “integrated bar.” He used that term as synonymous with “unified bar” for the most part although he may have implied racial

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Jackson's hard line, and perhaps the Washington Bar's threat and Hill's entreaty, worked. A month later, the Association met again. This time it voted to allow nonmembers to use the library without discrimination for the eight-dollar annual fee.⁶⁷ The vote was 115 to fifty-four, slightly more than the necessary two-thirds.⁶⁸ Opponent F. Regis Noel resigned from several committees in protest a day after the vote.⁶⁹ He labeled the action by the Attorney General "coercion."⁷⁰ This was far from the case. While opponents had gotten nine more votes than they did at the previous meeting, the fifty-four members voting to exclude black lawyers from the library represented only four percent of the Association's 1,350 members.⁷¹

The vote did not end the matter. For one thing, the Attorney General's order did not allow the Association to charge nonmembers a fee to use the library.⁷² His assistant had agreed to this during negotiations, but Jackson had not personally approved.⁷³ For another thing, the Association used the library for certain non-library functions with part of it being more like a lawyers' lounge.⁷⁴ The Association wanted to keep the space divided into two rooms.⁷⁵ One would be exclusively for library purposes.⁷⁶ The other would serve dual pur-

integration in concluding that he aimed for "the ideal of a *completely* integrated bar." (emphasis added). Francis W. Hill, Jr., *The Integrated Bar Movement*, 7 J.B. ASS'N D.C. 243, 245 (1940).

67. *Bar Voted Down Plan to Widen Library Use*, *supra* note 38.

68. *Bar to Open Its Library to Colored: D.C. Association Reverses Previous Action and Adopts By-Law Amendment*, WASH. POST, Mar. 12, 1941, at 17.

69. *Noel Protests Bar's Concession to Negro Lawyers*, WASH. POST (Mar. 13, 1941) at 8.

70. *Id.*

71. *Bar to Open Its Library to Colored*, *supra* note 68.

72. *Report of Committee on Extension of Library Privileges and Letter to the Attorney General*, 8 J.B. ASS'N D.C. 263, 264 (1941).

73. The initial proposal to allow non-members to use the library that was submitted and defeated at the October 1940 Association meeting and that had been negotiated with Jackson's deputy called for nonmembers to pay a fee in an amount to be determined later. *Proposal to Amend By-Laws*, 7 J.B. ASS'N D.C. 467, 467 (1940).

74. *Report of Committee on Extension of Library Privileges*, *supra* note 72 at 264. Association meetings were usually held in the Mayflower Hotel. However, balloting in the election of officers might take place in the library. For example, a 1939 report in The Washington Post said: "[t]he District Bar Association will hold its annual election of officers at the District Courthouse from noon to 6 p.m. Ballot boxes will be set up in the annex of the Bar Association library. *Bar Association to Elect Today*, WASH. POST, Jan. 17, 1939, at 9. A 1952 issue of the Journal of the Bar mentions, "balloting for officers of the Association for the ensuing year had proceeded all day in the Library of the Association in the U.S. District Courthouse." *Minutes of Annual Meeting of the Bar Association of the District of Columbia, June 10, 1952*, 19 J.B. ASS'N D.C. 301, 313 (1952). Thought was even given to making a stenographer available there. Bolitha J. Laws, *The Address of the President*, 5 J.B. ASS'N D.C. 147, 161 (1938).

75. *Report of Committee on Extension of Library Privileges*, *supra* note 72, at 264.

76. *Id.*

poses.⁷⁷ It would have books, but it could also be used for other purposes although nonmembers, e.g., black lawyers, would have access to any books there. The Association's committee conferred with Huver Brown and representatives of the Washington Bar, which had joined Brown in the lawsuit. The conferees unanimously agreed that the fee could be charged. They could not reach agreement on the Association's continuing to have space for non-library purposes. Nonetheless, the Association submitted its proposal to Jackson.⁷⁸ The added detail was somewhat at odds with Jackson's order, which plainly said that space and facilities set aside for the Association's use had to be available to all lawyers without regard to race.⁷⁹

This wrinkle about the second room was more symbolic than practical and, for this reason, may have been even more galling to African American lawyers since it was a physical reminder that while they might use the library, they were not entitled to the other privileges of membership in the Association no matter how small.

The courthouse, which is now home to the District of Columbia Court of Appeals, had once been the District's City Hall building.⁸⁰ The building was renovated to serve judicial functions in 1918.⁸¹ *The Washington Post* said the courtrooms were on the first floor and the judges' office on the second floor, continuing: "[t]he law library occupies the center rooms of the north side of the second floor, and is connected below by a brass tube dumbwaiter for delivery of books to the courts."⁸² The library seemingly was in the same space that is now occupied by the library for the District of Columbia Court of Appeals.⁸³ The Association also had a portion of another room, the so-called "annex," on the second floor.⁸⁴ The library was still said to be

77. *Id.*

78. *See id.* at 270.

79. *Id.* at 269–70.

80. Phillip Kennicott, *In D.C., Old City Hall is Expanded to Accommodate the Court of Appeals*, WASH. POST (June 17, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/16/AR2009061603225.html>.

81. *See generally* F. Regis Noel, *The Court-House of the District of Columbia*, 5 J.B. ASS'N D.C. 67–87 (1938).

82. *Hurry on Courthouse: New Structure May Be Ready for Business by March 1*, WASH. POST, Oct. 27, 1918, at 15.

83. Kennicott, *supra* note 80.

84. *See generally* Noel, *supra* note 81, at 86 (stating that the second floor contains chambers for the judges, offices for the United States Attorney and his assistants, for the Auditor, the Grand Jury, the Library of the Bar Association of [D.C.], dining-rooms, kitchen, and toilets). The function of the annex isn't clear, but it was designated as the place for balloting in 1939. *See Bar Association to Elect Today supra*, note 74.

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“badly cramped for want of space.”⁸⁵ After the Association voted to integrate the library, the rooms were rearranged once more and the Women’s Bar Association gave up its space in order to make things work out.⁸⁶ Since the Association’s main office then was in the Woodward Building on Fifteenth Street, the only non-library use of the courthouse space appears to have been for balloting in elections and for chairs, tables, and a telephone that members could use.⁸⁷

Allowance for non-member uses of the library and the members’ space was incorporated in the By-Laws, and the plan put into effect.⁸⁸ The Association reported this to Attorney General Jackson by letter on April 19, 1941 and met with him, but he withheld any acknowledgment of approval.⁸⁹ There is no evidence that the Justice Department ever approved. Jackson was nominated to the Supreme Court in June of 1941 and stepped down as Attorney General.⁹⁰ His successor, Francis Biddle, had not been involved in the negotiations. Similarly, Francis Hill who was President of the Association during the controversy stepped down in June to be replaced by E. Barrett Prettyman.⁹¹

85. Bolitha J. Laws, *The Address of the President, Bolitha J. Laws*, 5 J.B. ASS’N D.C. 147, 160 (1938). The federal district court and the federal court of appeals moved to the E. Barrett Prettyman Courthouse in 1952. The D.C. Court of Appeals later moved into the old building which was renovated in 2009. Kennicott, *supra* note 80. Plans for that renovation are on the wall of the first floor of the building and suggest that the current library occupies the same space as the old library did. Author visit October 26, 2016.

86. *Report of Committee on Extension of Library Privileges, supra* note 74, 268–69.

87. H. K. McCook, *Should the Bar Library be Moved?*, 6 J.B. ASS’N D.C. 509, 509–10 (1939). The Treasurer’s Report for the fiscal year ending in May 1955 itemizes an expense of \$76.46 for the telephone in the library. Thomas M. Raysor, *Report of the Treasurer of the Bar Association of the District of Columbia for the Year Ended May 31, 1955*, 22 J.B. ASS’N D.C. 457, 457–61 (1955).

88. *By-Laws of the Bar Association of the District of Columbia*, 13 J.B. ASS’N D.C. 317, 327–28 (1946).

89. In his report in June 1941, outgoing president, Francis Hill wrote that Jackson “has not as yet acted upon the plan.” *Report of Francis W. Hill, Jr., Retiring President, in Behalf of the Board of Directors to the Bar Association of the District of Columbia*, 8 J.B. ASS’N D.C. 295, 302 (1941). Earlier in the year, the Bar had amended its By-Laws to admit women. *Id.* The By-Laws were amended to conform to the settlement. For example, Article VIII on library privileges of the 1952 By-Laws provided in Section 3(a): “[t]he privilege of using the library of the Association may be granted to nonmembers of the Association members of the Bar in good standing, as hereinafter provided for a fee at the rate of eight dollars per annum.” *Articles of Incorporation and By-Laws of the Bar Association of the District of Columbia*, 19 J.B. ASS’N D.C. 404, 419 (1952). Section 3(b) contained the limitation “that the grant of such privileges shall not entitle nonmembers to use such of the Association’s rooms as shall be designated by the authority of the Board for the exclusive use of members, excepting as may be necessary to obtain therefrom books kept in stacks in such rooms.” *Id.*

90. Susan Navarro Smelcer & Kenneth R. Thomas, *From Solicitor General to Supreme Court Justice: Responsibilities, History, and the Nomination of Elena Kagan*, CONG. RESEARCH SERV. (June 23, 2010), <https://fas.org/sgp/crs/misc/R41299.pdf>.

91. *See Past Presidents*, BADC, <http://badc.org/archives/past-presidents/> (last visited Sept. 26, 2017).

The issue had roiled the Washington legal community for more than two years. Prettyman had been on the Association's board prior to becoming president although he wasn't directly involved in the library negotiations. Still, his casualness in referring to the settlement in his annual report to the Association at year's end is surprising: "[t]he delicate problem which had plagued us as to the use of the Library was settled . . ."⁹² He seemed to see the controversy as a minor nuisance rather than a matter of racial and constitutional significance.

In an unintended sense, Prettyman was right to minimize the settlement. While African American lawyers could use the library in the courthouse, they were still denied membership in the segregated organization which owned that library, which enjoyed rent-free space on government property, and which charged them a fee to access the books.

The same year and without controversy, the Association voted to allow women to join.⁹³ This probably explains why the Women's Bar Association was willing to give up its space in the courthouse.

Ironically, the Association's librarian throughout this period was African American. Elphonse W. Freeman, nicknamed "Alphonzo," was recognized for forty years of service and received a gold watch at a ceremony in 1940.⁹⁴ Lawyers, prosecutors, and judges attended.⁹⁵ Even William Richardson, who had implied he would not eat with an African American, was there.⁹⁶ Freeman's experience with libraries stretched back to 1898 when he worked to salvage books and files after a fire at the Supreme Court.⁹⁷ He had since become better at legal research than many lawyers.⁹⁸ In giving him the watch, the chairman of the Association's library committee remarked: "I can assure you that the lawyers who have been assisted by his [Freeman's] learning are numbered by the hundreds."⁹⁹ Freeman also served as

92. E. Barrett Prettyman, *Annual Report of the President, District of Columbia Bar Association*, 9 J.B. Ass'n D.C. 286, 295, 318 (1942).

93. *Report of Francis W. Hill, Jr., Retiring President, on Behalf of the Board of Directors to the Bar Association of the District of Columbia*, *supra* note 89 at 295.

94. *Elphonse W. Freeman Is Honored by the Bar Association*, 7 J.B. Ass'n D.C. 511, 511 (1940).

95. *Id.*

96. *District Bar Honors Freeman for 40 Years with Library*, WASH. POST, June 27, 1940, at 2. The article has a photograph of Freeman with three Association officials, including Association President Francis Hill. Freeman continued to work into the 1950s and was remembered by lawyers consulted for this article as detailed later.

97. *Id.*

98. *Id.*

99. *Id.*

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institutional memory for the Association. Upon his retirement in 1961, after sixty-one years of service, a tribute in the Association's journal noted that he had previously been honored in 1940 and 1950.¹⁰⁰ When he started work in 1900, the chief librarian and his assistant were both students at Georgetown Law School and were presumably white.¹⁰¹ The tribute concluded:

There is not a member of the Association so old that he has not had, during his entire legal career, the benefit of Mr. Freeman's wide knowledge of books and the law. His long memory has frequently and quickly recollected a precedent that has proved invaluable to Association members in the heat of battle.¹⁰²

The settlement's impact on racial attitudes within the Association was mixed. A report in the March 1942 issue of the *Journal of the Bar* discussed replacing the voluntary association with a mandatory, unified or "integrated" bar and pointed out that such an organization would be racially integrated, saying: "[i]t would forestall such unfortunate and unnecessary controversies as the seventeen year old [sic] dispute about Negro lawyers using the bar association library in the United States District Court House."¹⁰³ This likely suggests the issue had come up even before Brown filed his lawsuit. The report added: "[i]t is interesting to the bar here to note that no unpleasant incident has occurred in any Southern state having an integrated bar as a result of Negro lawyers enjoying full and equal rights with other members of the bar The Negro lawyers in the South with whom I've discussed the matter are proud of their membership in the integrated bar and consider it a valuable asset and protection to them."¹⁰⁴

In jolting contrast to this display of racial tolerance, the lead item in the same issue of the Association's journal consists of four pages of photographs of twenty or more members, including at least one future Association president, in blackface performing a minstrel show at the annual dinner.¹⁰⁵ Still, by 1943, F. Regis Noel, who had so adamantly opposed allowing black lawyers to use the library, admitted in a new

100. *Biographical Sketch, Elphouse Washington Freeman*, 28 J.B. Ass'n D.C. 274, 275 (1961)

101. *Id.* at 274.

102. *Id.* at 275.

103. *Report on the Judicial Circuit Conference*, 9 J.B. Ass'n D.C. 130, 134 (1942).

104. *Id.* The reference to a seventeen-year dispute over the library may be taken to suggest that the issue had been festering ever since the Washington Bar Association was established in 1925 and that it just came to a head when Brown filed his lawsuit in 1939.

105. *Pictures of Performers at December Bar Dinner*, 9 J.B. Ass'n D.C. 99 (1942).

article in the journal that “everyone is apparently satisfied” with the outcome.¹⁰⁶

The initial impact of the settlement was minimal. Treasurers’ reports for the Association itemize the annual receipts from nonmembers using the library and paying the eight-dollar fee: \$64 in 1943; \$96.02 in 1945; \$96 in 1950; and \$384 in 1955.¹⁰⁷ This translates into eight users in 1943, twelve in 1945 and 1950, and forty-eight in 1955. This money did not necessarily come from African American lawyers; any nonmember lawyer could use the library if he or she paid the fee. However, since a white lawyer could become a member for just four dollars more than the library fee cost, these paying users were surely black. The conclusion is buttressed by the fact that receipts tumbled after the Association was integrated in 1958.¹⁰⁸

J. Clay Smith, Jr. argues in his book, *Emancipation, The Making of the Black Lawyer, 1844-1944* that barring black lawyers from the library hindered effective representation for their clients:

Without the means to furnish their law offices with all the necessary law books, and with limited access to the public law libraries in the city, legal mistakes and shortcuts often flawed the pleadings of black lawyers. Such errors brought them before the bar association’s grievance committee, which was controlled by white lawyers and actively excluded any black members. Caught in a virtual catch-22, the black lawyers were oftentimes disbarred from practice as a result of their presumed misconduct.¹⁰⁹

While this argument has appeal, it is undercut by how few nonmembers were paying to use the library for the first nine years after the settlement.

106. F. Regis Noel, *The Dunkerque of the Bar*, 9 J.B. Ass’n D.C. 339, 387 (1943).

107. See generally *Annual Report of the Treasurer*, 11 J.B. Ass’n D.C. 358 (1944); *Annual Report of the Treasurer*, 12 J.B. Ass’n D.C. 310, 313 (1946); Budget Approved by Board of Directors for the Fiscal Year 1950-1951, 17 J.B. Ass’n D.C. 624, 625 (1950); Report of the Treasurer of the Bar Association of the District of Columbia for the Year Ended May 31, 1956, 23 J.B. Ass’n D.C. 572, 572 (1956).

108. *Report of the Treasurer of the Bar Association of the District of Columbia for the Year Ended May 31, 1962*, 29 J.B. Ass’n D.C. 505 (1962). Receipts fell from \$384 in 1955 to \$256 in 1961. The Bar was integrated in the fall of 1958.

109. J. CLAY SMITH, *EMANCIPATION: THE MAKING OF THE BLACK LAWYER* 134 (1993). Smith elaborates: “Black lawyers, therefore, were at a marked disadvantage. With no access to the law library at the courthouse, black lawyers had to argue the law as they thought it should be. Such ‘seat of the pants’ arguments often cost their clients dearly, and sometimes brought the lawyers before the bar’s disciplinary bodies.” *Id.* at 577. Smith’s claim that excluding black lawyers from the grievance committee contributed to unfair discipline is supported by a 1958 report of a committee of the Association headed by Edward Bennett Williams. *Report of the Committee on Civil Rights*, 25 J.B. Ass’n D.C. 416, 417-18 (1958).

V. RENEWING THE FIGHT

Years of Democratic administrations had integrated virtually every federal facility in the District of Columbia. In 1948, President Harry Truman knocked down the biggest federal symbol of Jim Crowism by ordering integration in the military.¹¹⁰ Thus, by 1949 *The Washington Post* could report the findings from a private survey of the state of racial segregation in the District:

The Federal Government has always operated its auditoriums on an absolutely nonsegregated basis. Most are available for various kinds of civic, philanthropic, local, national and international activities. All events must be on a nonsegregated basis. Both the District Court and the United States Court of Appeals have made courtrooms available for civic functions related to judicial problems . . . the use of courtrooms is always without any kind of racial segregation.¹¹¹

In 1950, the federal district and appellate courts began planning the move into a single, new courthouse, the building now named for E. Barrett Prettyman.¹¹² A question arose as to whether the Association would have space.¹¹³ The Association had formally asked for it a year earlier and was told yes.¹¹⁴ But, Chief Judge Harold Stephens of the Court of Appeals and Chief Judge Bolitha Laws of the District Court met with the Association board in 1950 to discuss rumors regarding the Association's disinterest in the space. According to minutes of this meeting, the board explained it was reluctant to commit to the move because it had heard that "if the Association accepted this space that it must permit unrestricted use of its library."¹¹⁵ This concern was probably due to the lawsuit, detailed later, that Aubrey Robinson, an African American lawyer, had filed earlier that fall, challenging the presence of the segregated Bar Association's library in a federal courthouse.¹¹⁶ The judges replied that "so far as they were

110. Exec. Order No. 8802, 6 F.R. 3109 (June 25, 1941), <https://www.eeoc.gov/eeoc/history/35th/thelaw/eo-8802.html>.

111. *Wender Urges D.C. Schools' After-Hours Use by All Races*, WASH. POST, May 8, 1949.

112. *Meeting Minutes of the Bar Association January 8, 1951*, 18 J.B. ASS'N D.C. 22, 23 (1951).

113. *Id.*

114. *Id.*

115. *Id.*

116. *President's Page*, 18 J.B. ASS'N D.C. 3 (1950). According to Association president Jo V. Morgan, a hearing on the Association's motion to dismiss Robinson's lawsuit had been held on December 18, 1950, resulting in the dismissal of the lawsuit. *Id.* The transcript of the hearing is reprinted in the same issue of the Bar journal. *Suit Against the D.C. Bar Association*, 18 J.B. ASS'N D.C. 15-17 (1951).

concerned the only conditions under which the new space would be made available were the same conditions which presently prevailed for use of the library in the present District Court Building.”¹¹⁷ The board was obviously concerned that it would have to let lawyers use its library without paying the fee. As stated previously, only twelve non-members were paying the eight-dollar fee in 1950, but its elimination would surely result in the library being flooded with non-members, many of whom would be African Americans. The judges said the Association was free to move the library out of the courthouse later if it so decided.¹¹⁸ Floor plans show the Association’s library was on the third floor.¹¹⁹ There were four rooms: the law library; two rooms labeled “stack room;” and an “attorney’s reading room.”¹²⁰ A second library for judges and clerks of both district and appellate courts would be on the fifth floor.¹²¹ The 1941 settlement and the By-Laws seemingly required that all four rooms in the Association library be available to black lawyers, and so they probably were. The courts moved into the new courthouse in October 1952.¹²²

In the late 1940s, a new generation of black lawyers began making their mark by filing broader civil rights challenges. The public schools in Washington, like those in the South, were segregated, and the black schools were a disgrace. Aubrey E. Robinson, Jr., a Howard University School of Law graduate, helped represent those wanting to change things. He would eventually become Chief Judge of the Federal District Court in Washington D.C., but in 1949, he was an associate in the law office of Belford Lawson, who represented the Browne Junior High School Parent-Teacher Association.¹²³ The Browne Junior High parents claimed that the segregated, black public school was inferior to its white counterparts.¹²⁴ Robinson’s name is on the appellate brief.

117. *Meeting Minutes of the Bar Association January 8, 1951*, *supra* note 112 at 23.

118. *Id.*

119. *See generally* LOUIS JUSTEMENT, *THE UNITED STATES COURTHOUSE FOR THE DISTRICT OF COLUMBIA: A DESCRIPTION OF THE BUILDING AND COPIES OF THE FLOOR PLAN* (1952) (detailing the floor plan of the E. Barrett Prettyman United States Courthouse). This was a memorial book, and a copy is available in D.C. Circuit Historical Society offices in the courthouse.

120. *Id.*

121. *Id.*

122. *Annual Report of the President, District of Columbia Bar Association*, 20 J.B. Ass’n D.C. 369, 371 (1953).

123. Lawson was a Howard University School of Law graduate.

124. *See generally* *Carr v. Corning*, 182 F.2d 14 (D.C. Cir. 1950).

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The Court of Appeals of the District of Columbia Circuit in an opinion written by E. Barrett Prettyman, who had become a judge by this time, rejected the challenge.¹²⁵ The plaintiffs asked the lower court to issue a mandatory injunction that would break the strict segregation in the city's school system.¹²⁶ They complained that for a time there were twice as many students at Browne Junior High as the school had capacity for, but the superintendent ordered double-shifts at the school instead of transferring students to an adjacent, under-capacity, white school.¹²⁷

Prettyman began his opinion by asserting that separation of the races was not forbidden by the Constitution but instead ordained by history and the solution was up to legislatures.

Since the beginning of human history, no circumstance has given rise to more difficult and delicate problems than has the co-existence of different races in the same area. Centuries of bitter experience in all parts of the world have proved that the problem is insoluble by force of any sort. The same history shows that it is soluble by the patient processes of community experience.¹²⁸

He then turned to the legislative pronouncements. He noted that while Congress had passed civil rights laws applicable to the District of Columbia in 1862 and 1875, it had also provided for segregated schools in the city by enactments in 1862, 1864, 1866, and 1874.¹²⁹ Indeed, Prettyman continued, the same Congress that proposed the Fourteenth Amendment's guarantee of equal protection of the laws also provided for segregated schools in the District of Columbia, the implication being that Congress could not have intended the Fourteenth Amendment to bar segregation.¹³⁰ He recited the fact that the city's school board was appointed by the federal district court – which, therefore, had far more than a mere judicial role in the controversy – but failed to address the implications of this.¹³¹ Without mentioning

125. Robinson's name appears on the brief in the court of appeals. It isn't known if he was trial counsel. However, in the oral history he gave the DC Circuit Historical Society, Robinson didn't remember doing appellate work when he was practicing law. He also said that he was asked if was willing to be named plaintiff in the lawsuit against the Bar Association. Oral History Project, *The Honorable Aubrey E. Robinson, Jr.*, THE HIST. SOC'Y OF THE DISTRICT OF COLUMBIA CIR., <http://dcchs.org/AubreyERobinson/AUBREY.pdf> (last visited Nov. 5, 2017); See generally *Carr v. Corning*, 182 F.2d 14, 21–22 (D.C. Cir. 1950).

126. *Corning*, 182 F.2d at 15–16.

127. *Id.*

128. *Id.* at 16.

129. *Id.* at 17.

130. *Id.*

131. *Id.* at 17.

Plessy, Prettyman concluded that separate-but-equal was the constitutional standard and that the city's segregated schools passed muster.¹³²

On September 25, 1950, seven months after Prettyman handed down this decision, Aubrey Robinson allowed himself to be named plaintiff in a lawsuit against the Bar Association, asking that its charter be revoked because he was denied membership and because the segregated organization was using a federal courthouse.¹³³ He was represented by James Laughlin.¹³⁴ The trial court ruled for the Bar Association.¹³⁵ On appeal, Robinson asked the court to require that he be admitted to Bar Association membership pending appeal.¹³⁶ A panel composed of Judges Bennett Clark, Wilbur Miller, and David Bazelon denied the request *per curiam*.¹³⁷ The panel noted that no authority was cited for the "unusual request."¹³⁸ Since discrimination on the basis of race by the Bar Association was manifest, Laughlin may not have felt it necessary to cite authority.

The appeal proceeded to the merits the next year.¹³⁹ Judge Clark, writing for Judges Miller and Charles Fahy, rejected Robinson's claim.¹⁴⁰ Clark summarily dismissed the attempt to revoke the Association's charter on grounds of discrimination, saying there was no provision for doing this in the District of Columbia Code.¹⁴¹ Besides, he pointed out, "the Bar Association is a private corporation, and its policies and conduct remain those of its membership, subject, of course, to those laws and regulations which pertain to the conduct of a corporation of its type."¹⁴²

He then turned to Robinson's argument, advanced for the first time on appeal, that by having its library in a federal courthouse, the Bar Association was receiving federal aid and could not therefore discriminate.¹⁴³ Judge Clark countered by accepting the Association's

132. *Id.* at 18. *Plessy*, of course, had involved action by a state, which was subject to the Fourteenth Amendment whereas the complaint in *Corning* was against the federal government. Therefore, technically, *Plessy* was not applicable.

133. *Jo V. Morgan, The President's Page*, 17 J.B. Ass'n D.C. 543, 545 (1950).

134. *Id.*

135. United States *ex rel.* Robinson v. Bar Ass'n of District of Columbia, 190 F.2d 664, 665 (D.C. Cir. 1951).

136. *Id.* at 664.

137. *Id.*

138. *Id.*

139. United States *ex rel.* Robinson v. Bar Ass'n of District of Columbia, 197 F.2d 408, 409 (D.C. Cir. 1952).

140. *Id.* at 409-10.

141. *Id.* at 409.

142. *Id.* at 410.

143. *Id.*

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argument that the government was the one receiving aid because it was saved the expense of paying for a library in the courthouse:

What appellant does not mention – and on argument did not refute – is that the Bar Association extends free use of the library and reading rooms to the Attorney General of the United States, the United States Attorney for the District of Columbia, the Corporation Counsel for the District of Columbia, and their assistants, as well as to the judges and clerks of the courts of the District of Columbia.¹⁴⁴

This was the same argument that Francis Hill had advanced in his 1941 article in the Association's journal to answer critics who claimed the Association was enjoying "rent-free" space.¹⁴⁵ But the argument no longer had merit, and Judge Clark had every reason to know this. The courts were moving into a new building which would have a separate library for judges paid for by the government.¹⁴⁶ His opinion was issued in May 1952, and the District Court and Court of Appeals moved into the new E. Barrett Prettyman Courthouse five months later.¹⁴⁷ Thus, the factual basis for the court's decision was patently untrue: the decision to put a library for judges in the new building was well-known at least two years earlier.

Judge Clark did not seem to fully appreciate that Robinson was not claiming he was denied use of the library, as Huver Brown had, but rather that a segregated organization was making use of federal space. Why else would Judge Clark go out of his way to explain almost patronizingly that Robinson could use the library:

With regard to the space itself, and the manner of its use, as was brought out in argument and acknowledged by appellant, full use of the library facilities – books and reading rooms alike – is open to all members of the Bar in good standing, whether or not they are members of the appellee Association, upon payment of a fee designed to defray in part the expense of replacements and additions to the reference materials. Beyond the perfectly reasonable requirement of membership in the Bar, in good standing, there is no discrimination practiced in the use of government space, but instead a valuable and

144. *Id.*

145. Francis W. Hill, Jr., *The Bar Library Problem*, 8 J.B. Ass'n D.C. 95, 95 (1941).

146. *See Meeting Minutes of the Bar Association January 8, 1951, supra note 112.*

147. *Annual Report of the President, District of Columbia Bar Association*, 20 J.B. Ass'n D.C. 369, 371 (1953)

essential facility is made available to the profession and the courts at little cost or sacrifice by the government.¹⁴⁸

Meanwhile, Robinson's attorney, James Laughlin, filed a lawsuit of his own *pro se*. His reasons for doing this are unclear since his appeal in *Robinson* was still pending. Perhaps he worried that he was asking for the wrong remedies in the *Robinson* case, e.g. revocation of the Bar Association's charter and for a quo warranto writ to kick it out of the courthouse.¹⁴⁹ In any event, his own lawsuit asked the court to order either the Commissioner of Public Buildings or the Attorney General, whichever had the power, to evict the Bar Association from the courthouse.¹⁵⁰ Such technical, procedural issues had been overlooked by Robert Jackson when he was Attorney General in 1941. But Jackson was a justice on the Supreme Court by this time. Instead, the United States, through United States Attorney George Fay, was among those filing in opposition to Laughlin. The same panel that decided *Robinson* decided the *Laughlin* case. The court acknowledged Laughlin had an interest in the courthouse as a member of the bar but went on to rule this was not enough to give him standing.¹⁵¹ His appeal was dismissed on this basis.¹⁵²

While the procedural issues in *Robinson* and *Laughlin* seemed to raise "technical details" like those that Attorney General Robert

148. United States ex rel. *Robinson v. Bar Ass'n of District of Columbia*, 197 F.2d 408, 410 (D.C. Cir. 1952). Judge Fahy, in his concurring opinion, also thought it important to mention that Robinson had access to the library. "In this connection it appears that the library facilities which occupy the space in question are available to appellant upon terms which appear reasonable insofar as the facts before us disclose." *Id.* at 411 (Fahy, J., concurring). Contacted for this article, Jacob Stein, who was a trial lawyer in this period and an associate editor for the Bar Association Journal in 1958, remembered that black lawyers could use the library. E-mail from Jacob Stein to James H. Johnston (July 16, 2016) (On file with author). He added that the librarian was black and "was a better lawyer than many of us [because he] could find the book that was needed – and quickly." *Id.* Eugene Ebert came to Washington in 1955 to practice law. After a stint in the Army, he was admitted to the bar in 1960. He remembers being in the bar library in 1955 and 1957. He says there were black lawyers in the library when he was there. Eugene Ebert voice mail to James H. Johnston July 23, 2016.

149. On its face, to proceed quo warranto seems perfectly reasonable. Title 16, Section 1601 of the District of Columbia Code, quoted in footnote in the opinion, provided: "[a] quo warranto may be issued from the District Court of the United States for the District of Columbia in the name of the United States – First. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the District a franchise or public office" *Robinson*, 197 F.2d at 411 (Fahy, J., concurring). The court did not explain why this wasn't applicable. The essence of Robinson's complaint was that it was unlawful to permit a segregated organization to have free space in a government office. Of course, the court may have considered that the word "office" referred to a position in government rather than a physical space.

150. *Laughlin v. Reynolds*, 196 F.2d 863, 864 (D.C. Cir. 1952).

151. *Id.* at 865.

152. *Id.*

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Jackson had brushed aside in the *Huver Brown* lawsuit, the Court of Appeals didn't have his clarity of vision. It permitted the segregated Bar Association to have a library in a federal courthouse and it countenanced that organization charging black lawyers a fee to use it. Years later, Robinson reflected back on the case in an oral history:

I could not understand why . . . I didn't have the right, as did every black lawyer, to be a member of that Bar Association since it not only maintained the library but did so out of relationship with the court; that it was the avenue and contact between the court and many of the things that went on in the practice of law.¹⁵³

The failure of the judges in these cases, Clark, Miller, Fahy, and Bazelon, to recuse themselves is inexplicable. All sitting judges in the city were eligible for admission as honorary members of the Association and exempt from dues, and these four judges are listed as Association members in 1952.¹⁵⁴ Their colleague Judge Prettyman had been president of the Association ten years earlier.¹⁵⁵ It was well known that honorary memberships were not extended to African American judges. James Laughlin sued the Association unsuccessfully in 1949 "to enjoin the holding of the spring outing of the Association in view of the fact that Judge [Armond] Scott was not invited" although he was a municipal court judge.¹⁵⁶

In 1953, African American Congressman Adam Clayton Powell (D-NY) took up the fight, asking the government to kick the Association and its library out of the courthouse because groups practicing racial discrimination should not be given "rent-free quarter" on federal property.¹⁵⁷ Surprisingly, the black Washington Bar Association defended the arrangement. Its president, Joel Blackwell, responded with a letter to Powell quoted in *The Washington Post*:

The Bar library is a moot issue inasmuch as all members of the bar of the District of Columbia are privileged to use said library upon payment of an annual library fee, which is very reasonable. The

153. *The Honorable Aubrey E. Robinson, Jr.*, *supra* note 125, at 34–35.

154. *Roster of the Members of the Bar Association of the District of Columbia*, 19 J.B. Ass'N D.C. 371 (1952).

155. Prettyman, *supra* note 92.

156. *Minutes of the June 14, Meeting of the Bar Association*, 16 J.B. Ass'N D.C. 435 (1949). Judge Scott was later picked as one of the first African Americans admitted to the Association when the By-Laws were changed in 1956, but that change was set aside by the courts as discussed *infra*. *Bar Group to Consider 10 Negroes*, WASH. POST, June 7, 1956, at 20.

157. *Group Fights Plan to Move Law Library*, WASH. POST, May 15, 1953, at 23.

members of our association have not indicated any desire to have . . . the present library moved from the Court House.¹⁵⁸

However, all was not lost. The Civil Rights Movement and the court fights were working on the consciences, energies, and patience of Association officers and its lawyers, a majority of whom, it must be remembered, favored integration of the Bar Association. Godfrey Munter and John Laskey had represented the Association without charge from filing of the Robinson case in 1950 until the Supreme Court denied certiorari in 1953. They were progressives, and even more progressive lawyers would take over in the next few years.¹⁵⁹ Aubrey Robinson's memory of the fight, given in an oral history years later, was that the Bar Association made a commitment to change at the conclusion of his litigation, and this would seem to be the case.

The first of seven attempts to amend the By-Laws in order to integrate the Association took place a few months before Robinson filed his lawsuit.¹⁶⁰ It was a referendum and failed. The same referendum was brought up in 1954. It too fell short of two-thirds but only by eighteen votes.¹⁶¹ A year later, 150 members signed a petition demanding the referendum again be submitted to the membership.¹⁶² However, one member, Archie Shipe, filed a lawsuit seeking to enjoin the balloting.¹⁶³ His legal argument was that the Association would be wasting the \$500 that a referendum would cost, but he told *The Washington Post* that his real aim was to block black lawyers from membership because the Association was a "professional and social" organization.¹⁶⁴ Association president Charles Murray told *The Washington Post* that the board of directors did not commit to the referendum.¹⁶⁵

158. *Id.*

159. *Minutes of Bar Association Meeting, Tuesday, May 13, 1952*, 19 J.B. ASS'N D.C. 262, 265 (1952); *Annual Report of the President, District of Columbia Bar Association*, 20 J.B. ASS'N D.C. 441, 443-44 (1953). While the minutes say certiorari was denied, no citation to support this can be found.

160. *Bar Voting on Admission of Negroes*, WASH. POST, May 11, 1950, at 4. In his 1958 report to the Association, Edward Bennett Williams noted the Association members had voted on referenda "several times" in recent years. Edward Bennett Williams, *Report of the Committee on Civil Rights*, 25 J.B. ASS'N D.C. 416 (1958).

161. *Lawyer Acts to Halt Bar Mail Ballot*, WASH. POST, Mar. 1, 1955, at 16.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

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Shipe dropped his lawsuit in June 1955 after new Association officers were elected.¹⁶⁶ This was not because the new officers, President Charles Rhyne and Vice President Edward Bennett Williams, were sympathetic to Shipe's bigotry. They weren't. Rhyne had promised to integrate the Bar Association if elected.¹⁶⁷ He recalled those days in an oral history: "[p]eople were unhappy and responded by leaving dead cats and garbage in my lawn Shocking my opponent, I won 920 to 225."¹⁶⁸

Rhyne kept his promise but moved in a new direction. Instead of using a mail-in ballot for the referendum, he would bring the matter to a vote at an Association meeting.¹⁶⁹ The idea proved better in planning than in the execution. The meeting was in the Williamsburg Room of the Mayflower Hotel on May 8, 1956.¹⁷⁰ An estimated 520 people attended, far fewer than had participated in the earlier votes by mail.¹⁷¹ Rhyne called for a voice-vote on the referendum.¹⁷² One member, Alfred Goshorn, rose to make a point of order that some of those in attendance were not entitled to vote, e.g., associate and honorary members.¹⁷³ Rhyne directed that those not entitled to vote should move to the side although none did.¹⁷⁴ A voice-vote was then taken, and Rhyne declared the referendum had passed by the necessary two-thirds.¹⁷⁵ The room erupted in applause and cheering while one member shouted objection to the method of voting.¹⁷⁶ He moved for a "division of the house," meaning a standing vote.¹⁷⁷ Rhyne called for a voice-vote on the objection after which he declared it had been defeated.¹⁷⁸ Goshorn sued to have the vote set aside.¹⁷⁹

166. *Archie Shipe Dead at 58; D.C. Lawyer*, WASH. POST, Sept. 23, 1955, at 26.

167. Paul Lewis, *Charles S. Rhyne, 91, Lawyer In a Landmark Case, Drowns*, N.Y. TIMES (Aug. 3, 2003), <http://www.nytimes.com/2003/08/03/us/charles-s-rhyne-91-lawyer-in-a-landmark-case-drowns.html>.

168. *Legends in the Law: Charles S. Rhyne*, DCBAR (Apr./May 1998), <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/legend-rhyne.cfm>.

169. The Washington Post reported in July 1955 that the Association was mailing out another referendum to integrate. *Color of Law*, WASH. POST, July 26, 1955, at 26. However, there is no later article about the result. Moreover, the *Journal of the Bar* makes no mention of any such balloting.

170. *Goshorn v. Bar Ass'n of the District of Columbia*, 152 F. Supp. 300, 302–03 (D.D.C. 1957).

171. *Id.* at 306.

172. *Id.* at 303.

173. *Id.*

174. *Goshorn v. Bar Ass'n of the District of Columbia*, 152 F. Supp. 300, 303 (D.D.C. 1957).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 303–04.

Judge Robert Wilkin, a retired federal district judge from Ohio, was sitting in the District by designation of the Chief Justice. He presided over the trial and wrote an opinion in the case, finding for the plaintiffs.¹⁸⁰ He noted Robinson's earlier lawsuit and the protracted fight within the Bar Association over integration.¹⁸¹ However, unlike Judge Clark in *Robinson*, who would not interfere in the Association's internal affairs, Wilkin was more than happy to do so: "[i]f [the members] feel that the social purposes of a limited membership are of more importance than being the agency of the entire bar of the District, their wishes and desires should not be overridden or denied except by action of the Association taken in accordance with the By-Laws."¹⁸² Courts had traditionally exercised broad oversight over associations of lawyers, Wilkin asserted, even citing the Court of Appeals opinion in the second *Robinson* case, although that case stood for precisely the opposite proposition.¹⁸³ He then concluded that Robert's Rules of Order, which the By-Laws said should guide the conduct of meetings, did not permit a voice-vote when a two-thirds vote was required.¹⁸⁴ No appeal was taken.¹⁸⁵

Instead, a new Board, which had been elected in June 1957, resorted to a mail-in ballot for a referendum in September 1957. It fell 150 votes short of two-thirds with 1,366 voting for integration and 908 voting against.¹⁸⁶ The Bar Association had voted to change the By-Laws three times by mail and once by meeting and had one mail ballot blocked by Shipe's lawsuit.¹⁸⁷

The referendum was brought up at the annual meeting on June 10, 1958.¹⁸⁸ It fell even shorter of two-thirds, 1,140 to 810.¹⁸⁹ However, proponents immediately petitioned for the referendum to be put on the agenda of the next meeting scheduled for October 14, 1958.¹⁹⁰

179. *Goshorn v. Bar Ass'n of the District of Columbia*, 152 F. Supp. 300, 301 (D.D.C. 1957).

180. *Id.* at 306.

181. *Id.* at 305-06.

182. *Id.* at 306.

183. *Id.* at 305.

184. *Goshorn v. Bar Ass'n of the District of Columbia*, 152 F. Supp. 300, 305 (D.D.C. 1957).

185. No appeal is on record. Wilkin handed down his decision in June 1957, and a new board was elected that same month.

186. *Lawyers Bar Negroes*, N.Y. TIMES, Sept. 8, 1957, at 66.

187. See Charles B. Murray, *Annual Report of the President - 1954-1955*, 22 J.B. ASS'N D.C. 389 (1958).

188. *Minutes of the Annual Meeting of the Bar Association of the District of Columbia, June 10, 1958*, 25 J.B. ASS'N D.C. 370, 370 (1958).

189. *Id.* at 377.

190. *Id.*

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They also moved that the Report of the Civil Rights Committee be published in the Association Journal.¹⁹¹ A vote by the membership was needed on this because the Association's Board had refused to publish the report.¹⁹² But, before the motion could be voted on at the meeting, a motion was made to adjourn.¹⁹³ The President, who seemingly opposed integration, said the motion to adjourn took precedent.¹⁹⁴ His ruling was appealed.¹⁹⁵ This allowed the members to vote on the procedural question, and they overturned the decision to adjourn.¹⁹⁶ They then voted to publish the Civil Rights Report.¹⁹⁷ Thus, the stage was set to revisit the question of integration in four months.

The August issue of the Journal carried the four-page report. Most of it dwelled on the somewhat practical aspects of integration: that since society and government were increasingly becoming integrated, the Bar Association should be. The appeal to the members' better nature came at the end:

Our claim of leadership in maintaining law, order and justice based on reason is nullified when we fail to apply these principles in our own membership policies. And so, when we exclude qualified lawyers on the basis of race, we lower the respect of all thinking people for lawyers and the law.¹⁹⁸

There would not be a repeat of the chaotic vote of 1956 when no one was sure how many non-voting members were in the crowd and whether the vote should be by voice. So monumental was the action that the Association still has in its possession a scrap of paper outlining how the meeting should be conducted:

At Tuesday night's meeting, only active members qualified to vote will be permitted on the main ballroom floor [at the Mayflower Hotel]. Doors will be guarded and honorary and 'associate' members (judges, officeholders etc) will be askt [sic] to go up to the balcony & keep quiet until after the voting is over.¹⁹⁹

191. *Id.* at 372.

192. *Id.* at 377.

193. *Id.*

194. *Id.*

195. *Id.* at 378.

196. *Id.*

197. *Id.*

198. *Report of the Committee on Civil Rights*, 25 J.B. Ass'n D.C. 416, 419 (1958).

199. Bill Gold to Ben Gilbert, "Some stray thoughts . . ." (Oct. 6, 1958) in possession of Bar Association of the District of Columbia with a copy made available to author by email of Evonne Edmonds (July 15, 2016).

Appropriately, Francis Hill, who had been the president to settle the Huver Brown lawsuit in 1941, attended.²⁰⁰ Opponents resorted to procedural shenanigans as they had in 1956, but Association President Justin Edgerton was prepared. He took care to conduct the meeting pursuant to Roberts Rules of Order and to vote by written ballot. Of some 3,100 Association members, only 807 were at the meeting that night. The referendum to integrate garnered 588 votes or seventy-three percent. Edgerton thanked both sides for their cooperation.²⁰¹

Finally, after eight years of trying, more than two-thirds of the Bar Association had taken the simple but momentous step of striking three occurrences of the word “white” in the By-Laws. The Washington Post reported: “[a] great shout went up from the ballroom of the Mayflower Hotel on Tuesday night, and the demonstration was clearly warranted.”²⁰² However although the newspaper was pleased, it wasn’t quite willing to forget the history: “[w]armest congratulations are due to the Association for excising a restriction which was as embarrassing to the legal profession as it was to the community.”²⁰³

VI. CONFLICTING LEGENDS

As the complicated series of events faded from memory, the narrative began to shift. Those involved in the Huver Brown lawsuit focused on his accomplishment. His obituary in 1966 concluded: “[p]erhaps his greatest civic achievement was his suit against the Bar Association of the District of Columbia for its exclusionary policy toward colored lawyers with regard to its library facilities which were housed in the building of the United States Court.”²⁰⁴ Likewise, the Washington Bar Association and Howard University School of Law also remember his feats. His achievement is noted with pride on the website of the Washington Bar, and Howard University School of Law maintains the Huver I. Brown Award for its Moot Court Competition.

However, the purpose of the Robinson and Laughlin lawsuits is muddled in other recollections. Those lawsuits were remembered as being aimed at ending segregation in the library, which had been achieved in 1941, rather than at ending segregation in the Bar Associ-

200. *Minutes of the October Meeting of the Bar Association of the District of Columbia, October 14, 1958*, 25 J.B. ASS’N D.C. 627, 628 (1958).

201. *Id.* at 629–34.

202. *Bar Without Color*, WASH. POST, Oct. 6, 1958, at A22.

203. *Id.*

204. *Attorney Huver Brown, Civic Leader, Dies*, THE AFRO AMERICAN, Oct. 22, 1966, at 10.

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ation. A 2002 article in *Washington Lawyer* magazine commemorating the thirtieth anniversary of the founding of the unified, D.C. Bar was based in part on an interview with Charles Duncan, an African American lawyer and former law partner of Aubrey Robinson. According to the article, he:

[R]emembers the circumstances well. The largest of the District's voluntary bar organizations, the Bar Association of the District of Columbia ("BADC") (which was widely regarded as the city's principal bar), excluded blacks from membership. It was the BADC that operated the law library, which was open to all BADC members – meaning whites only. Consequently, Duncan found himself banned from the law library, even though that library was located in the *federal* courthouse. Eventually, the law library was forced to permit black lawyers entry as the result of a successful law suit filed by the legendary Aubrey E. Robinson, Jr.²⁰⁵

Robinson's later recollection was different. In an oral history, he at first recalled his lawsuit both opening the library to African Americans and to the Bar Association's leadership starting the process for integrating the Association itself.²⁰⁶ However, when later in the interview, he was asked specifically if the library was available to blacks. Robinson answered, "[w]ell, I don't know whether it was quite that. There was a firm commitment that there would be a change I do not have a recollection of what the sequence of specific events were [sic]"²⁰⁷

Similarly, the 2005 obituary of Federal District Court Judge William Bryant in *The Washington Post* reads:

His reputation as a criminal defense attorney took him to the U.S. attorney's office in 1951, making him the first black prosecutor in

205. *The Founding of the D.C. Bar*, 16 WASH. LAW. 21, 22 (2002). Charles Duncan told the same story in his oral history for the D.C. Circuit Historical Society. Interview by Gregory L. Poe with Charles Duncan, Lawyer, in Annapolis, Maryland. (Apr. 23, 2003), available at <http://dcchs.org/CharlesTDuncan/04232003.pdf>. Duncan's recollection is different from the Court of Appeals opinion in the Robinson case, which said the library was open to African American lawyers.

206. *The Honorable Aubrey E. Robinson, Jr.*, *supra* note 126, at 34–36, <http://dcchs.org/AubreyERobinson/AUBREY.pdf>. (last visited Oct. 1, 2017).

"[O]ne of the interesting experiences I had was that I could not understand why in this courthouse the Bar Association was allowed to have a library from which it could exclude blacks, and did I know I filed a lawsuit. The lawsuit was settled and dismissed because at that time the president and generally Bar officials talked with me and said they were going to make changes. They did make changes. They opened up the library and then there came a time where there was additional pressure as far as the Bar Association itself was concerned – to open up its membership – and, I don't know when they did."

207. *Id.* at 36.

federal court here. But even there, he was not allowed to use the D.C. Bar Association's law library. So he researched his cases with the help of a black court employee who opened the library to him after closing time.²⁰⁸

These recollections are obviously in error. James Laughlin admitted in the brief and at oral argument in the *Robinson* case in 1952 that the library was integrated.²⁰⁹ His aim was to integrate the Bar Association by having Robinson admitted or to have it thrown out of the courthouse. Since the United States Attorney filed in opposition Laughlin's case, Bryant, who was an assistant United States Attorney, should have known of Laughlin's admission that the library was open to African American lawyers. Bryant was entitled to use the library by Association By-Laws.²¹⁰ Judges Clark, Miller, and Fahy might have come out the other way in *Robinson* if an assistant United States attorney had been barred from using the library.

In light of the long and bitter struggle, it is understandable that memories were confused fifty years later. But to focus on the trivial and false memory that the library was segregated in 1952 overlooks the disturbing truth: the Bar Association was segregated until 1958, and yet neither the federal government nor federal judges would throw it out of the courthouse. Sadly, the judges seemed more sympathetic to the segregationists than to equality, fairness, the Constitution, and the will of a majority of the Bar. Duncan and Robinson were correct that Robinson's lawsuit gave impetus to amending the By-Laws of the Association to admit African American lawyers, but this didn't happen until 1956 and even then Judge Wilkin set aside the

208. Yvonne Shinhoster Lamb, *Pioneering D.C. Judge Beat Racial Odds With Wisdom*, WASH. POST (Nov. 15, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/14/AR2005111401699.html>. A contemporary document to support the legend is a letter to the editor in *The Washington Post* in 1958. At the time, the Bar Association was embroiled in the question of whether black lawyers should be admitted to membership. The letter, from a presumably white lawyer, said: "[t]he Bar Association is a segregated organization. Negro lawyers cannot become members. Thus, they cannot use the Bar Association Library, which is open only to members." L.C. Seligman, *Bar of Color*, WASH. POST, June 17, 1958, at A14. However, the suggestion that Bryant used the library "after closing time" is difficult to credit. The library was open seven nights a week until 10:30 p.m. although it closed to new users at 9:30 p.m. The night librarian in 1949, and probably later, was Charles Johnson. *Annual Report of the President of the Bar Association*, 16 J.B. ASS'N D.C. 337, 339 (1949).

209. United States ex rel. *Robinson v. Bar Ass'n of District of Columbia*, 197 F.2d 408, 411 (D.C. Cir. 1952).

210. At the time, Article VIII, Section 1 of the By-Laws included the Attorney of the United States for the District of Columbia and his assistants among those government officers and judges who were entitled to use the library for free. *Articles of Incorporation and By-Laws of the Bar Association of the District of Columbia (As amended through September 1, 1952)*, 19 J.B. ASS'N D.C. 404, 418 (1952).

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vote for the most technical of reasons. It had all been so unnecessary. The first African American lawyers were admitted to the Bar Association in 1959, the unified DC Bar Association was created in 1972, and the library was ordered to move out of the courthouse by the end of 1983 because the judiciary needed the space.²¹¹

VII. NO PRECEDENT

The integration of the Bar library in 1941 was not seen as precedent-setting by two of the men most involved, Robert Jackson and Barrett Prettyman. Jackson set the policy, and Prettyman implemented it. Since it was a significant departure from the “separate-but-equal” approach of *Plessy v. Ferguson* and the Bar Association’s original plan, these two eminent Washington lawyers should have realized what had been done: *Plessy* was overturned by the lawyers in Washington D.C. thirteen years before the Supreme Court overturned it.

Yet when segregation of the public schools in the District of Columbia was challenged, Federal Court of Appeals Judge E. Barrett Prettyman wrote the opinion for the majority, held that separate-but-equal schools were constitutional, and held that the segregated schools for African Americans in the District were in fact equal.²¹²

Robert Jackson was a Justice on the Supreme Court when it granted *certiorari* in the *Carr* case. The case sat on the docket for several years while the Supreme Court focused on the better known appeal styled as *Brown v. Topeka Board of Education*.²¹³ Given Jackson’s bold stance on integrating the Bar Association library, the case should have been easy for him. Instead, he struggled. He even drafted a concurring opinion, which, according to his clerk, read more like a dissent. Author Richard Kluger focuses on that draft in his book, *Simple Justice, The History of Brown v. Board of Education and Black America’s Struggle for Equality*. After reviewing the equality of the races and the importance of desegregation, Kluger writes:

Jackson then said there was little in the nation’s legislative or judicial history that provided the Court with a strong basis for outlawing school segregation. The Fifth Amendment had never been invoked before the Civil War in behalf of Negro claims that slaves were de-

211. See *Bar Desegregation Termed Successful*, WASH. POST, Nov. 8, 1959, at B8; *The President’s Page*, 38 J.B. ASS’N D.C. 4 (1971); Al Kamen & Laura A. Kiernan, *Law Library Looks for a New Home*, WASH. POST, Sept. 20, 1982, at B3.

212. *Carr v. Corning*, 182 F.2d 14, 22 (D.C. Cir. 1950).

213. See generally *Brown v. Board of Education*, 347 U.S. 483 (1954).

nied their liberty without due process of law. The Fourteenth Amendment could hardly be said to have given the Negro the blanket rights his lawyers now claim The fact was that the Constitution was mute about education and segregation Custom, “a powerful lawmaker,” has reinforced the practice of segregation, and the Supreme Court, in common with all courts, was reluctant to use judicial power to try to recast social usages.²¹⁴

It is hard to square such a hesitant draft with the clarity of Jackson’s thinking in 1941 when he told the Bar Association’s president that having a segregated library in a federal courthouse was simply unconstitutional. Of course, Jackson never finalized the draft. Chief Justice Earl Warren persuaded him that the Court needed to speak with a single voice on an issue as important and potentially divisive as racial integration. Cognizant of the need for unity and despite a recent heart attack, Jackson was on the bench, against doctors’ orders, when Warren read the unanimous opinion. The same day, a unanimous Court also struck down Judge Prettyman’s approval of segregation in the *Carr* case.²¹⁵

CONCLUSION

The fights over the Bar Association library stand out for two reasons. First, while the 1941 vote to integrate the library should have been precedent-setting, it wasn’t. Two-thirds of the voting lawyers of the Bar Association of the District of Columbia rejected separate-but-equal in favor of true integration thirteen years before the Supreme Court made that the law of the land. But two of the principals, Prettyman and Jackson, forgot their own precedent. As jurists a decade later, Prettyman followed *Plessy* and Jackson was hesitant to overturn it.

214. RICHARD KLUGER, *SIMPLE JUSTICE, THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 692 (2004).

215. *Carr* was ruled on by the Supreme Court as *Bolling v. Sharpe*. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). Justice Robert Jackson’s clerk at the time was E. Barrett Prettyman, Jr., the son of the author of the *Carr* opinion. When asked in his oral history if he had a sense for how his father assessed Jackson as a judge, the younger Prettyman answered:

I know they knew each other But . . . my father was a different kind of guy. He himself felt that in some cases if the government or the authorities or the police are going overboard they needed to be corrected, and he might use a particular case in order to do that. But he did not believe that in a case you simply tried to reach a result that was necessarily fair.

Robert H. Kapp, Oral History of E. Prettyman, Jr, Third Interview (July 15, 1996) 102 http://dcchs.org/EBarrettPrettyman/ebarrettprettyman_complete.pdf (last visited Sept. 16, 2017). See also NOAH FELDMAN, *SCORPIONS, THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES* 396–05 (2010).

Segregation in the Federal Courthouse

Second, despite being attacked in two lawsuits and defended in two others, the segregated Bar Association was allowed to remain in the courthouse. Indeed, what might be considered judicially-sanctioned segregation, prevailed in the federal courthouse in Washington only blocks away from the Supreme Court – for four years after *Brown*.

Between Resistance and Embrace: American Realtors, the Justice Department, and the Uncertain Triumph of the Fair Housing Act, 1968-1978

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“In the south, they don’t mind how close you get as long as you don’t get too big. In the north, they don’t mind how big you get as long as you don’t get too close.”

Dick Gregory, 1967

“Sue the bastards.”

National Neighbors’ fair housing slogan, 1970

ABSTRACT

Despite the historical consensus that the Fair Housing Act was ineffective and toothless, the first decade after the Act’s passage saw sharply reduced rates of discrimination. After demonstrating that such a significant drop could not have been the result of overall changing racial attitudes, this Article attempts to show that it resulted from the enforcement of the Act itself – especially the vigorous efforts of the Department of Justice. Not only did DOJ successfully sue hundreds of landlords and developers across the country (including the heretofore unknown New Yorker Donald J. Trump), but it focused its efforts on America’s real estate agents – a linchpin of the system of housing discrimination. These actions succeeded: this Article presents evidence from the realtors themselves and from fair housing advocates – who did not figure to be overly optimistic – that substantial changes in behavior resulted from aggressive litigation by federal civil rights law enforcement. The efforts were not a universal success, for by the end of the 1970’s discrimination rates remained far too high. And they did not alter patterns of segregation. But they represented a significant policy success. The Article concludes how the story of successful civil rights enforcement generates important theoretical implications in the psychology of law, theories of social norms, and the celebrated “Convergence Thesis” of American civil rights law.

INTRODUCTION

On the eve of the Fair Housing Act’s passage in 1968, discrimination in residential housing was routine and commonplace. Blacks could not purchase homes in white neighborhoods or rent apartments in white buildings. Realtors would not show properties to Black fami-

lies, white homeowners would not sell to Blacks, and of course Blacks could not get financing for such purchases.¹

Less than a decade later, the situation had dramatically improved. A good, although not comprehensive, measure can be found in discrimination rates for housing availability, i.e. whether a searcher is told that a unit is available.² In the Housing and Urban Development survey, Blacks encountered net discrimination³ 27% of the time for rentals, and 15% for sales.⁴ This was, of course, still far too high, especially because discrimination rates are cumulative: if, say, 25% of encounters yield discrimination, by the time someone goes to three different rental agents, she has a three in four chance of facing dis-

1. I emphasize housing discrimination against African-Americans as opposed to other groups because: (1) those studies and surveys that existed in 1968 all focused on white/black disparities; and (2) the common view among historians is that housing discrimination against Latinos, while significant and debilitating, was less severe than the discrimination against African Americans. See LILIA FERNANDEZ, *BROWN IN THE WINDY CITY: MEXICANS AND PUERTO RICANS IN POSTWAR CHICAGO* 146–47, 152 (2012).

2. Housing availability might be the most damaging and prominent form of discrimination, but it is not the only one. For example, rental or sales agents might be less courteous, or not make available important financing options, which would clearly constitute discrimination, but would not represent a refusal to show a house or apartment. A further discussion of the 1977 HMPD findings can be found in *infra* Part I.

3. “Net” discrimination refers to the amount of negative encounters minus the amount of positive encounters. For example, if black testers encounter worse treatment fifty percent of time, but *better* treatment twenty-five percent of time, the “net” discrimination rate is twenty-five percent. The highest quality research uses this method because of the randomness in so many aspects of a housing search and the vagaries of the search process. There might be many reasons for disparate treatment, not simply invidious discrimination, and few researchers would believe that positive treatment of blacks and other minorities suggests that agents are unduly favoring them. For a succinct methodological discussion, see U.S. DEP’T OF HOUS. AND URBAN DEV., *HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES*, at xii (2012). A sidebar, “Understanding the Numbers,” said:

Not every instance of white-favored treatment should be interpreted as systematic discrimination. In some tests, random factors may contribute to observed differences in treatment; in other tests, minorities may experience more favorable treatment than their white partners for systematic reasons. Therefore, we report the share of tests in which the white was favored over the minority, the share in which the minority was favored over the white, and the difference between the two. This difference—or net measure—provides a conservative, lower-bound estimate of systematic discrimination against minority homeseekers, because it not only subtracts random differences from the gross measure of white-favored treatment, but may also subtract some differences that reflect systematic reverse discrimination. Gross measures of discrimination receive less emphasis in this report than in past national studies because analysis over the past 25 years strongly suggests that they reflect a lot of random differences in treatment, and that net measures more accurately reflect the systematic disadvantages faced by minority homeseekers.

4. HARRIET NEWBURGER, U.S. DEP’T OF HOUS. AND URBAN DEV., *RECENT EVIDENCE ON DISCRIMINATION IN HOUSING* 7–8 (1984). I offer a somewhat more conservative interpretation of the Housing Market Practices Survey’s findings in Part I.B., but do not differ significantly with Newburger’s assessment.

crimination. Nevertheless, it represented a steep decline from the previous decade.⁵

How did this happen? This Article argues that the enforcement of the Fair Housing Act and the Civil Rights Act of 1866 serves as a major part of the answer. In particular, the interaction of the enforcement of these laws and the ecology of the American real estate industry led to a striking success of the last major legislation of the Civil Rights Movement.

Such a conclusion directly challenges the regnant scholarly consensus, which usually derides the Fair Housing Act as tepid, toothless, and ineffective. The leading text on housing discrimination states that the FHA was crafted that it “would not and could not work.”⁶ Virtually every other significant study echoes this sentiment.⁷

This Article proceeds as follows. First, I set forth the trends in housing discrimination during the first decade of the Fair Housing Act’s existence, focusing on the Department of Housing and Urban Development’s (“HUD”) 1977-79 Housing Market Practices Study. Examining the data reveals deep drops in discrimination levels – a fact elided by the standard account. Second, I consider one standard explanation for these drops, viz. that popular attitudes toward housing discrimination dropped similarly during the decade. The data shows a decline in prejudiced attitudes, but not nearly so deep as the drops in discrimination itself; indeed, it appears to show the continuation of a standard decline in prejudice that had been occurring for several decades. In Part III, I examine the role of the Department of Justice in combating housing discrimination, and aim to show that early on, it developed an aggressive and sophisticated litigation program that took on some of the most powerful actors in the U.S. real estate indus-

5. See Part I for a discussion of what is known about discrimination rates on the eve of the Fair Housing Act.

6. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 195 (1993).

7. See, e.g., CHARLES M. LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS* 47–50 (2005); ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960s* 208 (1984) (a pioneering standard work about the decline of liberalism in the 1960s, on the 1968 Act: “A great victory for civil rights it was not. Without an enforcement agency to issue cease and desist orders . . . the act was little more than a gesture toward the principle of fair housing.”); THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 423 (2008) (“[T]he Fair Housing Act . . . was largely a symbolic gesture. While it forbade discrimination in housing by race, creed, national origin, or sex, there was one hitch. To win Republican support, the bill’s authors had defanged it. Title VIII left it to private individuals or advocacy groups to file suit against housing discrimination.”). See generally GEORGE R. METCALF, *FAIR HOUSING COMES OF AGE* (1988).

try. In Part IV – the longest Part – I focus on the role played by America’s realtors, who played a pivotal role in the ecology of housing provision and had vehemently resisted fair housing laws. I attempt to demonstrate that while they hardly loved fair housing, they came to accept it under pressure from regulatory agencies. In Part V, I consider the broader theoretical implications of these findings, showing how they tend to confirm Tom Tyler’s argument on why people obey the law, and demonstrate a good example of Lawrence Lessig’s thesis on the regulation of social meaning. They tend to undermine, however, Derrick Bell’s interest-convergence thesis of the development of anti-discrimination law.

By 1979, discrimination existed in numbers completely unacceptable in any society, and – importantly – the trend did not mean an end, or even a large dent, in *segregation* – a closely related but quite different phenomenon. But we should not overlook a striking – and hidden – policy success.

I. TRENDS IN DISCRIMINATION, 1968-1977

A. Before the Fair Housing Act

Because systematic paired testing for discrimination only began in the 1970’s, we lack precise knowledge of discrimination rates. But virtually all commentators, contemporary and subsequent, agree that it was rampant; in the words of the Kerner Commission, it was “pervasive.”⁸ “By the late 1960’s, Detroit’s suburban residents, realtors, and officials had helped ensure that most neighborhoods remained off-limits to black people.”⁹ Robert Self sees a purposeful strategy of “containment” across the country in Oakland, California, and environs.¹⁰ During the debate on the Fair Housing Act in 1968, Congressman John B. Anderson of Illinois, whose crucial vote in the Rules Committee paved the way for full House consideration, recounted the story of a Black schoolteacher in Rockford, Illinois who “answered some 100 ads in vain seeking a home or an apartment and who in each and every case was turned away.”¹¹

8. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, SUMMARY OF THE REPORT 13 (1968), <http://www.eisenhowerfoundation.org/docs/kerner.pdf>.

9. DAVID M. P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 384 (2007).

10. ROBERT O. SELF, AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND 264–65 (2003).

11. 90 CONG. REC. 9551 (1968) (statement of Rep. Anderson); see also OHIO CIVIL RIGHTS COMM’N, DISCRIMINATION IN HOUSING IN OHIO 21, 48 (1963) (finding “outright refusal to show

And this was *outside* the South: in the land of Jim Crow, the problem figured to be even more extreme. In August 1967, Senator Walter Mondale’s Senate Subcommittee on Housing and Urban Affairs held hearings on that year’s fair housing bill, and heard testimony from Navy Lieutenant Carlos Campbell, an African-American fighter pilot detailed for service at the Defense Intelligence Agency at the Pentagon.¹² That meant Campbell had to find housing in northern Virginia, and no one would rent to him within a 25 mile radius around the Pentagon: “I continuously ran into a brick wall of sheer unadulterated prejudice. I might as well have been dressed in dungarees as in my dress blues—complete with gold stripes and wings.”¹³

B. The Result of a Decade

Within less than ten years, the situation had changed rapidly. In 1977, HUD commissioned the “Housing Market Practices Survey,” which endeavored to determine the extent of continuing discrimination.¹⁴ Over the next year, HUD’s research team conducted more than 3,200 paired-test audits – by far the most comprehensive and methodologically sophisticated operation up until that time. And HUD’s contractor – the National Committee against Discrimination in Housing – did not figure to be a soft touch when it came to making findings.

Discussing “discrimination rates” is a very complex topic, because discrimination can occur at so many times during the housing search process: there is the initial contact, the interview with a realtor or landlord, the showing of an apartment or house, the information re-

minority group members, especially Negroes, homes situated in ‘all-white’ areas . . . The major conclusion to be drawn is inescapable. There exists throughout Ohio a consistent pattern whereby Negroes, and other minority groups, are denied free choice in housing . . . Patterns of exclusion, discrimination and segregation have become institutionalized and constitute a major component of the practices of the housing and real estate business, broadly defined to include real estate brokers and salesmen, landlords, builders, and developers, mortgage lending institutions, and governmental housing agencies.”).

12. Walter Mondale, who as a Senator co-sponsored the bill that eventually became the Fair Housing Act, recalled that “the guy looked like he came directly out of central casting.” Interview with Walter Mondale, Sen. in Minneapolis, Minn. (July 3, 2010).

13. *Fair Housing Act of 1967: Hearing before the Subcomm. on Hous. and Urban Affairs of the Comm. on Banking and Currency on S. 1358, S. 2114, and S. 2280*, 90th Cong. 200 (1967) (statement of Lt. Carlos C. Campbell, USNR). Campbell testified that he eventually found a place to live by renting a room in an Army Colonel’s house; he had to send his wife and infant son back to Chicago.

14. See RONALD E. WIENK ET AL., U.S. DEP’T OF HOUS. AND URBAN DEV., MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS: THE HOUSING MARKET PRACTICES SURVEY 1 (1979) [hereinafter HMPS REPORT].

quested of the applicant, the information given to the applicant, terms for rental or purchase, and many others. This makes it difficult to give a precise bottom-line number, but examining HMPS data yields a pretty clear result: discrimination remained significant and pervasive, but had dropped enormously from pre-FHA levels.

For rentals, the HMPS broke the process down into four main categories:

(1) *Housing Availability* – whether the agent said that an apartment was available; whether the applicant was told that a first-choice was unavailable; whether other apartments were volunteered; whether someone was put on a waiting list, etc. This was the most important and fundamental factor, for as the HMPS commented, “[i]f a rental agent told one auditor that no apartments were available but told the other auditor that something was available, it matters little whether both auditors received the same treatment for each of the other items.”¹⁵

(2) *Courtesy* – this was fairly self-explanatory, and involved issues such as wait times, offer of literature or “drinks, cigarettes, etc.”, informal chatting, asking to be seated, invited to call back, length of interview, etc.¹⁶

(3) *Terms and Conditions* – also self-explanatory, involving the monthly rent, lease requirements, security deposit, whether an application fee was required, and the length of the credit check.¹⁷

(4) *Information Requested and Volunteered* – whether the agent requested income, employment, references, phone number, or address, or whether the agent volunteered information regarding lease requirements, security deposit, the existence of a waiting list, the application procedure, or a credit check.¹⁸

The HMPS found some very telling overall numbers. For Housing Availability, by far the most important number,¹⁹ the bottom line number nationwide was 27%; for courtesy, it was 12%, for Terms and Conditions it was -2%, and for Information Requested and Volunteered it was 6%. One could not simply add these numbers because

15. *Id.* at 7.

16. *Id.* at 65, 68.

17. *Id.* at 77–78.

18. *Id.* at 85–86, 94–95.

19. When HUD wanted to dramatize to the general public how housing discrimination worked, they usually used lack of availability rather than any other measure. *See, e.g.*, The Leadership Conference, “Accents” (Fair Housing PSA), YouTube (Mar. 3, 2008), <https://www.youtube.com/watch?v=84k2iM30vbY>.

Statistically significant relationships appear to exist between the overall index of housing availability and all other indices except for terms and conditions. That is, if blacks were treated less favorably with respect to apartment availability, they also tended to be treated less courteously, to be volunteered less information, and to have more information requested of them than was true for their white teammates.²⁰

It is, then, somewhat misleading to state with great confidence an overall bottom-line number. Taking into account the overlaps, general housing discrimination nationwide very conservatively could be estimated at lower than one-third.²¹

That was far too high for any nation that prided itself on equal opportunity, but in comparison to the rampant discrimination of less than a decade earlier, it was quite an extraordinary accomplishment. A clear majority of the time a Black family wanted to rent an apartment, it would not face discrimination of any kind.

II. THE ARGUMENT FROM ATTITUDES

So how did it happen? To the extent that there is an explanation about the decline in discrimination rates through the 1970's, it is that attitudes changed sharply. But the data does not show this. White attitudes toward housing discrimination demonstrated relatively continuous trends from the 40's through the late 60's, gradually revealing greater tolerance to integrated neighborhoods and opposition to outright discrimination.²² Similar trends persisted from 1968 through the end of the 1970's. Three organizations—Gallup, the National Opinion Research Center (“NORC”) and the Institute for Social Research (“ISR”) polled questions about segregation and open housing throughout the period.²³ All showed that white attitudes became

20. HMPS REPORT, *supra* note 14, at 13.

21. *Id.* at 20. Breaking out discrimination rates in rental markets by metropolitan area, which shows a range of fifty-seven percent (Detroit) to fourteen percent (Milwaukee) in large markets. In small markets, “black auditors encountered far less discrimination . . . on average, than in large [markets], for each of the categories of treatment reported. In fact, as measured by the indices of courtesy and service, black auditors were systematically favored in small metropolitan areas.” *Id.* at 20.

22. See Thomas F. Pettigrew, *Attitudes on Race and Housing: A Social-Psychological View*, in SEGREGATION IN RESIDENTIAL AREAS: PAPERS ON RACIAL AND SOCIOECONOMIC FACTORS IN CHOICE OF HOUSING 21, 33 (Amos H. Hawley & Vincent P. Rock eds., 1973).

23. NORC asked a four-part question concerning respondents attitudes toward segregation, as well as a question asking whether respondents would support an open housing law. ISR asked whether respondents opposed segregation. NORC and Gallup also asked more pointed questions. NORC framed the question this way:

more accepting of integration and non-discrimination during the 1970's – but only gradually and at rates consistent with changes for the previous three decades, making it impossible that the severe drops in discrimination rates derived from attitudes.

Although the patterns of responses vary, they all undermine the thesis that discrimination rates dropped because of sharply dropping prejudice among whites. The sharpest increase in anti-segregation sentiment comes in the NORC survey, showing opposition to segregation rising from 40% to 60% between 1968 and 1972, and *strong* opposition to segregation doubling in that time from 20% to 40%. But between 1972 and 1978, this opposition waned, dropping from 60% to 50% in opposition and from 40% to 25% in strong opposition.²⁴ In other words, during the critical period of FHA enforcement, Americans became *more*, not less, accepting of segregation. If anything, the FHA appears to have jolted people briefly into thinking segregation was wrong, but then returning more closely to the pre-FHA upward slope afterwards. This cannot account for the far more spectacular decreases in discrimination during that time.²⁵

Similarly, in the Gallup survey, 60% of white Americans in 1968 said that they would not move “if black people came to live next door” – a positive result belying the notion that discrimination rates simply reflected attitudes.²⁶ By 1977, the year of the Housing Market Practices Survey, a little more than 80% said the same thing – an even

Here are some opinions other people have expressed in connection with (Negro/black)– white relations. Which statement on the card comes closest to how you, yourself, feel? White people have a right to keep (Negroes/blacks/African Americans) out of their neighborhoods if they want to, and (Negroes/blacks/African Americans) should respect that right. . . . Agree strongly, Agree slightly, Disagree slightly, or Disagree strongly?

ISR asked:

Which of the statements would you agree with: White people have a right to keep (Negroes/black people) out of their neighborhoods if they want to, or, (Negroes/black people) have a right to live wherever they can afford to, just like anybody else? [Framed as:] 1. Keep blacks out 2. Blacks have rights.

General segregation question from ISR: “Are you in favor of desegregation, strict segregation, or something in between?”

Gallup: “If black people came to live next door, would you move? Would you move if black people came to live in great numbers in your neighborhood?”

HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 106–08, 121 (1997).

24. *Id.* at 135.

25. *Id.* at 113, 134–36. The rest of the surveys essentially continue the mild upward slope from the pre-FHA era. The ISR “oppose segregation” number in 1963 is at 65%; in 1968, 72%; in 1972, 79%; 1976, 86% - essentially, a straight line. *Id.* at 135.

26. *Id.* at 148.

more positive result.²⁷ But hardly one that could serve as the cause of discrimination rates dropping from nearly-universal to less than one-third.

On the eve of the passage of the FHA, actual discrimination in housing was routine. Thus, if attitudes drove discriminatory behavior, an observer would expect that discrimination rates would change, but would gradually decline over the period. The data repudiates such an expectation. If we are looking for a cause of discrimination rate drops, we will have to look elsewhere.

III. ENFORCEMENT AND ITS FRAMEWORK

We are left, then, with the obvious. For the first time in U.S. history, strong federal law banned housing discrimination, most prominently the Fair Housing Act, and in the wake of the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*,²⁸ the Civil Rights Act of 1866.²⁹

But were these laws enforced? The scholarly consensus answers this question resoundingly in the negative, focusing primarily on the United States Department of Housing and Urban Development ("HUD").³⁰ Such a focus makes sense if one looks at the Fair Housing Act's formal language, which indeed vests "[t]he authority and responsibility for administering this Act . . . in the Secretary of Housing and Urban Development."³¹ And if one does focus on HUD, the story is basically accurate. HUD could not bring its own lawsuits, and inside the Department, the program bureaus resisted fair housing directives from the well-meaning but overmatched³² HUD Secretary,

27. *Id.*

28. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (holding that § 42 U.S.C. 1982 bars all racial discrimination in the sale or rental of property).

29. 42 U.S.C. § 1982 (1866). This section provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *Jones* held that this provision prohibits private as well as public housing discrimination. *Jones*, 392 U.S. at 409, 413 (1968).

30. *See generally* CHRISTOPHER BONASTIA, *KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS* (2006); LAMB, *supra* note 7; MASSEY & DENTON, *supra* note 6; METCALF, *supra* note 7.

31. 42 U.S.C. § 3608(a) (1968).

32. During the 1968 Presidential campaign, Mitt Romney, then Michigan Governor, said that he had been "brainwashed" by military officials into believing that the United States was winning the war in Vietnam. The statement help sink his chances: Senator Eugene McCarthy acidly remarked that in Romney's case, "a light rinse would have been sufficient." *See Tom McNichol, Mitt Romney Keeps Saying the Wrong Thing . . . Just Like His Dad*, ATLANTIC (Feb. 28, 2012), <http://www.theatlantic.com/politics/archive/2012/02/mitt-romney-keeps-saying-the->

George Romney. As the west coast director of the National Committee to End Discrimination in Housing put it, HUD bureaus had spent decades *creating* segregation through discriminatory siting and funding practices: “It was something like giving a cat responsibility for guarding a plate of cream.”³³

But HUD did not actually have primary responsibility for the public enforcement of Title VIII – a crucial fact missed in every other treatment of the Act’s history. The Fair Housing Act gave that responsibility to the Justice Department, which could bring, on its own initiative, either lawsuits alleging a pattern and practice of discrimination, or cases raising an issue “of general public importance.”³⁴ Soon after the Act went into effect, courts quickly gave wide discretion to the Department to define “pattern and practice” and held that “general public importance” could mean just about anything the Attorney General wanted it to mean.³⁵ Courts also ruled that DOJ and private litigants could bring cases together – a powerful holding because including a private litigant meant that DOJ could effectively sue for monetary damages instead of just injunctive relief.

Would the Nixon White House allow enforcement of civil rights legislation? In the case of Title VIII, the answer is yes, for reasons having less to do with altruism and more to do with politics. Residential desegregation became a highly sensitive political issue during Nixon’s first term, especially after Romney developed “Operation Breakthrough,” which aimed to place integrated HUD projects in all-white suburbs.³⁶ The HUD Secretary attempted to cut off all federal funds to municipalities that refused to accept HUD projects; when the President, normally indifferent to domestic policy matters, saw a memo describing the effort, he immediately scrawled on it, “Stop this

wrong-thing-just-like-his-dad/253751/. Whatever Romney’s raw intelligence, his political instincts were poor. Ohio Governor James Rhodes famously said of him that “watching George Romney run for the Presidency was like watching a duck try to make love to a football.” See MICHAEL A. COHEN, *AMERICAN MAELSTROM: THE 1968 ELECTION AND THE POLITICS OF DIVISION* 185 (2016). The author has often heard that Rhodes did not use the phrase “make love to.”

33. *Hearings on Federal Governments Role in the Achievement of Equal Opportunity in Housing Before the Civil Rights Oversight Subcomm. (Subcomm. No. 4) of the Comm. on the Judiciary*, H.R. 113 (1971, 1972) (statement of Aileen Hernandez).

34. 42 U.S.C. § 3613(e) (1968).

35. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 125 n.14 (5th Cir. 1973) (granting broad discretion to the Attorney General to determine “cases of public importance”); *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221, 227 n.1 (5th Cir. 1971).

36. DEAN J. KOTLOWSKI, *NIXON’S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY* 52, 54–55 (2001).

one.”³⁷ Finally, in 1971, the President pledged “‘vigorous enforcement’ of the Fair Housing Act,” he also insisted that “[w]e will not seek to impose economic integration upon an existing local jurisdiction,” although “we will not countenance any use of economic measures as a subterfuge for racial discrimination.” Nixon liked its emphasis on court enforcement. “Excellent statement,” he noted. “We shall lose on it politically – but the law and justice of the issue require it.”³⁸

Nixon had developed self-pity to a high art:³⁹ in fact, the compromise was excellent politics. The administration could assure skittish and often bigoted suburban whites that they could keep HUD projects out of their neighborhoods, but it could also assure the media and moderates that it still headed the Party of Lincoln. There is little evidence that top Nixon officials *encouraged* fair housing enforcement, but they basically left the Civil Rights Division alone.⁴⁰

A. DOJ Moves Ahead

That was good enough for the DOJ, for it could simply continue what it had been doing from the beginning.⁴¹ As soon as the Fair Housing Act became law in 1968, the DOJ put together an aggressive

37. Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>. It should go without saying that I reject the conclusions of Hannah-Jones’ article.

38. LAMB, *supra* note 7, at 141.

39. The thirty-seventh President’s ability to feel sorry for himself was legendary. See, e.g., DAVID GREENBERG, *NIXON’S SHADOW: THE HISTORY OF AN IMAGE* 247–48 (2003); Ronald Steel, ‘I Had to Win’, N.Y. TIMES (Apr. 26, 1987), <http://www.nytimes.com/books/98/11/22/specials/ambrose-nixon.html> (Nixon was “perpetually out to get people, and . . . had an enormous amount of self-pity - it caused him almost physical agony to be criticized.”).

40. See, e.g., Interview by Jonathan Zasloff with Jerris Leonard (Oct. 31, 1977). In the rather lengthy interview with Leonard, school desegregation and busing are by far the most important issue, and to some extent voting rights. Leonard served as Assistant Attorney General for Civil Rights until 1971. Fair housing does not appear once in the entire interview, suggesting that it simply was not an issue at the highest or even middle levels of the administration. Leonard freely admitted that he sometimes had to block what he saw as over-aggressive enforcement in school busing cases and had battles with Leon Panetta, then the civil rights chief at the Department of Health, Education, and Welfare, over the scope of enforcement. So it seems reasonable to conclude that had he had any battles with the Housing and Credit Bureau over fair housing, he would have discussed it.

41. The head of the Civil Rights Division’s Housing and Credit Bureau said that he never felt pressure from the White House to back off of Title VIII enforcement. Interview by Jonathan Zasloff with Frank Schwelb, Civil Rights Attorney, U.S. Department of Justice (Dec. 3, 2010). In the 1979 USCCR report, referenced *infra*, Schwelb expressed bitterness over some interference, most notably then-Solicitor General Robert H. Bork’s decision to appeal the Seventh Circuit’s decision in the now-landmark case of *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930 (7th Cir. 1974), *aff’d* *Hills v. Gautreaux*, 425 U.S. 284 (1976), which the United States government

litigating team led by Frank Schwelb, a Civil Rights Division lawyer who escaped the Nazis from his native country Czechoslovakia at age 8. In 1969, Nixon's first assistant attorney general for civil rights, Jerri Leonard – whose claim to fame as a Wisconsin state legislator had been the authorship of the state's fair housing law – reorganized the department from regional to substantive specialty bureaus.⁴² Fourteen attorneys were placed at Schwelb's command, and his Housing and Credit Bureau was soon bringing roughly thirty-five cases a year, generating praise from unlikely quarters. William R. Morris, the NAACP's Director of Housing Programs, testified that the lawyers at the DOJ "have shown a lot of initiative."⁴³ In 1970, the U.S. Civil Rights Commission, which in its report lambasted virtually every federal agency for malfeasance in enforcing the FHA, praised the DOJ for its actions.⁴⁴

The DOJ faced a daunting challenge, given the massive size and decentralized nature of the nation's housing market. Thus, the Civil Rights Division focused on institutional change and targeted the biggest developers, apartment referral services, and real estate trade associations to change their default positions.⁴⁵ It often meant bringing suit even if the Division could initially find only one act of deliberate discrimination. Scholars have viewed the FHA's language restricting DOJ authority to "pattern and practice suits" as limiting its scope,⁴⁶ but no court ever threw a suit out on the grounds that this was a misinterpretation of the law, and the Division never felt constrained in terms of jurisdiction.⁴⁷

lost by a vote of a unanimous Supreme Court. It is fair to say that such instances were relatively few and far between.

42. William Grieder & Peter Milius, *Rights Lawyers Press Protest: Unit Reshuffled*, WASH. POST, Sept. 25, 1969. The "protest" referred to in the Post article concerned opposition from within DOJ concerning policy on school desegregation; Title VIII flew below the political radar.

43. *Hearings Before the Civil Rights Oversight Subcomm. (Subcomm. No. 4) of the Comm. on the Judiciary on Federal Governments Role in the Achievement of Equal Opportunity in Housing*, 92nd Cong. 113 (1971, 1972) (statement of William R. Morris).

44. See UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 540 (1970) ("The Department of Justice is one of the few Federal agencies with fair housing responsibilities that has attempted to carry them out vigorously and aggressively Despite staff restrictions, the Housing Section has undertaken an aggressive program of litigation under Title VIII. It has instituted sensible priorities to govern its activities and has attempted to bring wide publicity to the lawsuits it institutes to inform as many people as possible of their rights under Title VIII and to make it known that the law is being enforced.").

45. Interview by Jonathan Zasloff with Schwelb, *supra* note 41.

46. LAMB, *supra* note 7, at 50; MASSEY & DENTON, *supra* note 6, at 196; SUGRUE, *supra* note 7.

47. Interview by Jonathan Zasloff with Schwelb, *supra* note 41.

The Bureau thus decided to focus on the largest housing developers and landlords as well as major apartment referral services. Within the first twenty-four months of the Act's full existence, the DOJ brought cases against Samuel Lefrak, the biggest landlord in New York City, as well as a hitherto unknown developer named Donald J. Trump. But it was not confined to New York City; it also pursued Ben Weingart, one of the biggest landlords in Los Angeles.

B. Case Study: DOJ in Los Angeles

The first Fair Housing Act lawsuit brought by the Department of Justice in Los Angeles appears to have been an action filed March 10, 1970, against Weingart, a prominent businessman whose companies owned some 283 apartment buildings.⁴⁸ The front-page story in the *Los Angeles Times* quoted U.S. Attorney Matt Byrne calling it the largest Fair Housing Act lawsuit filed by the government so far in the western United States, and one of the biggest in the entire country.⁴⁹ It accused Weingart and his companies of violating the Act through a pattern of making rental units unavailable to black apartment-seekers, and of publishing statements indicating race-based preferences.⁵⁰ Not only did officials target a major landlord with units all over Los Angeles, but they chose for their first local lawsuit a well-known figure, described by the *Times* as being "prominent in real estate investment, development and construction here for many years."⁵¹ It was no coincidence that federal officials sought out such a high-profile figure for their first target in Los Angeles.

The government entered into a consent decree with Weingart's company, Consolidated Hotels, Inc., in the summer of 1970.⁵² Once again the story made the front-page of the *Times*, this time with a focus on the "novel" relief ordered as part of the settlement, which affected about 8,000 apartment units in Los Angeles.⁵³ Consolidated Hotels, Inc. was enjoined from discriminating on the basis of race, and ordered to notify fair housing groups each week of any vacancies in buildings with less than fifteen percent black occupancy.⁵⁴ Further,

48. See Gene Blake, *Hotel Magnate Charged with Bias in Rentals*, L.A. TIMES, Mar. 13, 1970, at A1.

49. *Id.*

50. *Id.*

51. *Id.* at 2.

52. See *Consent Decree Reached in L.A. Rental Bias Suit*, L.A. TIMES, July 30, 1970, at A1.

53. *Id.*

54. *Id.*

the company had to advertise in black newspapers, include racial minorities in any ads that depicted people, and step up nondiscrimination training efforts for employees.⁵⁵ U.S. Attorney General John Mitchell announced the resolution in Washington, and Schwelb promised “significant additional litigation in the Los Angeles area.”⁵⁶

Indeed, the DOJ brought at least two more Fair Housing Act cases in Los Angeles in 1970, one of which also seemed designed to have a sweeping impact. In August the government sued a rental agency with eight offices in the Los Angeles area, contending that it had unlawfully refused to inform apartment-seekers about vacancies on account of their race.⁵⁷ The potentially massive scope of the case was revealed when federal officials suggested that hundreds of landlords who used the agency might have also violated the Fair Housing Act by giving discriminatory instructions about what kinds of tenants they would be willing to accept.⁵⁸ The DOJ sought to use its new enforcement powers specifically enumerated in the Fair Housing Act, asking a judge for permission to inspect the rental agency’s records – which supposedly included special codes for landlords’ racial restrictions – and to take depositions.⁵⁹ A third case from 1970 targeted the owners and manager of four Los Angeles buildings with 65 units, alleging discriminatory rental practices.⁶⁰

The DOJ brought another substantial case the following year, filing a lawsuit that ended with a consent decree between the government and the president of the Apartment Association of Los Angeles County.⁶¹ The case originated with a complaint from the Hollywood-Wilshire Fair Housing Council, and the consent decree barring future discrimination covered forty buildings in the Los Angeles area with more than 1,400 units.⁶² The DOJ entered into a consent decree in July 1973 with Westside Building Company and Santa Monica Construction, a pair of affiliated construction and management firms that owned and operated more than 300 units.⁶³ The companies were enjoined from discriminating and ordered to institute an educational

55. *Id.*

56. *Id.*

57. *See Bias Suit Filed Against Rental Firm by U.S.*, L.A. TIMES, Aug. 25, 1970, at A3.

58. *Id.*

59. *Id.*

60. *2 Landlords Face Bias Suit*, L.A. TIMES, Oct. 1, 1970, at C4.

61. *Agreement in Rental Bias Case Reached*, L.A. TIMES, Aug. 24, 1971, at B4.

62. *Id.*

63. *United States v. Westside Bldg. Co.*, 382 F. Supp. 148, 148 (C.D. Cal. 1973).

program for employees, add a non-discrimination statement to rental forms and advertisements, and notify a local fair housing agency representative of existing and expected vacancies.⁶⁴

Although we cannot know for sure, these actions against large-scale landlords with hundreds and even thousands of units across the city must have had a dramatic impact on Los Angeles' real estate community. By targeting prominent property owners and finding cases that implicated the practices of hundreds of landlords, the government seemed to get off to a strong start in enforcing the Fair Housing Act in Southern California.

IV. THE TRANSFORMATION OF AMERICAN REALTORS

But hitting big landlords and developers was not good enough. The real estate system contained one other key pressure point. The chief obstructor of fair housing throughout the 1960's was the powerful southern bloc in the Senate, which managed to sustain a filibuster on housing even after it collapsed for the rest of civil rights legislation. But the southerners had a powerful ally, with a vast constituency throughout the north, west, and midwest: America's realty boards. As William Taylor of the Center for National Policy Review told the House Judiciary Subcommittee on Civil and Constitutional Rights: "We don't think you can get at the dual housing market without getting at the brokers."⁶⁵ A contemporaneous scholarly study concluded that "the most influential element among the discriminating forces seems to be the white real estate broker or salesman."⁶⁶

A. The Ideology of Forced Housing

Realtors were and are a quintessentially American species: small businessmen who make their living through drumming up clients, making connections throughout towns and cities, fiercely independent, reliant on personal connections for their business, and seeing

64. *Id.* at 149-50.

65. *Hearing Before the Subcomm. on Constitution and Civil Justice of the H. Comm. on the Judiciary*, at 131 (1971).

66. JOE T. DARDEN, *AFRO-AMERICANS IN PITTSBURGH: THE RESIDENTIAL SEGREGATION OF A PEOPLE* 46-47 (1973); see also Lynn W. Eley, *Introduction*, in *THE POLITICS OF FAIR-HOUSING LEGISLATION: STATE AND LOCAL CASE-STUDIES* 7 (Lynn W. Eley & Thomas W. Cass-tevens eds., 1968) ("Real-estate brokers have been the group most stubbornly opposed to fair-housing laws.").

themselves as pillars of their local communities (because it is helpful to get clients).⁶⁷ And they hated fair housing.

Perhaps more accurately, they hated what they called “forced housing”: organized real estate interests refused to call the proposal “fair housing” at all. The opposition of the National Association of Real Estate Boards (NAREB), the Realtors’ trade group, appeared to be essentially ideological. John Williamson, the Realtors’ executive vice president during the 1960’s, recalled a government agency doing “continuity-of-government” work, i.e. how to keep public order going in the event of a nuclear war – it “presupposed the death of 20 million, 30 million people, and all the big centers of population destroyed.” So the agency envisioned an “executive reserve that would run the country,” and among other things it would control the prices of housing, everything from cost control to rent control.” The agency asked NAREB to designate someone for the executive reserve:

I’ll always remember how [NAREB President] Morgan Fitch responded. His exact words were: ‘Even in the event of a nuclear attack, even in the event of the destruction of all our great population centers and the deaths of 20 millions to 30 million people, even then, I will not concede the right to control a man’s property.’ What he said was absolutely consistent with the position he held all of his life and I’ll grant him that. The executive committee just went along with his analysis and accepted it.⁶⁸

Throughout the 1960’s and up to the passage of the FHA, NAREB’s newsletter and statements of its leaders were filled with invective about the impending disaster that “forced housing” would bring. Realtors in California spearheaded Proposition 14, which repealed the state’s 1963 fair housing law.⁶⁹ They generated thousands

67. *See generally* JEFFREY M. HORNSTEIN, *A NATION OF REALTORS: A CULTURAL HISTORY OF THE TWENTIETH-CENTURY AMERICAN MIDDLE CLASS* (2005). Indeed, George F. Babbitt, the eponymous hero of Sinclair Lewis’ famous novel, is a realtor.

68. History of the National Association of Realtors 15 (unpublished manuscript) (on file with NAR library, Chicago, IL).

69. The best historical accounts of the passage of the Rumford Fair Housing Act, and its eventual overturning by the California Real Estate Association’s Proposition 14, are found in BILL BOYARSKY, *BIG DADDY: JESSE UNRUH AND THE ART OF POWER POLITICS* 90–09 (2008); ETHAN RARICK, *CALIFORNIA RISING: THE LIFE AND TIMES OF PAT BROWN* 288–90 (2005). Although the voters of California repealed the Rumford Act in 1964 by more than two-million votes, the United States Supreme Court struck down the repeal, holding that repealing a civil rights statute by initiative is state action and violates the Equal Protection Clause of the Fourteenth Amendment. *See generally* *Reitman v. Mulkey*, 387 U.S. 369 (1967).

of letters to Congress opposing the FHA in 1966, when it ran aground on a southern filibuster backed by Republican votes.⁷⁰

B. The Shock of the New

And then, suddenly, in April 1968, fair housing became federal law. This came as a shock to the realtors. As late as January, their newsletter did not foresee a fair housing bill on the horizon. And in any event, Everett Dirksen – one of their most reliable allies on Capitol Hill – had been saying for years that fair housing was unconstitutional: “if you can tell me what in interstate commerce is involved about selling a house fixed on soil or what federal jurisdiction there is,” he said, “I’ll eat the chimney on the house.”⁷¹ But in 1968, Dirksen suddenly changed his position, and even though in March, once again the realtors delivered thousands of letters of Congress, they had been caught flat-footed and unable to stop the passage of the Fair Housing Act.

The Realtors’ surprise was not only political: it was ideological. For decades, NAREB’s motto had been “liberty under the law.” Its self-image centered on the idea of the solid, sober, law-abiding businessman,⁷² bound by a code of ethics that stressed adherence to the law. Politicians could smoothly turn positions on a dime, but thousands of realtors would have a harder time of it. The last use of the phrase “forced housing” occurred NAREB’s April 22, 1968, newsletter, which devoted its first three pages to printing Title VIII in full. Its editorial, “Living With Law,” snidely referenced Martin Luther King’s practice of civil disobedience, rejected it, and said that “[t]his Association holds that laws are to be observed. Failure to observe laws applicable to our business violates the code of ethics.” Whether or not NAREB’s position was correct, national policy has been declared.

70. See Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. LEG. 247, 255 (2016) (describing failure of federal fair housing legislation in 1966).

71. JULIAN E. ZELIZER, *THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY* 236 (2015).

72. In contrast to students, professors and hippies who were destroying the country. NAREB’s editorial of April 14, 1969 provides a typical example:

[The] vast majority of the people are thoroughly fed up with the antics of the shaggy-haired, slovenly, unkempt, and foul-mouthed mobs of pseudo-collegians who have been making themselves so conspicuous with the help of much of the news media. The wanton destruction of property that they have committed is enough to condemn them. But the despoiling of their minds in their efforts to appear intelligential [sic] is more serious to the future of the nation.

The Supreme Court's decision in *Jones v. Mayer*,⁷³ handed down just a few weeks after the FHA's passage, administered another gut punch to NAREB's position. *Jones* declared that the Civil Rights Act of 1866, heretofore thought of only as barring formal discriminatory legislation, applied to all private sales and rental of property. NAREB's newsletter ran five separate editorials on the decision, which focused on two points: (1) the decision as well as the FHA, were the law of the land and disobedience was futile; and (2) realtors needed to take proactive steps to avoid lawsuits.

Even before LBJ signed the bill (although after it cleared Congress), realtors were well aware of it and began covering their tracks. Two days prior to the signing ceremony, the Los Angeles Realty Board revised its annual handbook, excised its section on getting rid of "undesirable tenants" because of fear of FHA liability.⁷⁴

The philosophical challenge posed by the Fair Housing Act coincided with a changing of the guard at NAREB—a departure from an ideologically driven core to a practical and transactional orientation.⁷⁵ The idea of realtors making contributions deeply offended the old guard. As Williamson recalled, Morgan Fitch, who had fought the idea of government housing after a nuclear war, "was so upset. He was very emotional about it. It was demeaning, Fitch believed, even to suggest that Realtors had to give people in politics money to get a fair hearing."⁷⁶ Fitch had a point, but Washington had changed – and so did the Realtors. NAREB began focusing on

[B]read and butter issues. By that I mean getting down to business figuring out what role we could play in using government to help realtors and property owners sell houses. We stopped viewing the

73. *Jones*, 392 U.S. at 409, 413 (1968).

74. Public Relations Committee Report, Apr. 9, 1968, Los Angeles Realty Board Papers, Special Collections, UCLA. The discussion does not explicitly mention the FHA: instead, after observing a moment of silence in memory of Martin Luther King, Jr., "the Committee . . . discussed the many legal problems and possible future court decisions and new laws." The Committee excised this portion of the Handbook "because future court decisions and laws that may be enacted after the Book is published might present a liability to the Board." The only relevant difference from the previous year, when no one expressed problems with the Handbook, was the FHA.

75. Williamson recalled: "Throughout my twenty years with the Realtors [1951-73], the emphasis was constantly on issues like rent control, public housing – all ideological issues. When the association finally realized that we had used up so many years on these things, and finally saw that the old guard had really kept it at a standstill for too long, it also had to make some fundamental changes." History of National Association of Realtors, *supra* note 68, at 18.

76. *Id.* at 17.

government from the outside and moved to be a force that shaped the policies of government itself.⁷⁷

The Realtors began aggressively supporting government housing subsidies and searching for ways to use them⁷⁸ instead of seeing everything through an antigovernment lens.

The new pragmatism at the top of NAREB helped realtors accommodate themselves to fair housing. After all, fair housing did not figure to hurt the realty business – if anything, just the opposite. Williamson recalled, “Secretary Bob Weaver of HUD called me about an hour after the President had signed the Civil Rights Act of 1968. ‘Congratulations, Jack,’ he said. ‘I’ve just returned from the White House where the President by the stroke of a pen has increased your market by 35[%].’”⁷⁹ That was a significant overstatement, but the overall point made sense: hard-headed businessmen had little reason to hate fair housing, especially if noncompliance made them susceptible to lawsuits.

Indeed, the California Real Estate Association (“CREA”), the most prominent and powerful real estate group in the state and the driving force behind Proposition 14, opted to publicly embrace the new law. The group spent \$50,000 to have Universal Studios produce a half-hour documentary entitled “A House to Live In” touting realtors’ commitment to open housing.⁸⁰ In advance of a preview screening at the CREA’s statewide gathering in the fall of 1968 – the first such conclave since passage of the Fair Housing Act – association president Robert W. Karpe said the film was “intended to make clear to the general public that realtors will give equal service to everyone, no matter what his ethnic background.”⁸¹ However, lest anyone think that the new approach was an admission of past bad behavior, Karpe added that the film documents the fact that realtors are barred from discriminating by their code of ethics, “and have been successfully following that policy since 1963.”⁸²

77. *Id.*

78. *Id.* at 18.

79. *Id.* at 13–14.

80. Robert S. Fairbanks, *CREA Calls Off Fight on Open Housing*, L.A. TIMES, Dec. 15, 1968, at B4; *3,000 to Attend CREA Parley*, L.A. TIMES, Sept. 22, 1968, at M1.

81. *3,000 to Attend CREA Parley*, *supra* note 80, at M1, 15.

82. *Id.* at 15. Karpe’s reference to 1963 was to the year that the Rumford Act was initially passed by the California Legislature, even though it was repealed by the voters in 1964, and then reinstated by the United States Supreme Court in 1967. I have found no evidence either from the California Real Estate Association or from the National Association of Realtors that realtors

By late 1968, the FHA prompted the CREA to end its long-running effort to repeal the Rumford Act. After Proposition 13 had been struck by the courts, the CREA had supported several bills to repeal the California fair housing law through the legislature.⁸³ Only twelve months earlier, the State Senate actually voted to repeal the Rumford Act in 1967. However, after the Senate broke the southern filibuster on fair housing, Gov. Ronald Reagan shifted his position from supporting the CREA's position to indicating that he would veto the repeal.⁸⁴ Finally, in December of that year, CREA officials announced that they would no longer seek to repeal or modify the Rumford Act because passage of the federal fair housing law made it clear that the legislature would not pass such a bill.⁸⁵

Back on the ground in Los Angeles, fair housing activists and sympathetic local government officials seized the momentum provided by the new federal law by immediately launching new outreach campaigns. Soon Los Angeles County joined in, launching a public relations campaign aimed at increasing white acceptance of integrated housing. The County Commission on Human Relations marshaled \$250,000 in private donations to fund 200 billboards across the city, thousands of bumper stickers, signs on 4,000 roving telephone company trucks, radio and television messages and newspaper ads—all carrying slogans such as “Is Your Neighborhood All-White or All-American?”⁸⁶ Herbert Carter, the executive director of the human relations panel, said that even with the passage of the Fair Housing Act, “we’re going to have to change the attitudes of the great middle-class, white Los Angeles.”⁸⁷ Such a campaign had been recommended

passed any ethics provisions in 1963 banning discrimination. Realtors, did, of course, pledge in their ethics codes to follow the law and all relevant regulations.

83. Fairbanks, *supra* note 80.

84. See Ken Fanucchi, *Rumford Vote Pleases Realtors, Jars Negroes*, L.A. TIMES, Apr. 17, 1967, at SF8; Tom Goff, *Reagan Shift on Rumford Repeal Halts Legislation*, L.A. TIMES, Apr. 4, 1968, at 3. Extreme right-wing Senator John Schmitz, a longtime prominent member of the John Birch Society, continued to introduce repeals, but they went nowhere. See *Bill to Repeal Rumford Act Clings to Life*, L.A. TIMES, Apr. 25, 1968, at B2. Schmitz was expelled from the John Birch Society for extremism and was on the far right even by the standards of ultraconservative Orange County. See Matt Coker, *John G. Schmitz, In His Own Words*, OC Weekly (Jan. 18, 2001, 12:00 AM), <http://www.ocweekly.com/2001-01-25/columns/john-g-schmitz-in-his-own-words/>.

85. See Fairbanks, *supra* note 80.

86. Jack Jones, *Drive to Boost Acceptance of Open Housing by Whites Starts*, L.A. TIMES, Nov. 19, 1968, at SF0 [hereinafter Jack Jones, *Drive to Boost*].

87. *Id.* The campaign did not get off to a perfect start: an error placed 10 “Is Your Neighborhood All-White” billboards in South Central Los Angeles, which should have gotten signs reading “Good Neighbors Come in All Colors.” *Id.*; Art Seidenbaum, *Wrapping White, black and Brown in Red, White, Blue*, L.A. TIMES, Mar. 5, 1969, at E9.

as far back as 1965 during the aftermath of the Watts riot, but it took recent developments including passage of the Fair Housing Act to provide the spark to realize the project. “Maybe the time wasn’t right then,” said Meyer Price Stern of the Human Relations Commission. “Now, we feel the time is ripe.”⁸⁸

In late August, the *Times* checked in on local fair housing organizations and found that in the wake of the publicity surrounding the Fair Housing Act and the *Jones v. Mayer* decision, complaints had doubled from an average of two to four per day.⁸⁹ The head of one group, Ola Pacifico of the Centinela Bay Human Relations Committee, said the developments out of D.C. had already given advocates greater leverage in helping black families find housing. “There has been a gradual change in real estate people,” she said. “[T]hey’re ready to sell if a little pressure is applied, they’re scared of the new law.”⁹⁰ Joining in the efforts was the California Real Estate Association (CREA), which now had a dedicated fair housing specialist, who described the organization’s new procedure for handling discrimination complaints that could lead to the suspension of offending realtors or even entire local realty boards.⁹¹ Between July 1969 and December 1970, the Housing Opportunities Center of Greater Los Angeles, or its affiliates “filed more than 70 discrimination lawsuits . . . none has been lost.”⁹²

In short, a few months after *Jones* and the passage of the FHA, the nation’s realtors felt betrayed and angry, but had a commitment to obeying the law and little financial reason to disobey it. In addition, at the top of NAREB and leading organizations such as CREA, new leadership was anxious to make a break with the patterns of the past. Into this scenario stepped the Department of Justice.

C. DOJ Moves Against Realtors

The Civil Rights Division moved quickly. Six months after the FHA became applicable to private home sales, DOJ brought suit West Suburban [Chicago] Board of Realtors for FHA violations, including steering, denying access to MLS, telling them units were not available

88. *Jones*, *supra* note 86.

89. Tony Shultz, *High Court Ruling Eases Housing Situation for Minority Residents*, L.A. TIMES, Aug. 25, 1968, at CS2.

90. *Id.*

91. *Id.*

92. *FH Congress Organized: So. Calif. Group Result of Change In L.A. Program*, TRENDS IN HOUSING, First Quarter 1971, at 6.

when they were, and forcing financial disclosures not required of whites.⁹³ The suit received front page coverage in both the NAREB newsletter and the *Chicago Tribune*.

Importantly, the civil rights division had an unlikely ally: DOJ's antitrust division, which for its own part was actively pursuing a series of lawsuits against local real estate boards for blocking access to multiple listing services and setting forth fee schedules.⁹⁴

Growth of these antitrust suits "ultimately led to a complete rethinking of where NAREB was and where it wanted to be." Jack Pontius, who took over from Conser as NAREB's newsletter editor in 1970, conceded that "many of the suits were prompted because of an underlying current of the minority issue." In the early 1970's, "the entire mood of the times was different than it is today [1984]. There was civil rights. There was antitrust. There was suspicion divided between industry and government." For the Realtors, the issues were—with good reason—linked,⁹⁵ and it scared them.

NAREB's official yet unpublished history expressed the prevailing mood:

For the first time in history, the National Association found itself the target of a concerted attack by no less powerful an opponent than the federal government. Dispelled finally and forever was the comfortable notion prevalent among local boards of REALTORS that they did not need any help to fight their battles.⁹⁶

Scrambling, NAREB established an equal opportunity committee, with members from some of the most prominent local real estate boards. In an especially telling turnabout, the committee invited the

93. See *U.S. Again Accuses West Suburban Realtors of Racial Bias*, CHI. TRIB., Sept. 28, 1972, at B7 (referencing original July 14, 1969 lawsuit).

94. See, e.g., *United States v. Multiple Listing Service*, No. 72-68, 1973 WL 811, at *1-2 (D. Or. June 29, 1973); *United States v. Greater Pittsburgh Bd. of Realtors*, No. 72-499, 1973 WL 794, at *1-2 (W.D. Pa. May 21, 1973); *United States v. Long Island Bd. of Realtors*, No. 70 Civ. 1418, 1972 WL 584, at *1-2 (E.D.N.Y. Aug. 1, 1972); *United States v. Memphis Bd. of Realtors*, No. 72-218, 1972 WL 581, at *1-2 (W. D. Tenn. July 27, 1972); *United States v. Prince George's Cty. Bd. of Realtors*, No. 21545, 1970 WL 546, at *1-2 (D. Md. Dec. 28, 1970) (all of these cases represented consent decrees entered into by local realty boards).

95. Such a link made good legal sense, as an agreement between realtors, or between realtors and sellers or purchasers, could amount to a "conspiracy in restraint of trade" under antitrust laws. In 1971, fair housing advocates in Washington State brought such a suit under state antitrust laws, and settled it under a consent decree after the trial judge rejected defendants' contention that antitrust laws do not apply to discriminatory behavior. See *Wash. State Suit*, TRENDS IN HOUSING, First Quarter 1971, at 5. The argument that antitrust laws could cause liability for housing discrimination had already attracted academic support. See Norman Dorsen, *Critique of Racial Discrimination in Private Housing*, 52 CAL. L. REV. 50, 53-55 (1964).

96. "History of the National Association of Realtors," unpublished manuscript, NATIONAL ASSOCIATION OF REALTORS ARCHIVES, (on file with author).

attendance of the leadership of the National Association of Real Estate Brokers, also known as NAREB,⁹⁷ the leading organization of Black real estate agents, whose members were (and still are) known as “realists” instead of “realtors.” The equal opportunity committee started work on affirmative practices for local realtors to comply with fair housing laws – and thereby avoid lawsuits.

And those lawsuits were coming. DOJ soon put “new emphasis on ‘steering’ practices of realty rental and sales organizations.”⁹⁸ Alexander Ross, the deputy chief of housing services at the Civil Rights Division, delivered a speech to the national meeting of ASK, an international homes sales network that operated as an affiliate of Baltimore’s Donald E. Grempler realty firm, and turned over to the group a 14-page memorandum of DOJ’s “don’ts” to the audience.⁹⁹ Ross emphasized that DOJ would inspect internal realtor records, their patterns of advertising, how much realtors told prospective buyers about financing, and even data on the nature of personal service.¹⁰⁰ To show it meant business, a few days later, DOJ filed suit against Grempler, who said that he was a target “because we are the largest broker and because we do have the computers” to provide Justice with detailed compliance data. “We’re not the last broker in Baltimore that they’ll be going to,” Grempler warned, and suggested that other realtors get on board with the consent decree that he signed.¹⁰¹ A week after the suit was filed, U.S. Attorney George Beall announced that his office had received several more complaints and more suits could be expected shortly.¹⁰²

In 1973, NAREB – now known as the National Association of Realtors, or NAR – invited the Assistant Attorney General for Civil Rights, J. Stanley Pottinger, to give the keynote address at the annual convention of its State and Urban Boards Program.

Pottinger did not assuage their fears. In the speech, he announced a new DOJ policy of finding individual litigants to file along with DOJ itself, in order to get maximum money damages. Pottinger

97. In part for this reason, the National Association of Real Estate Boards changed its name in the early 1970’s to the National Association of Realtors (NAR). See Mary Szto, *Real Estate Agents as Agents of Social Change: Redlining, Reverse Redlining, and Greenlining*, 12 SEATTLE J. SOC. JUST. 1, 7 (2013).

98. Carleton Jones, *Clearing the Air on Open Housing*, BALTIMORE SUN, June 25, 1972, at 101.

99. *Id.*

100. *Id.*

101. James D. Dilts, *U.S. Charges Bias to Grempler Realty*, BALTIMORE SUN, July 26, 1972, at C24, C8.

102. Fred Barbash, *More Bias Suits Predicted Here*, BALTIMORE SUN, Aug. 2, 1972, at C24.

observed that “there are often dozens, and on occasion, hundreds of victims, many of whom are not aware that they received discriminatory treatment from the defendant.” And in case the realtors thought perhaps he was talking about landlords and developers, Pottinger disabused them:

I regret to tell you that a significant number of incidents have come to our attention involving realtors and their associates who have preyed on racial fears while concentrating their solicitation for listings in racially transitioned neighborhoods and have contributed to resegregation by steering blacks into and whites away from such neighborhoods.

These practices must cease. . . . We intend to concentrate our enforcement activities on these violations and will support the efforts of state licensing agencies to use license revocation as an enforcement tool. . . . We have brought what we call ‘steering’ cases in Baltimore, Cleveland, Chicago, Atlanta, New Orleans, Dallas, Detroit, Toledo, St. Louis and Houston among others, and will continue to do where litigation is necessary to put an end to violations.¹⁰³

By the time Pottinger spoke, the Housing and Credit Bureau had nearly doubled in size, to twenty-five lawyers, seven paralegals, with FBI agents also available for investigations.¹⁰⁴ NAR’s leadership got the hint. A few months later, NAR’s General Counsel, William D. North, published a pamphlet entitled “Realtors and the Law,” and sent it to the Association’s membership around the country. On the first page, he warned,

Already we have seen a proliferation of civil rights suits against real estate brokers by the Civil Rights Division of the Department of Justice; an estimated sixty-three suits in 1973. We have seen increased activity by enforcement section [sic] of the Department of Housing and Urban Development. And we have observed a significant increase in the number of private civil rights suits, include a recent massive class actions suit against all real estate brokers in a major metropolitan area on behalf of all buyers and sellers or residential housing in that area.

[T]he effort to control the real estate broker goes even further. As revealed in the terms of proposed consent decrees and demands for

103. Morton Mintz, *U.S. Suits Seen As Aiding Equal Housing*, WASH. POST, Nov. 11, 1973, at A2; see also Moses J. Newson, *Pottinger Warns Realtors: Fair Housing Law Will Be Enforced*, BALT. AFRO-AMER., Nov. 17, 1973, at 1–2.

104. See Newson, *supra* note 103, at 2; see also Interview by Jonathan Zasloff with Schwelb interview, *supra* note 41.

relief in suits filed by the Department of Justice, the government is demanding the right to require real estate brokers to advertise in specified minority medias and to determine the amount of money and the amount of advertising which shall be devoted to such media.¹⁰⁵

D. Rewriting the Realtors' Code of Ethics

Faced with the prospect of DOJ lawsuits, and committed, at least publicly, to "law and order," Realtors attempted to clean up their image, and to some extent, their practices. Nowhere was this seen more clearly than in the Realtors' "Code of Ethics," which formed a key section of the group's self-conception.

At the time of the FHA's passage, Realtors' Codes of Ethics practically demanded discrimination. The original Article 34 of the Code promulgated in 1928 read: "A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood."¹⁰⁶

By the late 1940's, in light of *Shelley v. Kraemer*,¹⁰⁷ several members of NAR's Committee on Professional Standards became nervous about the explicit language in the Code.¹⁰⁸ Thus, the Realtors made fairly direct attempts to preserve the intent while also excising smoking guns from the actual language. In 1950, NAR overhauled the entire Code, and in doing so, replaced the old Article 34 with a new Article 33: "A Realtor should not be instrumental in introducing into a neighborhood a character of property or use which will clearly be detrimental to property values in that neighborhood." Some realtors insisted that they were not at fault for any racial strife, with one commenting that "the fault lies with unscrupulous white real estate agents, not Realtors." But the overall intent was clear: "When approached for a ruling on Article 34," Mr. McLellan is to ask the question,

105. WILLIAM D. NORTH, *Civil Rights in Housing: A Legal Update*, in THE LAW: HOW IT AFFECTS REALTORS AND BOARD MEMBERS 20, 20–21 (1974).

106. NAT'L ASS'N OF REAL ESTATE BOARDS, CODE OF ETHICS 7 (1924).

107. *Shelley v. Kramer*, 334 U.S. 1, 22–23 (1948) (holding that the Equal Protection Clause forbids enforcement of racially restrictive covenants despite state action requirement).

108. Letter from Committee of Professional Standards Service (Dec. 1947) (on file with author). Mr. Ray Nichols of Oakland brings up Article 34 of the Code, "which deals with racial discrimination." He mentions that this is relevant in light of *Shelley*. November 17, 1949 Meeting: "Correspondence from the Christian Friends of Racial Equality was read and considered. This matter is tabled by the Committee."

“Whom do you want living next to you. Read Article 34 and answer the question yourself.”¹⁰⁹ Such hedging persisted through 1962, the last time the Code of Ethics was reviewed prior to the enactment of the FHA.¹¹⁰

However, by 1974, the year of the first post-FHA revision, the realtors realized that they could no longer get away with such subterfuge. The entire article was excised and replaced with a new Article 10: “The REALTOR® shall not deny equal professional services to any person for reasons of race, creed, sex, or country of national origin. The REALTOR® shall not be a party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex, or country of national origin.”¹¹¹ Any realtor belonging to NAR had to sign it.

E. Establishing the Affirmative Marketing Agreement

The threat from DOJ also sent the Realtors back to the more-pliable HUD. HUD and NAR concluded their nationwide “Affirmative Marketing Agreement” in 1975. It was often vague and somewhat tepid. Given the decentralized nature of NAR, it also did not bind individual realty boards or real estate agencies. But it was light-years ahead of what had been the norm only seven-years prior.

If nothing else, the publicity was extensive. NAR sent copies of the Agreement to 1,696 member boards across the country, with a cover letter and an explanatory booklet urging endorsement of the Agreement through local HUD office.

Much of the Agreement centered on publicity and education: a Board adopting the Agreement would place an ad in a newspaper of

109. May 9, 1950 Meeting.

110. Even in the early 1960s, the Realtors were feeling less and less comfortable with the implications of this Article, renumbered Article V in the revision of 1962. In that year, a Realtor sold a house in an all-white neighborhood to a non-white purchaser. A white neighbor then complained to the relevant Board of Realtors that this action constituted a violation of the ethical provision. The realtor responded, and the Board accepted, the defense that introducing a non-white *occupant* did not violate the Code of Ethics because the Code only guarded against “a character of property or use” that would reduce property values, and that a specific occupant was not a “character” or “use.” See NAT’L ASS’N OF REAL ESTATE BOARDS COMM. ON PROF’L STANDARDS, INTERPRETATIONS OF THE CODE OF ETHICS 38–39 (1963). But it is one thing for Realtors to say that their own professional standards do not require them to separate the races; it is quite another to say that the law should force them to practice non-discrimination. As noted, realtors vehemently opposed all fair housing legislation, and despite this decision, the California Real Estate Association sponsored the state’s Proposition 14, which overturned California’s Rumford Fair Housing Act.

111. NAT’L ASS’N OF REALTORS, CODE OF ETHICS 3 (1974).

general circulation and would try to put an HUD-approved “Publisher’s Notice” in the local press and on television. It would provide educational materials to participating realtors, recruit minority brokers to join local boards, sponsor outreach and training programs, monitor progress and (significantly) pay the administrative costs of doing so. For their part, individual Realtors adopting the Agreement needed to display equal opportunity posters in advertisements, brochures, and all places of business, and inform their clients of legal requirements.

The Agreement’s teeth, such as they were, centered on office procedures and techniques that HUD and NAR argued were designed to prevent discrimination. These procedures were not mandatory, but HUD and NAR noted that the “failure to provide some effective safeguards against racial steering—which these procedures were primarily designed to prevent—could be construed as lack of commitment by the signatory firm in question.”¹¹² And in case anyone missed the point, the Agreement clearly specified that “[i]n no way is any exemption or immunity from compliance with Title VIII or any other fair housing law granted or implied by the Agreement.”¹¹³

Many of the provisions of the Affirmative Marketing Agreements would have been familiar to realtors because they were standard components of consent decrees that DOJ had been pushing since 1969. But of course, Affirmative Marketing Agreements were voluntary and unenforceable. And for many realtors, presumably, that was the point. Nevertheless, only by adhering to an affirmative marketing agreement could a realtor defend itself against a fair housing lawsuit. And for NAR’s leadership, *that* was the point.

NAR President Arthur Veitch explained to San Fernando Valley Realtors in 1976 why the realtors moved to the Affirmative Marketing Agreement. First, DOJ brought antitrust lawsuits against realtors, leading to the creation of the Fourteen Points program guiding the operation of Multiple Listing Services against antitrust actions. The antitrust experience, Veitch said, showed that “the National Association must constantly strive to ensure that industry programs, policy, and practice are consistent with law and the National Association

112. U.S. DEP’T OF HOUS. & URBAN DEV., VOLUNTARY AFFIRMATIVE MARKETING HANDBOOK 3–4 (1979).

113. *Id.* at 3–13.

must anticipate trends in enforcement activities to help avoid costly litigation.”¹¹⁴

Veitch pulled no punches. The Affirmative Marketing Agreement served as a way to avoid DOJ consent decrees: “Realtors, however innocent they may be, desiring to accept a consent decree to avoid ruinous defense costs are finding themselves confronted with terms which are equally, if not more ruinous.” He continued:

All of these developments – the need to anticipate trends in legal enforcement, the oftentimes prohibitive cost of legal defense and increasing use of consent decree which go beyond the requirements of the law caused the National Association to consider the development of the Affirmative Marketing Agreement.¹¹⁵

Veitch’s address was included in the Affirmative Marketing Handbook sent to every realty board in the country. For his part, NAR General Counsel Nolan included in the handbook an essay praising the Affirmative Marketing Agreement as insurance to litigation, and highlighted a case in Detroit where the judge, pointing to the defendant realtor’s signing and adherence to the Agreement threw out fair housing charges.

Not surprisingly, the civil rights community was hardly thrilled with NAR’s Affirmative Marketing Agreement, and they made their objections clear. In March 1976, the House Subcommittee on Civil and Constitutional Rights held a three-day hearing on “Equal Opportunity in Housing,”¹¹⁶ and the lead witness was Robert C. Weaver, one of the most distinguished housing scholars in the nation and the first African American Cabinet member in U.S. history, when he served as the inaugural HUD Secretary, under President Johnson.

Weaver pointed to findings from a HUD region concerning the “areawide agreement” in San Diego.¹¹⁷ The region concluded that the agreement had “no measurable effect or noticeable influence on housing racial segregation[;]” “practices of developers had altered very little in response to affirmative fair marketing[;]” and “HUD’s

114. Veitch’s speech is quoted in NAT’L ASS’N OF REALTORS, AFFIRMATIVE MARKETING HANDBOOK (1st ed. 1977).

115. *Id.*

116. *Equal Opportunity in Housing: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, Part 1, House of Representatives, 94th Cong. (1976)* [hereinafter *Equal Opportunity Hearing*].

117. *Id.* at 3 (statement of Prof. Robert C. Weaver, Dep’t of Urban Affairs, Hunter Coll., N.Y., President, Nat’l Comm. Against Discrimination in Hous., Inc.).

monitoring, enforcement, and technical aid had been minimal and largely ineffective.”¹¹⁸

These protests were revealing. Despite Subcommittee Chair Don Edwards’ warning against being “lulled into thinking that housing discrimination is virtually a thing of the past,”¹¹⁹ Weaver’s complaints concerned not *discrimination* in the private housing market—which after all accounted for the vast majority of housing in America—but rather *segregation*, and in particular the role that the limited number of HUD programs played in fostering or combatting segregation. His model affirmative marketing plan came from Ohio’s Miami Valley and concerned “the allocation of subsidized housing units in the region”¹²⁰ – an important issue, but not one concerned with discrimination.¹²¹ Conspicuously, although the Subcommittee called six witnesses from HUD, it called none from DOJ.

No one argued that the Affirmative Marketing Agreements were perfect, or even a major step forward in and of themselves. The most enthusiastic reactions came, not surprisingly, from the realtors.¹²² But this very enthusiasm showed how the terms of debate and action had changed in less than a decade. All over the country, realtors were now lining up to claim that they did not discriminate. And the advocates in Washington, DC were beginning to recognize that private

118. *Id.* at 2–3.

119. *Id.* at 1 (statement of Rep. Don Edwards, Chairman, Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary).

120. *Id.* at 3 (statement of Prof. Robert C. Weaver, Dep’t of Urban Affairs, Hunter Coll., N.Y., President, Nat’l Comm. Against Discrimination in Hous., Inc.). Weaver devoted the majority of his testimony not to Affirmative Marketing Agreements but rather to implementation of the Housing and Community Development Act of 1974, revealing again how the focus had shifted from discrimination to public programs designed to alleviate segregation – without anyone clearly distinguishing between the two phenomena.

121. Scholars, observers, and advocates were only slowly becoming aware that the problem of segregation was decoupling from that of discrimination. Later in the hearing, the Subcommittee heard testimony from Professor Reynolds Farley, a distinguished demographer, who testified that most blacks could afford housing in white suburbs, and that white attitudes had substantially changed: “[t]he vast majority of whites agree that blacks should be able to live wherever they can afford.” Yet he also argued that integration was prevented by a “web of discrimination,” which he defined as “the real estate practices, the mortgage lending arrangements, the climate of opinion and the like which deter blacks from obtaining the housing for which they are economically qualified.” If this seemed confusing, it was. Shortly after he concluded his testimony, Farley was asked by Representative Robert Drinan (D-MA) whether “there are any specific laws that you feel are need, or any new regulations that should be written or proposed by HUD?” He responded: “I am not familiar with existing laws, and I am unable to give you an opinion whether there should be new and more encompassing laws in that area.” *Equal Opportunity in Housing: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, Part 2, House of Representatives*, 94th Cong. 103–06 (1976) (statement of Reynolds Farley, University of Michigan).

122. RANDY HILL, VOLUNTARY EQUAL HOUSING AFFIRMATIVE ACTION 4 (1975).

market discrimination, while hardly a thing of the past, had been significantly reduced: this is why throughout 1976, virtually nothing was discussed concerning discrimination, and the focus turned to broader and complex issues of segregation.¹²³

F. Effects on the Ground

The prospect of litigation and sanctions appears to have had at least some effect with realtors on the ground. Even Chicago, the home of the bitterest open housing battles, began to see a change. Much of this was driven by coordination between DOJ and the Leadership Council for Metropolitan Open Communities. The Leadership Council received a substantial HUD grant to develop a legal action program, and by the end of 1972, it had filed some 202 cases and had at that time over 40 cases pending.¹²⁴ The Leadership Council's legal action together with the DOJ lawsuit against the West Suburban Realtors Association, got the attention of the region's realtors.

In Park Forest, an inner ring southern suburb, local whites in 1970 protested the influx of Blacks into their neighborhoods, in an effort to avoid tipping (it was integrated beforehand). The local realtor's response was telling:

We can't keep track of where people live by race. We could be accused of violation if blacks asked to buy a specific house and we did not show it. Every Realtor is being tested by Blacks. We have no choice. There are law suits against brokers who have refused to show properties to certain people. Some have settled out of court, some are in process. I am not going to lose my license over this. I can't call anybody up or contact them in any way legally and ask them where they are selling to colored.¹²⁵

In 1972, the Chicago Real Estate Board distributed several hundred copies of the Leadership Council's *Guide to Practice Open Housing Under Law* to its members.¹²⁶

123. The 1976 hearings included one survey of realtors' affirmative marketing agreements, from Prince George's County, MD, which found that several firms in the county did not do the required outreach either to minority media, to prospective black employees, or to customers by using the HUD-approved Fair Housing logos. It is fair to say that the survey was not a model of rigor: it comprised only twelve realtors. *Id.* at 2-9.

124. *Leadership Council for Metropolitan Open Communities Records, Part I, 1954-1988*, CHICAGO HISTORY MUSEUM, <http://chsmmedia.org/media/fa/fa/M-L/LCMOC-inv.htm>, (last visited Sept. 7, 2017).

125. BRIAN J.L. BERRY, *THE OPEN HOUSING QUESTION: RACE AND HOUSING IN CHICAGO, 1966-1976* 116 (1979).

126. *Id.*

Just west of Chicago, in Oak Park, the threat of private and DOJ fair housing lawsuits also drove realtors into compromise. “The local real estate industry, at first strongly opposed to ‘forced housing’—the catchword of fair housing opponents—subsided in its opposition when the Federal Civil Rights Act was passed in April 1968, possibly feeling that compliance with a local ordinance might decrease their susceptibility to prosecution under the stricter federal law.”¹²⁷ At times, the FHA looked like the Borg: “The local real estate industry is reasonably cooperative with the integration effort. Many local real estate men seem to have concluded that *containment is futile* and that scattered integration serves their own best business interests’.”¹²⁸

Realtors across the country echoed the attitude of their Chicago colleagues. In early 1970, even before the FHA had fully come online, and before DOJ had sued the major realtors in New York, NCDH surveyed realtors in the Tri-State New York Metropolitan Region, and found that:

Regardless of their personal attitudes. . .most realtors are on the horns of a dilemma: to conform to the law because of the threat of losing their license (and thereby their livelihood) or to lose listings because of refusal to accept restricted offerings. Few brokers expressed concern about adverse findings by human rights commissions or about fines or court orders. But fear of losing their license was a cited as a major deterrent to discriminatory practices.¹²⁹

Kale Williams, the Leadership Council’s Executive Director, summed it up toward the end of 1975. Williams told the New York Commission on Human Rights “the procedures for handling [fair housing] cases have now been refined, and the education of the bar and the bench has proceeded to the point where it now can be said, in our jurisdiction, that enforcement of the federal fair housing law is a prompt and effective remedy to racial discrimination in housing.” Williams noted that lawsuits were filed within one or two days of receiving complaints and pressure for damages meant that the procedures were working. Moreover, he noted, the lawsuits were having an effect:

[T]he repeated enforcement of that law begins to have a corrective effect on the real estate industry. A success record of eighty-five

127. *Id.* at 282.

128. *Id.* at 302.

129. *First Post-FH Law Study: Realty Inquiry Shows FH Change ‘Slow, Reluctant’*, TRENDS IN HOUSING, May 1970, at 5.

percent, the time and trouble of defending a lawsuit, the damages and fees are leading to changes in behavior on the part of the real estate industry. These are not yet adequate, but they are of great significance.¹³⁰

Williams, of course, was biased: he wanted to show success for his agency and urge its replication elsewhere (as indeed he did later in the speech). But he was also someone at the center of the city's civil rights community, who had founded the Leadership Council with Martin Luther King, Jr. in 1966, spearheaded its litigation program, had helped bring the famous *Gautreaux* lawsuits and developed the eponymous program that came out of that case.¹³¹ He was no shill for the realtors. But even he had to acknowledge, in light of the nationwide Affirmative Marketing Agreement, that "the recent policy declarations by the National Association of Realtors represent a major turning point in . . . affirmative efforts to overcome the effect of past discrimination."¹³²

The institutionalization of fair housing law also meant that other regulations incorporated it by reference, and that added teeth. The real estate industry had long been subject to some state oversight, but the 1970s saw a dramatic increase in California, as the state legislature added new laws governing the supervision and control of real estate brokers.¹³³ These moves toward the regulation and professionalization of the industry included a focus on fair housing, with California law being amended to require real estate brokers to familiarize salespeople with 30 detailed separate types of prohibited discriminatory conduct.¹³⁴ A state regulation that became effective in 1981 created

130. Kale Williams, *Bias Marks Chicago Housing*, CHI. DEFENDER, Aug. 23, 1975, at 4.

131. An excellent memoir of the *Gautreaux* case, including portraits of many of the lawyers and activists that worked on it, can be found in ALEXANDER POLIKOFF, *WAITING FOR GAUTREUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* 226–31 (2006).

132. *Id.* The Leadership Council as an organization took a similar position. In its 1974 Practice Guide for lawyers, it stated:

Initially, it was thought there would only be a few cases, but as the remedy became more known, more and more minority homeseekers looked for legal advice and the assistance of the courts. The courts, in turn, came to recognize the need for prompt and effective relief, and recalcitrant defendants were faced with restraining orders against disposing of a housing unit by rental or sale when discrimination was alleged. Plaintiffs were able to get the housing they wanted and began pressing also for damages, costs, and attorney's fees.

LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES, *GUIDE TO PRACTICE OPEN HOUSING LAW* 2 (1974).

133. See Brief for Respondent at 14, 18–19, *Meyer v. Holley*, 537 U.S. 280 (2003) (No. 01-1120), 2002 WL 31190162.

134. *Id.* at 20–21; CAL. CODE REGS. tit. 10, § 2780.

new disciplinary procedures for real estate professionals who engaged in such discriminatory behavior.¹³⁵

The California Real Estate Association had tried to implement some institutional fair housing measures in the wake of its massive effort to pass Proposition 14. Aware that its advocacy of the measure had proved extremely divisive and alienating to minorities, the group formed its first Equal Rights Committee in 1965, and with subsequent legal developments including the passage of the Fair Housing Act the organization began formally training real estate agents in fair housing law.¹³⁶ This infrastructure became more meaningful in the 1970s as minority real estate agents were finally admitted into the ranks of the state's professional organizations. The Los Angeles Realty Board elected Lillie R. Evans as its first black director in 1971.¹³⁷ Evans had been a director of the Consolidated Realty Board, a black organization that formed because the Los Angeles board excluded African Americans until 1962. Upon becoming a director of the Los Angeles Realty Board, Evans said racial barriers in the real estate industry were coming down, but "open housing is not really a reality yet."¹³⁸

The Westside was becoming more open to minority residents, but they tended to settle in what were then lower-income areas such as Culver City and Mar Vista.¹³⁹ A *Times* article from 1978 quoted real estate agents as denying that ethnic steering was at work, saying it was simply a matter of economic resources. "This whole racial thing, it's been finished with," said one Brentwood real estate broker.¹⁴⁰ "People have gotten to the point where if they can afford it, they got it" Harris and Rosloff were quoted in the piece as saying that discrimination persisted, though it had become more subtle.¹⁴¹ In the 1980s, the Council formally created an alliance with the Santa Monica and Venice/Marina del Rey boards of realtors after the realty boards entered into an Affirmative Marketing Agreement with HUD. The joint effort involved disseminating information about fair housing laws to

135. CAL. CODE REGS. tit. 10, § 2780.

136. See J. Walter Cobb, *Historical Markers of Housing Discrimination and Segregation in Los Angeles County*, in LOS ANGELES COUNTY COMMUNITY RELATIONS CONFERENCE RECORDS, USC Libraries Archival Collection (1985) (on file with author).

137. See Jean Murphy, *String of Firsts for Realtor: Black Realtor*, L.A. TIMES, Dec. 13, 1971, at 4.

138. *Id.* at 15.

139. See Bob Baker, *Arch Rivals Forge Alliance to Create Community Housing Board*, L.A. TIMES, Dec. 4, 1980, at WS1, 7.

140. *Id.*

141. *Id.*

prospective renters and buyers, but primarily to real estate professionals. “My attitude toward realtors in the past was always ‘sue the bastards,’” Rosloff told the *Times*. “But with this I think we’re beginning to learn about each other.”¹⁴²

What emerges from looking at local reports during the crucial decade is uneven progress, with some areas seeing sharp declines in discrimination and others remaining stubbornly fixed to the status quo. In Westchester County, the *New York Amsterdam News* reported in early 1971 that while “[d]iscrimination still exists, . . . [i]n the past year . . . there has been a marked decline in . . . complaints, because of the cooperative relationship” that the local fair housing organization developed with many local brokers.¹⁴³ The *New York Times* found the same situation, again noting that brokers had changed their minds, partly because the soft housing market made them eager for commissions.¹⁴⁴ The fair housing organization reported that their clients rarely had complaints about treatment from brokers and lauded the local brokers for their cooperation and proactive attitude.¹⁴⁵

Kentucky’s Housing Opportunity Centers surveyed 47 Black families who had integrated white neighborhoods in Louisville and found them “relieved and somewhat surprised to discover that their race was not the obstacle that they might expected it would be.” Some brokers engaged in “an unnecessarily close questioning about the potential buyer’s finances,” some brokers were steering, and one seller had to be threatened with legal action after he had accepted a down payment and then tried to back out, but “the largest [sic] majority had no problems at all with the agent they consulted in obtaining a new home.”¹⁴⁶

Some progress occurred even faster. By the end of 1970, the executive director of Denver’s leading fair housing organization reported that:

We note with interest that we are seldom called upon to perform the function for which the Center initially was conceived. With middle-income minority family moves throughout the metro area having become an everyday occurrence, we note that brokers, owners,

142. *Id.* at WS1.

143. *Help 100 To Find A Home*, N.Y. AMSTERDAM NEWS, Mar. 20, 1971, at 29.

144. Linda Greenhouse, *Suburban Housing for Blacks Eases*, N.Y. TIMES, Jan. 24, 1971, at 55.

145. WESTCHESTER RESIDENTIAL OPPORTUNITIES, INC., 1971 ANNUAL REPORT.

146. HOUSING OPPORTUNITY CENTERS OF THE KENTUCKY COMMISSION ON HUMAN RIGHTS, *A BETTER PLACE TO LIVE* 2, 4 (1978).

neighbors, and mortgage lenders appear to have taken a giant step forward. We rarely see a middle-income family with a housing problem.¹⁴⁷

In other areas – particularly those areas close to large areas of concentrated minority populations, resistance appeared to be the order of the day. An early paired testing study in Akron found twelve out of thirteen real estate firms discriminating in some way.¹⁴⁸ In the East Bay, the all-white city of San Leandro, next to heavily Black Oakland, put up barriers to a single Black family moving in: “San Leandro is not 99.9% white by accident,” noted NCDH co-director Edward Rutledge, whose organization had received HUD money to study discrimination and segregation in the Bay Area.¹⁴⁹ He noted that it was typical for small cities in the region.¹⁵⁰

Slowly, the numbers began to drop, yielding substantial but far from universal discrimination.¹⁵¹ By late 1972 and early 1973, Akron saw discrimination rates in the 60’s, with one audit finding 49% discrimination. On the other side of San Francisco Bay, the Mid-peninsula Citizens for Fair Housing undertook a series of audits, and found discrimination in the mid-range. In 1970, the Mountain View audit yielded 40%; Sunnyvale and Palo Alto in 1971 had 54% and 58% respectively.¹⁵² Long Beach’s Fair Housing Foundation found racially discriminatory practices in 47% of apartment buildings tested.¹⁵³ Baltimore was heavily tested and heavily discriminatory: in 1972 – discrimination occurred forty – fifty-five percent of the time,¹⁵⁴ whereas an alternative claim shows that half of urban developments and two-thirds of suburban developments discriminated, and another alternative claim revealed that forty-nine percent of ninety-eight apartments

147. Report of the Director, Metro Denver Fair Housing Center, 1970.

148. See JULIET SALTMAN, *OPEN HOUSING: DYNAMICS OF A SOCIAL MOVEMENT* 182–83 (1978).

149. Ralph Craib, *San Leandro Called Racist*, S.F. CHRON., May 14, 1971.

150. *Id.*

151. As noted in Part I.B we must exercise caution in reporting and interpreting discrimination rates from paired-testing studies. A simple bottom-line number can be misleading, especially if we do not know how it is disaggregated, and bottom-line numbers in different surveys can generate apples-to-oranges comparisons. I cite these numbers here for comparisons through time, i.e. discrimination rates have dropped, and also to show that even with great imprecision, discriminations rates from the basically routine, pervasive rates of the pre-FHA era.

152. NCDH Papers, 136/7.

153. Special Report, Fair Housing Foundation of Long Beach, *With All Deliberate Delay?* (June 1971), in *HEARING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS* 1032 (Washington, DC 1971).

154. SALTMAN, *supra* note 148, at 94; Juliet Saltman, *Housing Discrimination: Policy Research, Methods and Results*, 441 ANNALS AM. ACAD. POL. & SOC. SCI. 186, 191 (1979).

discriminated.¹⁵⁵ But even there, heavy discrimination meant a rate of about half – a sharp decline from just a few years earlier.

This most assuredly did *not* mean that discrimination had vanished or that realtors had given up. In the (then) more-conservative suburb of Evanston, for example, roughly half of the realtors engaged in discriminatory practices, and the Leadership Council found several instances of realtors soliciting restrictive listings. As noted above, the 1977 HDS found discriminatory treatment in fully one-third of tests. But such practices were more and more on the defensive each year, and they represented a very sharp drop from less than a decade before.

G. 1979 USCCR Report

None of this meant that DOJ's enforcement was perfect. In the spring of 1979, the United States Commission on Civil Rights surveyed the overall enforcement of fair housing;¹⁵⁶ unsurprisingly, it was harshly critical of HUD.¹⁵⁷ It was far less critical of DOJ, noting its "impressive qualitative litigation record" leading "consistently . . . successful in its efforts to obtain relief in fair housing cases."¹⁵⁸ But it found ample fault there as well. Most prominently, Commission staff criticized DOJ for 1) not maintaining its own extensive paired-testing program; 2) not making strategic use of data to identify patterns of discrimination to be attacked; and 3) not bringing enough lawsuits.

The first two criticisms had purchase, as Schwelb acknowledged in his response. What few understood at the time was that they reflected the actual success of the FHA's first decade. Landlords, homeowners, and realtors were still systematically discriminating against Blacks and Latinos, but they were fewer and farther between than they had been, and so identifying patterns and low-hanging fruit was more difficult. As Schwelb acknowledged, however, DOJ's fair housing enforcement needed to get more strategic and precise to ferret out more discrimination.¹⁵⁹

As to the third complaint, however, Schwelb was unrepentant. Commission staff argued that DOJ needed to take more cases and

155. Trends in Housing 5 (May, June 1973); Trends in Housing 1 (Aug. 1978)

156. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT (1979).

157. *Id.* at 5–6.

158. *Id.* at 57.

159. *Id.* at 65.

abandon its internal standard for whether to pursue litigation, viz., “whether a fairminded court could reasonably be expected to rule in favor of the United States on the basis of available evidence.”¹⁶⁰ Although it acknowledged that DOJ had developed an excellent success record, the Section could ease its standards somewhat without jeopardizing its excellent record in the courts” and that doing so would put it in the “vanguard” of pursuing suits concerning exclusionary zoning, sex discrimination, and redlining.¹⁶¹ Schwelb indignantly responded:

While I have no precise count, I believe that we have sued about 800-850 defendants, often many in the same suit. These include cases against large defendants who control tens of thousands of units or other transactions. We have sued one or more of the largest real estate companies in many, if not most, of the major metropolitan areas of the country. We have taken on a State and more than fifteen municipalities and public housing authorities. In the “Appraiser” case, we have taken on four large nationwide organizations. I know of no other Section in this Division, or of any other entity anywhere, that has brought so many cases, many of them very significant, involving patterns and practices of discrimination. Who else has sued more than 800 defendants? It is frankly disillusioning to have such a record, based on very aggressive outreach, summarily dismissed• as “disappointing” without any frame of reference being provided or any constructive comparison being offered.¹⁶²

It is hard not to sympathize with Schwelb here: he had developed one of the most effective civil rights litigation programs in the nation’s history, and his reward was criticism from a body without official responsibility.

Yet one can also see the Commission’s frustration that more had not been accomplished.¹⁶³ Even with incredible progress, between one-in-four and one-in-three encounters between Blacks and the housing market resulted in discrimination, meaning that each African-American over the course of his or her lifetime would suffer from it several times.¹⁶⁴

160. *Id.* at 72.

161. *Id.*

162. *Id.* at 71.

163. *See id.* at 71–73.

164. It is also relevant that at the time that the USCCR report was completed, the HMPS *final* report had not appeared; only a preliminary measure had been published, and that report suggested that discrimination levels were far higher than the final report showed. *See generally Bias in Housing High, HUD Study Shows*, BOSTON GLOBE, Apr. 17, 1978 (stating that the preliminary study showed 75% discrimination rates for rentals and 62% for sales).

Moreover segregation levels remained extremely high, and had only barely descended from a decade earlier. Neither the Commission nor DOJ realized at the time that the problem of segregation had diverged from discrimination.¹⁶⁵ Discrimination might have created segregation, but then it took on a life of its own, baked into the texture of American life. Suburbs excluded affordable housing from their neighborhoods, which also contained the better schools and institutions that led to social mobility. And just as the law required equal treatment of Blacks in employment, the United States deindustrialized, preventing many from following whites to those suburbs that would have them. With the perspective of history, the Commission's chastisement of DOJ at least on the third point seems sincere, well-meaning, and entirely misplaced.

Still, the Justice Department had the hammer of fair housing enforcement, used it, and used it well. Discrimination levels collapsed. Broader structural forces meant the problem was bigger than a nail. But for the vast majority of Blacks by the end of the 1970's, their ability to find a home or an apartment was light years ahead of where it had been just ten years earlier. The persistence and damage of segregation should not obscure a remarkable policy success.

V. THEORETICAL IMPLICATIONS

What might all this mean for the present? The story of the DOJ's attack on housing discrimination in the 1970's reveals two relatively clear points. First, law mattered. Congress passed a statute, a key administrative agency enforced it, and it made a big and positive difference on the ground. Second, although discrimination and segregation are clearly related, reducing one did not necessarily mean reducing the other. Even as early as the end of the 70's, it had become clear that they were different problems.

But aside from these relatively straightforward lessons, there are broader theoretical lessons for scholars and advocates.

A. Why Realtors Obeyed The Law

America's real estate industry, and particularly its realtors, did not become civil rights proponents overnight. Indeed, they did not

¹⁶⁵ This was also the case with even the leading scholars of segregation and discrimination. See *Equal Opportunity Hearing*, *supra* note 116 (regarding Reynolds Farley's testimony before the House Subcommittee on Civil Rights).

become civil rights proponents at all. Instead, the hydraulic pressure of DOJ and private lawsuits, the ideological turbulence brought about by the FHA's passage and the *Jones* holding achieved major changes in their behavior within just a few years.

The pressures of lawsuits need little theoretical explanation for deterrence in and of itself. But a skeptic might well wonder how the DOJ and private litigants, all by themselves, could have achieved what they appear to have achieved. The answer is that they did not do these all by themselves. They were necessary, and crucial, but they were not alone.

Tom Tyler's famous work suggests that adherence to law is not simply a matter of deterrence. Nor is it a matter of agreeing with the law itself. Instead, for Tyler, the key variable is *legitimacy*, that is: did those who enacted the law have the right to do so? Was the *process* credible, sound, and done with integrity? If so, people will obey the law even if they might disagree with it.¹⁶⁶

This seems to have been the case with the realtors. They did not particularly like the law, but they accepted its legitimacy. They said as much in 1968. NAREB editorial, writing about the *Jones* decision, commented:

There should be no thought that the case, on either side, was inadequately presented. A careful study of the briefs indicates the most exhaustive study by counsel for both sides. Not only were the applicable Constitutional amendments and the laws passed by the Congress analyzed virtually word by word, but arguments in prior case before the Court were re-argued as to their intent.

Debates in Congress of a century ago were quoted, analyzed, and argued, as were newspaper reports of that day commenting on the debates. There can be no apology for the presentations to the court. They were exhaustive.

Neither can it be said that the court acted hastily or prejudicially, or peremptorily. The arguments pro and con were exhaustively analyzed and accepted or discarded with reason carefully noted. It would be a mistake to charge the court with inadequate consideration. Rather, a thorough study of the majority (7-to-2) opinion of Mr. Justice Stewart can lead only to the conclusion that it was most ably presented.¹⁶⁷

166. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3-4 (1990).

167. Eugene P. Conser, *Import of Jones v. Mayer - I*, REALTORS' HEADLINES, June 24, 1968, at NAR.

This editorial could serve as the ideal type for Tyler's thesis. Combined with the realtors' traditional, almost talismanic commitment to "liberty under law," and a professional self-conception based upon an adherence to a Code of Ethics that now demanded nondiscrimination, it led to a period of malleability, and then grudging acceptance, for the majority of US realtors.

B. Transforming Social Meaning

Two other factors played important roles. First, as noted above, adherence to nondiscrimination did not disrupt realtors' bottom lines. Weaver may have been overoptimistic to say that realtors' business would increase by 35%, but there is no evidence nondiscrimination hurt it. This is not to suggest that nondiscrimination is a fundamentally "irrational" norm: privileged groups might well wish to enforce it as a way of bolstering their privilege and place in hierarchies.¹⁶⁸ But an individual realtor is looking for buyers and sellers, and the law's allowing her to increase the prospective pool of clients hardly figures to buttress her resistance to it.

Perhaps other realtors, and other community members, might press her to resist nonetheless. This prospect points to the second additional factor in play. Lawrence Lessig has observed that legal changes can produce a change in the "regulation of social meaning."¹⁶⁹ In other words, passage of a law might give a different meaning to an action that it had beforehand. For example, before the outlawing of dueling, refusal to accept a duel might open a person up to charges of cowardice. After outlawing it, refusal to accept could simply represent a desire to maintain social order and carry no stigma.

The enactment of fair housing might well have performed the same function. Before fair housing, many realtors, buyers and sellers may very well have had no problems to transactions involving other races. Poll numbers show small although clear majorities of white Americans having no problems with selling to, buying from, or living next door to Blacks. But before 1968, such people would have been subject to pressure from neighbors, churches, chambers of commerce,

168. See generally EDMUND S. MORGAN, *AMERICAN SLAVERY/AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 328 (1975).

169. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 948 (1995) (explaining that to understand the place of orthodoxy in law it is important to understand something more about how the orthodox gets made, by whom, and with what techniques, which is to understand something more about the techniques of social construction).

“improvement associations,” and other groups not to sell or do business with Blacks. They might also have been subject to threats.

After 1968, however, they had a ready-made response: “will you pay my legal bills if I am sued?” The south Chicago realtor’s actual response spoke volumes: “I am not going to lose my license over this” – exactly the response that Pottinger had promised in his NAR address.¹⁷⁰ Put another way, *Jones* and the passage of the FHA allowed much of the latent *nondiscrimination* that built up in the country to manifest itself.

Merely because such latent *nondiscrimination* had built up says virtually nothing about whether it would have eventually become the norm. Recent events have demonstrated that the mere fact of even overwhelming public support means little in a political system characterized by a proliferation of veto points.¹⁷¹ Law matters. Fair housing mattered as much as anything.

A final repetition of caveat is in order: 1977 did not see an end to discrimination. It did not see an end to the substantial and real costs that Americans of color bore because of it. And most significantly, it came nowhere close to seeing an end to residential segregation, which continues to have severe negative effects on American society. But it did represent a profound policy success. For that, we can be grateful.

C. On the Convergence Thesis

The Justice Department’s experience with the realtors, and with fair housing enforcement more generally, contains important implications for Derrick Bell’s influence “convergence thesis” of racial equality in the United States. “Measurable improvements in the status of some blacks and predictions of future progress have not substantially altered the maxim: white self-interest will prevail over black rights. This unstated, but firmly followed principle has characterized racial policy decisions in this society for the three centuries.”¹⁷² Bell later refined the thesis thus:

170. Newson, *supra* note 104, at 1–2.

171. See, e.g., Louis Jacobson, *Gabby Gifford Says Americans “Overwhelmingly” Support Expanding Background Checks*, POLITIFACT (Apr. 18, 2013), <http://www.politifact.com/truth-o-meter/statements/2013/apr/18/gabrielle-giffords/gabby-giffords-says-americans-overwhelmingly-suppo/> (rating “true” the claim that “Americans ‘overwhelmingly’ support expanded background checks.”).

172. Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. 5, 6 (1976).

Translated from judicial activity in racial cases both before and after Brown, this principle of “interest convergence” provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.¹⁷³

Although Bell framed his argument as relating to *judicial* activity, there is no reason why it does not apply to legislative or administrative activity. Just the opposite: to the extent that legislatures and agencies are responsive to the public will, they should, according to Bell’s logic, be *less* likely to challenge white privilege.

But the record at least of DOJ during the Fair Housing Act’s first decade suggests that it mounted just that sort of challenge. Its lawyers brought hundreds of cases, and aggressively pursued litigation against the largest and most important defendants. It strategized about pressure points in the ecology of discrimination, and targeted those points. Political appointees in a conservative Republican administration backed up their line attorneys and gave pointed threats to potentially recalcitrant groups. The record of the Justice Department simply does not indicate any concern with “white interests” – instead, the evidence is that DOJ officials had little concern with them. Instead, their focus was on breaking resistance to the Fair Housing Act, whether it came from realtors, large landlords, appraisers, or anyone else.¹⁷⁴

One series of data points, even an important series such as the record of Fair Housing enforcement, cannot fatally wound a thesis. There is virtually no social science thesis that holds in every circumstance in every period. But in the critical period of a central pillar of American civil rights law, the Convergence Thesis falls very short of the mark.

173. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

174. One could argue, of course, that to the extent that DOJ lawyers were interested doing something for “the good of the country,” they were simply attempting to advance a “white interest” because the United States was and remains a majority white nation. 2010 U.S. Census, CENSUS.GOV <https://www.census.gov/2010census/>. However, the Convergence Thesis is more precise than that: it posits differing white and black interests, not without justification, although Justin Driver has effectively critiqued Bell’s notion of a *unified* “white” or “black” interest. See Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 164–71 (2011) (critiquing many of Professor Derrick Bell’s writings throughout his career on the topic of interest-convergence theory).

CONCLUSION

And indeed, this failure demonstrates a deeper and more important truth about the evolution of fair housing law in the United States, viz. a reason for optimism about the *potential* of achieving greater racial equality. The record of fair housing's crucial decade is one of substantial but imperfect success, driven by fair housing groups at the grass roots and Justice Department lawyers in Washington. Many of these activists and lawyers were Black, and many were white. And they were able to achieve something that even the most optimistic observers less than a decade earlier probably would have thought impossible: a significant and severe decline in discrimination rates.

If the United States will ever rid itself of extreme racial segregation – which is a distinct possibility¹⁷⁵ – it will require cross-racial and multi-institutional action at all levels. The successful attack on housing discrimination in the 1970's drew from community organizing, government pressure, litigation, policy changes, and the whole panoply of advocacy tools available to reformers. It came from many segments of society. The triumph was not unalloyed. It never is. But it made a very big difference in the lives of millions. It even began to change attitudes of those who, like the real estate brokers, had resisted fair housing for decades. That calls for celebration and a commitment to further progress, not complaints of futility that could become a self-fulfilling prophecy.

175. A book forthcoming next year, which I have co-authored with Richard Sander and Yana Kucheva – makes this argument fully.

Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution, and Constitutional Limitations

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ABSTRACT & KEYWORDS

The matter of police and municipal courts as revenue producers became increasingly prominent following Michael Brown's death from a police shooting. This article considers the use of misdemeanors, especially traffic violations, for the purpose of collecting substantial portions of the annual operating budgets in municipalities in St. Louis County, Missouri. The article argues that the revenue raising function of traffic offenses has displaced their public safety and traffic regula-

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tion functions. The change in function from public safety to revenue suggests that the governing laws are no longer valid as exercises of policing power but must be reenacted under the taxing power in order to remain valid. However, Missouri's constitutional taxing limitations prohibit the increase of existing taxes or enactment of new taxes without an affirmative vote of the electorate. Municipalities have circumvented the constitutional taxing limitations by using laws enacted under policing powers in violation of the constitution. The police and the municipal courts enforcing traffic laws have produced a racially discriminatory and regressive local tax system that violates the tax limitations of the Missouri constitution.

Keywords: *policing; constitutional tax limitations; racial discrimination; municipal courts*

INTRODUCTION

Following Michael Brown's 2014 death in Ferguson, Missouri from police gunshots, protests and political actions in the St. Louis, Missouri region¹ questioned whether the justice system in much of the United States continues to be racist nearly 150 years after the adoption of the Fourteenth Amendment to the U.S. Constitution.² The Black Lives Matter³ national chapter organization, formed at the time of George Zimmerman's acquittal of the unlawful killing of Trayvon Martin,⁴ assumed an active role in the Ferguson related protests along with numerous other activist community organizations.⁵ Some protest activities in the city of St. Louis were met with police in riot gear, tear gas, and National Guard troops with armored vehicles.⁶ The protests focused scrutiny on local justice systems and policing.⁷

1. *Ferguson Shooting Grand Jury Documents*, ASSOCIATED PRESS, http://hosted.ap.org/specials/interactives/_documents/ferguson-shooting/ (last visited Sept. 2, 2017) (stating that a St. Louis County grand jury did not indict the police officer who shot Michael Brown to death).

2. U.S. CONST. amend. XIV (granting citizenship to former slaves and guaranteeing equal protection of the law, in 1868).

3. BLACK LIVES MATTER, <http://blacklivesmatter.com/> (last visited Aug. 29, 2017) (detailing the organization and current activities of the movement).

4. Lizette Alvarez & Cara Buckley, *Zimmerman is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <https://nyti.ms/12MKyWV>.

5. Holly Yan, "Black Lives Matter" Cases: What Happened After the Protests?, CNN (July 27, 2016), <http://www.cnn.com/2016/07/13/us/black-lives-matter-updates/index.html>.

6. *Ferguson Day Three Wrapup: Calls for Justice*, ST. LOUIS POST-DISPATCH (Aug. 12, 2014), http://www.stltoday.com/news/local/crime-and-courts/ferguson-day-three-wrapup-calls-for-justice/article_6060a563-d7d1-544a-8bb3-793c46be427c.html.

7. *Id.*

In March 2015, the Civil Rights Division of the United States Department of Justice released its critical study of policing practices in the city of Ferguson, Missouri.⁸ Among the study's findings are observations that law enforcement practice in Ferguson is consciously revenue driven⁹ and discriminates against African Americans.¹⁰

In addition to the Department of Justice study, the governor of the state of Missouri established the Ferguson Commission and appointed its membership.¹¹ Governor Nixon charged the Ferguson Commission to “study and recommend ways to make the St. Louis region a stronger, fairer place for everyone to live.”¹² The Ferguson Commission released its report in the fall of 2015.¹³ That report confirmed the existence of continuing racial inequality on many levels in the St. Louis region and recommended changes.

The negotiated draft of a consent decree in *United States v. City of Ferguson* became available in late January of 2016.¹⁴ The City rejected the consent decree purportedly because of the cost of the reforms it would have required.¹⁵ The Department of Justice filed suit.¹⁶ Reversing its position, however, Ferguson subsequently

8. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter DOJ FERGUSON POLICE REP.].

9. *Id.* at 2 (citing a March 2010 written communication from the Ferguson City Finance Director to the Ferguson Police Chief Jackson: “unless ticket writing ramps up significantly before the end of the year, it will be hard to raise collections next year. . . . Given that we are looking at a substantial sales tax shortfall, it’s not an insignificant issue.” And further citing a March 2013 communication by the Finance Director to the City Manager: “Court fees are anticipated to rise about 7.5%. I did ask the Chief if he thought the PD could deliver 10% increase. He indicated they could try”).

10. *Id.* at 4.

11. Mo. Exec. Order No. 14–15 (Nov. 18, 2014), <http://www.sos.mo.gov/CMSImages/library/reference/orders/2014/eo14-15.pdf>. Eric Greitens succeeded Jeremiah Nixon as Missouri governor in January 2017. See Celeste Bott, *Missouri Gov. Jay Nixon Offers Partying Advice to Eric Greitens*, ST. LOUIS POST-DISPATCH (Jan. 5, 2017), http://www.stltoday.com/news/local/govt-and-politics/missouri-gov-jay-nixon-offers-parting-advice-to-eric-greitens/article_e4e8fb14-e369-5703-b5de-92c06df25e54.html.

12. Mo. Exec. Order No., *supra* note 11, at 14–15.

13. THE FERGUSON COMM'N, FORWARD THROUGH FERGUSON: A PATH TO RACIAL EQUITY (2015), http://3680or2khmk3bzkp33juiea1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf [hereinafter FERGUSON COMM'N REP.].

14. Consent Decree, *U.S. v. City of Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016), <http://www.moed.uscourts.gov/sites/default/files/mdl/16-0180/0012-02.pdf> [hereinafter *U.S. v. Ferguson Consent Decree*].

15. Laura Wagner, *Ferguson City Council Accepts Consent Decree Worked Out With Justice Department*, NPR (Mar. 15, 2016), <http://www.npr.org/sections/thetwo-way/2016/03/15/470598733/ferguson-city-council-accepts-deal-with-justice-department>.

16. Complaint, *U.S. v. City of Ferguson*, No. 4:16-cv-000180 (E.D. Mo. Feb. 10, 2016), http://www.stltoday.com/doj-lawsuit-against-ferguson/pdf_afa0e395-82c7-505e-a691-33e642e501bc.html.

adopted the consent decree somewhat altered from the original decree.¹⁷ The Federal District Court for the Eastern District of Missouri approved the decree in April, 2016.¹⁸ The decree¹⁹ limits police activities and alters aspects of Ferguson's municipal court system.²⁰ The decree was intended to diminish racism in law enforcement and limit the use of policing and the municipal court to raise revenue. Reacting to anticipated diminution of revenue from the municipal court, ballot measures to increase taxes in Ferguson were prepared and appeared on the April 2016 ballot.²¹ Voters in Ferguson passed a sales tax increase but rejected a property tax increase.²² Later voters approved a two percent utility tax increase on the August 2016 ballot.²³

Public attention to the issues of the municipal courts, the activities of community organizations, and the Department of Justice intervention contributed to significant decline in municipal revenue from traffic fines²⁴ and may have encouraged the Missouri Supreme Court to address many of the issues concerning municipal courts by modifying the minimum operating standards for municipal courts. The new supreme court rule, replacing the existing standards, alters the existing rule broadly. The new rule limits fines, requires alternate payment arrangements for fines, restricts use of incarceration, increases the transparency of court operations and information access for defend-

17. Wagner, *supra* note 15.

18. Ricardo A. Ramirez, *Federal Judge Approves Ferguson Consent Decree Following Public Hearing*, ADVANCEMENT PROJECT (Apr. 20, 2016), <http://www.advancementproject.org/news/federal-judge-approves-ferguson-consent-decree-following-public-hearing>.

19. *U.S. v. Ferguson Consent Decree*, *supra* note 14.

20. Matt Apuzzo & John Eligon, *Justice Department and Ferguson Reach Agreement on Police*, N.Y. TIMES (Jan. 27, 2016), <https://nyti.ms/1PFrnw1> (describing the settlement between the U.S. Department of Justice and leaders in Ferguson to end "unlawful arrests, ensur[e] that the courts are independent of prosecutors and preserv[e] people's right to film police officers").

21. See Monica Davey, *Ferguson Voters Give Split Result on Funding Police Overhaul*, N.Y. TIMES (Apr. 6, 2016), <https://nyti.ms/206bLCJ>.

22. The property tax increase proposal got a majority of the votes but required a two-third super majority to pass, while the sales tax increase proposal required only a majority and passed with sixty-nine percent. *Id.*

23. *Ferguson Residents Approve Proposition U*, CITY OF FERGUSON (Aug. 3, 2016), <http://www.fergusoncity.com/CivicAlerts.aspx?AID=476&ARC=878>.

24. Jeremy Kohler, *Municipal Court Business is Way Down After Ferguson Unrest*, ST. LOUIS POST DISPATCH (Feb. 5, 2017), http://www.stltoday.com/news/local/crime-and-courts/municipal-court-business-is-way-down-after-ferguson-unrest/article_6c541acb-a28d-524b-ba83-c0238af72ce7.html (reporting a greater than seventy percent decline in traffic fine revenue in several municipalities from 2014 to 2016 and broad declines throughout the county). Incarcerations for ordinance violations also have declined precipitously. *Id.* The law clinics at Saint Louis University School of Law often in cooperation with ArchCity Defenders have been particularly active in defending purported municipal ordinance offenders and challenging the activities and operations of the municipal courts in St. Louis County, Missouri.

ants, allows all ages to be present in courtroom (defendants may bring children so they do not have to find childcare), and limits warrants and add-on charges, among other changes.²⁵ A separate supreme court order supplements local rules to require municipal courts to ascertain the ability of purported offenders in municipal courts to pay fines that may be imposed.²⁶ While these changes in Missouri and St. Louis County in particular are promising, the issues surrounding revenue-based policing that we highlight in this article continue to be prevalent in Missouri and many other places.²⁷

While the D.O.J. Ferguson report²⁸ and the consent decree²⁹ both address practices in Ferguson only, the Ferguson Commission report³⁰ identifies racism in policing and use of the municipal justice system to raise revenue as regional issues.³¹ Our research confirms that revenue driven and discriminatory law enforcement practices permeate municipal justice throughout St. Louis County, most prominently in non-affluent municipalities³² with large black populations.³³ Through analysis of survey results,³⁴ our research further discloses that individuals who appear in municipal courts perceive police and the municipal courts, especially in non-affluent communities, to be focused more on producing municipal revenue through the justice system than on meting out justice to protect public safety and regulate dangerous or dis-

25. Order re: Rule 37.04 Supervision of Courts Hearing Ordinance Violations and Minimum Operating Standards for Missouri Courts: Municipal Divisions (Mo. 2016), <http://www.courts.mo.gov/sup/index.nsf/9f4cd5a463e4c22386256ac4004a490f/c908dc0681884e13862580340051c22b?OpenDocument>.

26. Order In re: Model Local Rule 69.01- Determining Indigent Status in Municipal Division Cases (Mo. 2016), <http://www.courts.mo.gov/sup/index.nsf/9f4cd5a463e4c22386256ac4004a490f/cf23602080662ba98625803400614221?OpenDocument> (standardizing the Statement of Financial Condition and requiring clerks of court to distribute it to defendants).

27. See Emily Shaw, *Where Local Governments are Paying Bills with Police Fines*, SUNLIGHT FOUND (Sept. 26, 2016), <https://sunlightfoundation.com/2016/09/26/where-local-governments-are-paying-the-bills-with-police-fines/>.

28. DOJ FERGUSON POLICE REP., *supra* note 8.

29. *U.S. v. Ferguson Consent Decree*, *supra* note 14.

30. FERGUSON COMM'N REP., *supra* note 13, at 9, 35.

31. *Id.*; see also Thomas A. Garrett & Louis Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 71 (2009) (reporting results from empirical testing of the issuance of traffic tickets for revenue in North Carolina).

32. This paper uses the terms “affluent” and “non-affluent,” rather than related terms, such as: “rich” and “poor,” or “high-income” and “low-income,” etc., to be consistent with the convention adopted in KENNETH F. WARREN ET AL., FERGUSON AND A DOZEN OTHERS: PERCEPTIONS OF AFFLUENT V NON-AFFLUENT MUNICIPAL COURT SYSTEMS IN SAINT LOUIS COUNTY BY RACE AND COMMUNITY AFFLUENCE (forthcoming) [hereinafter MUNICIPAL COURTS SURVEY]; see *infra* app. B (displaying the “affluent” and “non-affluent” identification of communities).

33. See *infra* Appendix. C.

34. See *infra* Appendix. B.

ruptive activities.³⁵ The results also disclose that the surveyed group perceives the municipal justice system to discriminate against blacks.³⁶

If the justice system is discriminatory and revenue driven, as the D.O.J. Ferguson police report concludes and our research broadly confirms for large swaths of St. Louis County, Missouri, the report and our research raise the fundamental question of whether we respect the “rule of law”³⁷ at the local level in the twenty-first century United States. Discussions of elements of the rule of law vary, but most discussions agree that the rule of law means that: (1) all members of society are subject to identical legal rules; (2) courts apply the law independently; (3) laws are transparent and understandable; and (4) laws are enacted by legislatures that represent the people to whom the laws apply.³⁸

Even if most municipalities in the United States do not discriminate or use their municipal justice systems to raise revenue from their non-affluent populations, some do.³⁹ The perception that the rule of law is absent in municipal justice systems may be as significant as actual absence of the rule of law. That perception undermines the willingness of segments of the population – especially blacks—to cooperate with and call upon law enforcement authorities when needed. Lack of confidence that they will receive fair treatment from the police and courts consistent with the rule of law principles also discourages participation in the political process so that the legislatures often do not represent the population to whom the legal rules they enact apply.⁴⁰ The perception of unfairness, whether justified or not, may also cause community members not to accept any part of the justice system as fair. Perception of unfairness undercuts the effective

35. *Id.*

36. *See infra* Appendix. C.

37. *See generally* *Rule of Law and Peace and Security*, U.N., <https://www.un.org/ruleoflaw/rule-of-law-and-peace-and-security/> (last visited Sept. 2, 2017); *Part I: What is the Rule of Law?*, AM. BAR ASS’N DIV. FOR PUB. EDUC., <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf> (last visited Sept. 2, 2017); *What is the Rule of Law*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/what-rule-law> (last visited Aug. 27, 2017).

38. *See e.g.*, AM. BAR. ASS’N DIV. FOR PUB. EDUC., *supra* note 37, at 6.

39. *See e.g.*, Garrett & Wagner, *supra* note 31.

40. *See supra* text accompanying note 37; *see also* Bill Chappell, *Ferguson Voters Elect Two Black Members to City Council*, NPR, (Apr. 8, 2015), <http://www.npr.org/sections/thetwo-way/2015/04/08/398232781/ferguson-voters-elect-2-black-members-to-city-council> (reporting that the election made the numbers of black council members equal to the number of white council members for the first time after high voter turnout and also noting that the city has a black majority population).

administration of the rule of law because it evidences that the laws in their application are not transparent and understandable.⁴¹

Much literature on discrimination examines issues of racial profiling.⁴² People of color tend to eschew interaction with the police even when they need police assistance.⁴³ Evidence, both anecdotal⁴⁴ and statistical,⁴⁵ of racial profiling and disparate treatment of people of color is ubiquitous. The likelihood of a police stop and questioning increases when one is not white and suspicion directed at people of color manifests itself in all activities where people of color interact with whites – even if the police officer, security guard, or other person in a similar role is also non-white.⁴⁶ While style of dress and appearance ameliorates that discriminatory effect somewhat, it never eliminates it.⁴⁷

Against the backdrop of the events in and examination of Ferguson and the long, continuous U.S. history of racial discrimination, this article focuses on the economic impact of discriminatory municipal law enforcement.⁴⁸ Part One of this paper considers police and municipal court practices in St. Louis County, with an emphasis on traffic offenses as a source of municipal revenue. Part Two considers whether municipal justice systems are primarily operating under police powers by regulating activities to promote public safety, or primarily serving as revenue agencies by providing financial resources for themselves and their municipalities through fines and fees that are regressive tax substitutes.⁴⁹ Part Two also briefly reviews the literature

41. *See supra* text accompanying note 37.

42. See DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002), for a broad discussion and critique of racial profiling in policing.

43. *See supra* text accompanying note 37. The rules may be neutral on their face but enforcement is discriminatory so that in fact, the same rules do not apply to everyone.

44. *See* Ronald Weitzer & Steven A. Tuch, *Perceptions of Racial Profiling: Race, Class, and Personal Experience*, 40 *CRIMINOLOGY* 435 (2002), for polling data on racial profiling measuring perceptions.

45. *See e.g.*, THE LEADERSHIP CONFERENCE, *RESTORING A NATIONAL CONSENSUS: THE NEED TO END RACIAL PROFILING IN AMERICA* 9–24 (2011), <http://cdm266901.cdmhost.com/cdm/ref/collection/p266901coll4/id/3486> (reporting quantitative data, analysis and recommendations on profiling).

46. *Id.*

47. A former black colleague explained to me that he always was meticulous in his dress when he went out in public in order to avoid racial targeting.

48. Other articles that are part of this municipal justice project report survey results and other research of perceptions of law enforcement and municipal court practices in St. Louis County, Missouri.

49. *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 *VAND. L. REV.* 1055, 1098–04 (2015) (discussing a shift to the privatization of misdemeanor justice and fine only misdemeanors as one of the means to limit mass incarceration).

on implicit taxation and considers Missouri decisional law distinguishing the municipal power to regulate from the municipal power to tax. In addition, Part Two argues that many municipalities are cloaking the use of taxing power as the exercise of police power, by comparing the concept of tax, i.e. revenue production, functionally with fines and fees, i.e. public safety and punishment. Part Three focuses on the Hancock Amendment to the Missouri Constitution limiting the power of the legislature or municipal authority to increase taxes without a vote of the people. Part Three concludes that Missouri's municipalities, as well as those in other states that have tax limitation provisions, violate those tax limitations whenever they alter the mix or increase the fines and fees associated with enforcement of municipal ordinances. Part Three also places the use of fines and fees for revenue production in their political context by discussing how the legislature does not address the constitutional tax limitation possibly because it otherwise might have to propose tax increases requiring a referendum vote. Part Four views the municipal justice system in Missouri from the perspective of the U.S. Constitution. In considering decisional law from the federal courts, this article argues that because of conscious and systemic discrimination in distribution of those fines and fees, they may violate the U.S. Constitution as well.⁵⁰ Part Five briefly concludes that revenue-based policing and courts undermines administration of justice and threatens maintenance of a society purportedly based on rule of law principles.

I. ST. LOUIS COUNTY POLICE AND COURTS

St. Louis County, Missouri has eighty-nine municipalities.⁵¹ Most of the municipalities have their own police force and municipal court.⁵² The judge and the prosecutor serving in the municipal court frequently are associated with a law firm that regularly represents the municipality, and some judges and prosecutors serve as judges or prosecutors in more than one municipality or as judges in some mu-

50. See DOJ FERGUSON POLICE REP., *supra* note 8, at 54–62 (concluding that fees and penalties for failure to appear are excessive).

51. Saint Louis County Missouri Municipalities available at <http://www.stlouisco.com/YourGovernment/Municipalities> (listing municipalities in St. Louis County); FERGUSON COMM'N REP., *supra* note 13, at 34.

52. *It's Not Just Ferguson: Missouri Supreme Court Should Consolidate the Municipal Court System*, ARCHCITY DEFENDERS 1, <http://www.archcitydefenders.org/wp-content/uploads/2014/07/Its-Not-Just-Ferguson-Consolidate-the-Municipal-Courts.pdf> (last visited Aug. 28, 2017) (identifying eight-one municipal courts in St. Louis County, including the county court).

nicipalities and prosecutors in others.⁵³ The dual functions of prosecutor and judge, even if separated by municipality, may compromise the individual's ability to act independently in either role and, when further influenced by emphasis on producing revenue,⁵⁴ seems likely to undercut public confidence in the rule of law requirement of an independent judiciary.⁵⁵

The workload of each municipal court is comprised of hearing misdemeanor offenses, and in Ferguson those offenses were split substantially evenly between traffic and non-traffic violations.⁵⁶ Traffic violations include moving violations like speeding, traffic signals, improper turns, vehicle maintenance offenses like broken tail lights, and status offenses like expired license plates or driver licenses. The size of the docket that the municipal court disposes at each sitting suggests that most traffic violations resolve swiftly and without contest from the purported offender with a fine and court costs.⁵⁷ In some instances, the amount of the fine and costs is less than \$100 but our research shows fines and court costs for offenders lacking legal representation to be significantly in excess of \$100.⁵⁸ Rarely does the purported offender have assistance of counsel or insist on a trial even if he or she is not guilty of the offense with which charged.⁵⁹ The Ferguson Commission identified the absence of counsel for offenders as a serious shortcoming and recommended requiring informed consent for waiver of the right to counsel, appointment of counsel for juvenile

53. FERGUSON COMM'N REP., *supra* note 13, at 34; *see also The Official Voice of St. Louis Regional Municipalities*, MUN. LEAGUE OF METRO ST. LOUIS, <http://www.stlmuni.org/> (last visited Aug. 28, 2017).

54. DOJ FERGUSON POLICE REP., *supra* note 8, at 9, 42 (revenue as priority for the police and courts).

55. *See generally* UNITED NATIONS, PROFESSIONAL TRAINING SERIES NO. 9, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS (2003), <http://www.ohchr.org/Documents/Publications/training9chapter4en.pdf>; *see also supra* text accompanying note 37.

56. DOJ FERGUSON POLICE REP., *supra* note 8, at 9.

57. *Id.*

58. MUNICIPAL COURTS SURVEY, *supra* note 32 (finding that only about sixteen percent of fines were under \$100 but, with the exception of seat belt violations, more than \$100 with the addition of court costs).

59. In most instances, the cost of engaging counsel and conducting a trial outweighs the cost of paying the fine and court costs. In addition, the time required to return for a trial setting is burdensome as well. *Supra* note 54 accompanying text (discussing that individuals represented by counsel usually plea bargain for payment of a fine in exchange for a conviction for a non-moving violation).

offenders, and public defenders for individuals who cannot afford counsel.⁶⁰

Purported traffic offenders often fail to appear for the hearing on their traffic offense. Those who do not appear are predominantly non-affluent individuals,⁶¹ who fail to appear for a variety of reasons: 1) their own neglect, 2) work obligations (including risk of termination for missing work), 3) lack of childcare (most courts do not permit children in the courtroom), and iv) inability to pay the fine that will be imposed.⁶² Municipal court dockets tend to be crowded so wait times in the municipal court may be substantial.⁶³ Wait times further exacerbate problems associated with time away from work and childcare.⁶⁴ As a courtesy to counsel, judges prioritize cases in which the purported offender has legal representation so that defendants who can afford counsel have shorter wait times than those who cannot afford counsel.⁶⁵ Non-affluent individuals rarely have representation.⁶⁶

In many instances affluent individuals for whom appearance might be an inconvenience, even with a short wait time in court, may avoid appearance.⁶⁷ They engage counsel, who negotiates with the prosecutor for the amount of the fine and quality of the offense without the purported offender having to appear in person.⁶⁸ Individuals ticketed for moving violations, who can afford to and do engage counsel, frequently enter a guilty plea to a plea bargained, non-moving vio-

60. FERGUSON COMM'N REP., *supra* note 13, at 33. *Compare id.* at 34 (recommending independent city prosecutors and municipal judges), with *U.S. v. Ferguson Consent Decree*, *supra* note 14, ¶¶ 357–58 (ordering the implementation of policies that ensure the independence of city prosecutors and the impartiality of municipal judges); KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 284–88 (5th ed. 2011).

61. Thomas Harvey et al., *Municipal Courts White Paper*, ARCHCITY DEFENDERS (Nov. 23, 2013), <http://03a5010.netsolhost.com/WordPress/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> (last visited Sept. 27, 2017), reported that the inability to hire a lawyer, lack of general education about how the Missouri court system works, and a shortage of economic resources to pay the traffic ticket and courts costs are factors contributing to the individual's likelihood of appearing in court. Failure to appear in court often leads to warrants. Administrative data from 2014 showed that the black non-affluent communities were the only municipalities that had warrants of one or greater per capita (e.g., Normandy had 3.28 and Pagedale had 2.85 warrants per capita, respectively).

62. *Id.*

63. DOJ FERGUSON POLICE REP., *supra* note 8, at 49.

64. *Id.*

65. Radley Balko, *How Municipalities in St Louis Profit*, WASH. POST (Sept. 3, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/?utm_term=.34b36864a836.

66. Harvey et al., *supra* note 61, at 8.

67. *Id.* at 7.

68. *Id.* at 8.

lation, because moving violations impact their state driving record⁶⁹ and their insurance risk rating.⁷⁰ The trade-off in the plea bargain may be fines greater than those imposed for a moving violation, but the additional insurance cost that would follow from a moving violation would be greater than the incremental fine. Such offenders are not incarcerated temporarily under a bench warrant or required to pay fees for issuance and service of the warrant because their counsel has negotiated a plea bargain and they have paid their fine.

When purported offenders fail to appear, courts issue warrants for arrest of the purported offender (“bench warrants”).⁷¹ Non-affluent individuals may have bench warrants outstanding in multiple county jurisdictions. To resolve a bench warrant, the purported offender may be incarcerated⁷² and must post bail to secure his or her temporary release.⁷³ Not infrequently when an individual posts bail, instead of release, a municipality passes him or her on to another municipality in which a bench warrant also is outstanding.⁷⁴ The individual must post bail there as well. Resolving the matter in any given municipality requires payment of the fine associated with the misdemeanor, court costs, and fees for issuance of the bench warrant and service of process. Even if the fine itself is manageable, the additional costs and fees may place payment beyond the non-affluent individual’s reach. Recent state law amendments have required municipalities to alter their procedures.⁷⁵ The new state law places restrictions on temporary incarceration, requires prompt hearings, and prohibits incarceration to coerce payment of fines and fees.⁷⁶

The likelihood of arrest for any specific offense is not predictable, but that likelihood does vary from jurisdiction to jurisdiction. Arrest and citation issuance in a jurisdiction depends on a variety of factors, some of which are random, others deliberate, many subject to municipal policy decisions and the exercise of discretion by law enforcement authorities. In the case of moving violations, enforcement may be au-

69. *Tickets and Points FAQs*, MO. DEP’T OF REV., <http://dor.mo.gov/faq/drivers/points.php> (last visited Aug. 26, 2017).

70. Jessica Bosari, *What Really Goes Into Determining Your Insurance Rates?*, FORBES (Jan. 8, 2013), <http://www.forbes.com/sites/moneywisewomen/2013/01/08/what-really-goes-into-determining-your-insurance-rates/>.

71. Harvey et al., *supra* note 61.

72. *Id.*

73. MO. REV. STAT. § 544.455(a)(2) (2013).

74. DOJ FERGUSON POLICE REP., *supra* note 8, at 57.

75. MO. REV. STAT. § 479.360(1) (2015).

76. *Id.*

tomated in some instances – red light cameras that the Missouri Supreme Court may have outlawed⁷⁷ and speed cameras, also of questionable validity following the Missouri Supreme Court ruling on red light cameras⁷⁸ – but most traffic arrests continue to result from police observation. Hence, enforcement of traffic laws is somewhat random in that the offense must occur when a law enforcement officer is present to observe it. Vehicle maintenance offenses – broken tail lights, signal failure, burned out head lights, vehicle noise—similarly are somewhat random but issuance of citations for vehicle maintenance offenses generally is deliberate and reflects a purposeful decision to enforce that the police supervisory authority communicates to the officers on the streets. Unlike observable moving and vehicle maintenance violations, status offenses like driving on an expired license are invisible without the detention of the suspected offender. Enforcement of nearly all traffic laws is committed to the discretion of the arresting officer. While supervisors may establish general arrest policies that pressure officers to increase arrests and citation issuance to achieve departmental arrest goals, the officer nevertheless may elect to arrest, warn, or ignore any given offense.⁷⁹

In the absence of special factors, uniform enforcement of traffic laws throughout the county should yield violation numbers that are substantially proportional to traffic flow. Motorists crossing multiple jurisdictional borders seem unlikely to modify their behavior in order to comply with traffic laws in one municipality but not in another, unless a jurisdiction has a reputation for stricter traffic law enforcement than others. Some municipalities may be commonly known as a “speed traps,” for example, and motorists reduce their speed passing through specific areas. Motorists are unlikely to limit their travel to a single municipality, especially in St. Louis County where there are many small municipalities. If, relative to traffic volume, municipality A has more traffic law violators than municipality B, the reasons for that disproportion are probably related to non-uniform traffic laws and non-uniform enforcement practices. Possible, for example, is that municipality A has a lower speed limit on a street passing through

77. *Tupper v. City of St. Louis*, 468 S.W.3d 360, 365 (Mo. 2015) (holding red light camera ordinance unconstitutional because it shifted the burden of proof to defendants to establish that they were not the operators of the vehicle).

78. *Id.*

79. See KENNETH CULP DAVIS, *POLICE DISCRETION* (1975) (discussing that aside from special orders, “all officers readily acknowledge that some law is never enforced and that some is only sometimes”).

both A and B than B has⁸⁰ or, in the case of traffic signal violations, A has more signals or shorter yellow lights than does B.⁸¹ With respect to enforcement, police in A might enforce traffic laws more strictly than police in B. On speed, for example, police in B may tolerate 7 miles per hour over the limit while police in A issue a citation at three miles per hour or more over the limit. Or police in A might issue a red light citation if a motorist enters an intersection as the light is changing from green to yellow while police in B only issue citations to motorists who enter an intersection as the light is changing from yellow to red. Similarly, A's police may be more vigilant than B's police in identifying motorists whose automobile license plates have expired.⁸²

It is possible, on the other hand, that motorists in non-affluent suburbs comply with traffic laws less frequently than motorists in affluent suburbs. The former motorists simply may have been raised to be scofflaws and statistics on overall criminal activity may confirm that non-compliance pattern.⁸³ In St. Louis County, traffic stops accompanied by issuance of citations are far more common in non-affluent municipalities than in affluent municipalities.⁸⁴ Compare, for example, Creve Coeur, an affluent suburb, with Jennings, a non-affluent suburb, suburbs of roughly equal geographical area and population.⁸⁵ In both jurisdictions, black motorists are disproportionately represented among those whom police ticket.⁸⁶ Moreover, a white motorist is disproportionately likely to be given a warning rather than a

80. *See* *Tank Truck Rentals, Inc. v. Comm'r.*, 356 U.S. 30, 32–37 (1958) (holding fines imposed for violation of maximum weight limits in Pennsylvania not deductible despite Pennsylvania's maximum weight limits being lower than adjacent states').

81. Ken Leiser, *Some Yellow Lights Will Yield More Time for Missouri Drivers*, ST. LOUIS POST-DISPATCH (June 24, 2011), http://www.stltoday.com/news/local/metro/some-yellow-lights-will-yield-more-time-for-missouri-drivers/article_c645f166-068a-5b95-8b38-ac58742040cd.html.

82. *See* MO. DEP'T. OF REV., MISSOURI DRIVER RECORD TRAFFIC VIOLATIONS DESCRIPTIONS AND POINTS ASSESSED FORM 899 (2017), <http://dor.mo.gov/forms/899.pdf> (discussing in Missouri, driving on expired plates may yield a citation and a fine, but the violation has no impact on the motorist's driving record).

83. *See Unincorporated St. Louis County and Contracted Areas Part I Crimes*, ST. LOUIS COUNTY POLICE (June 2015), <http://maps.stlouisco.com/police/lib/sbar/stats.html> (depicting in unincorporated St. Louis County, for example, crime statistics disclose a greater number of incidents in the non-affluent areas than in affluent county areas).

84. OFF. OF MO. ATTORNEY GEN., 2016 ANN. REP. VEHICLE STOPS – EXECUTIVE SUMMARY 1–12 (2016), <https://ago.mo.gov/home/vehicle-stops-report>.

85. *QuickFacts selected: Ferguson City, Missouri; Creve Coeur City, Missouri; St. Louis County, Missouri*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/ferguson-citymissouri,crevecoeurcitymissouri,stlouiscountymissouri/PST120216> (last visited Sept. 25, 2017).

86. OFF. OF MO. ATTORNEY GEN., 2016 ANN. REP. VEHICLE STOPS – EXECUTIVE SUMMARY, *supra* note 82.

citation.⁸⁷ Those disproportions inhere throughout most of the county, but evidence suggests that in the municipality of Pine Lawn, a predominantly black, non-affluent community, white motorists are stopped more frequently and fined more heavily than are black motorists.⁸⁸ Population patterns distribute proportionally more white motorists in affluent suburbs than in non-affluent suburbs.⁸⁹

Many policing practices fall within the discretion of individual officers. Whether of tolerance for “public safety” infractions such as driving in excess of a speed limit, or of tolerance for status infractions such as expired license plates, individual officers may exercise their discretion differently depending on the appearance of the motorist. Sex, race, or other appearance factors may inform the exercise of discretion. And officers may exercise discretion unfavorably if their superiors give them citation or revenue targets they are expected to meet – a common practice in St. Louis County.⁹⁰ Where police in jurisdiction A have revenue targets, police there may issue a citation routinely if a motorist has a malfunctioning turn signal, brake light, or other vehicle defect, while police in B, who have no or low revenue targets, may ignore such infractions or may stop the motorist to inform or remind him or her to repair the defect. Similarly, police in A may stop motorists, more or less randomly, to determine if the motorist has a valid license to drive. In order to meet revenue targets, police may stop blacks more frequently than whites because racial profiling may have proven to be a relatively reliable means to identify unlicensed drivers⁹¹ or, alternatively, blacks make easier and less challenging targets because they have learned to expect to be stopped.⁹²

87. *Id.*

88. John Hoffman, *Tales of Four Cities and Traffic Stops*, CHESTERFIELD PATCH (June 7, 2012), <https://patch.com/missouri/chesterfield/the-tale-of-four-cities-and-traffic-stops>.

89. See *Map of Race and Ethnicity by County Subdivision in St. Louis*, STATISTICAL ATLAS (Apr. 17 2015), <https://statisticalatlas.com/county/Missouri/St-Louis-County/Race-and-Ethnicity#data-map/county-subdivision>; *Map of Household Income by County Subdivision in St. Louis County*, STATISTICAL ATLAS (Apr. 17 2015), <https://statisticalatlas.com/county/Missouri/St-Louis-County/Household-Income#data-map/county-subdivision>.

90. DOJ FERGUSON POLICE REP., *supra* note 8, at 10.

91. Compare racial profiling with the audit function for federal income tax returns. The I.R.S. is unable to audit all returns so it uses algorithms to choose which returns are most likely to be inaccurate and yield additional revenue – a less offensive or less obvious form of profiling. Nevertheless, the IRS no longer may use TCMP audits to develop its algorithms. *Information on IRS' Taxpayer Compliance Measurement Program*, U.S. GEN. ACCT. OFF., <http://www.gao.gov/assets/230/221808.pdf> (last visited Sept. 5, 2017).

92. David Harris, *Driving While Black: Racial Profiling on our Nation's Highways*, AM. CIV. LIBERTIES UNION (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways>.

Some St. Louis County municipalities derive a substantial, regular, and predictable portion of their municipal revenue from the fines, costs, and fees imposed by these municipal courts.⁹³ Missouri statutes limit the portion of municipalities' general operating revenues from "fines and court costs for traffic violations" to thirty percent of their general operating revenue.⁹⁴ In municipalities that rely on the municipal court as a major source of revenue, members of racial or ethnic minorities tend to bear a disproportional share of the burden of the fines, costs, and fees relative to non-minority societal groups.⁹⁵

Revenue driven justice administration may be common but it always is troubling.⁹⁶ Property seizures in connection with the enforcement of controlled substance laws received considerable attention in the latter decades of the twentieth century.⁹⁷ In those instances, there often was no criminal prosecution but also no practical opportunity for the unprosecuted, purported offender to recover the seized property.⁹⁸ In Ferguson, as is probably common throughout the U.S., most traffic law violations resolve through guilty pleas, default judgments and no contest adjudications because assistance of counsel is unavailable, and, even if available is met with hostility and retaliation except for plea bargains.⁹⁹ The cost to the defendant of conducting a trial generally far outstrips the uncontested fine and cost amount. Defense often is futile in any event, since only the police officer and the defendant may have any knowledge of the purported offense and they disagree on the facts generally tilting the scale in the officer's direction. Moreover, the purported offender may be uncertain as to some offenses where the line between innocence and guilt is particularly fine or where enforcement is committed to arresting officer's discretion as it often is for vehicle maintenance offenses – driving with a broken tail light, for example.

93. See generally *Frequently Asked Questions*, MO CTS., <https://www.courts.mo.gov/page.jsp?id=1917> (discussing the state of Missouri has implemented a uniform traffic fine collection system with standard fines if the county elects to participate).

94. MO. REV. STAT. § 302.341(2) (2015).

95. Balko, *supra* note 63.

96. See *Development in the Law: Policing: Chapter One: Policing and Profit*, 128 HARV. L. REV. 1723, 1723 (2015).

97. Nyika Prendergast, *No Instructions Required: Due Process and Post-Deprivation Remedies for Property Seized in Criminal Investigations*, 90 J. CRIM. L. & CRIMINOLOGY 1013 (2000); see also Denise Lieberman, *Asset Forfeiture*, <http://www.deniselieberman.com/articles/assetforfeiture.htm> (last visited Sept. 5, 2017).

98. *Asset Forfeiture Abuse*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/asset-forfeiture-abuse> (last visited Sept. 5, 2017).

99. DOJ FERGUSON POLICE REP., *supra* note 8, at 43.

The Missouri legislature recently addressed the issue of municipal courts and revenue based policing by enacting Senate Bill 5.¹⁰⁰ Under that legislation, municipalities in Missouri may not retain fine and fee revenue exceeding twenty percent of their operating budgets.¹⁰¹ Senate Bill 5 also restricts the use of incarceration to coerce payment of fines for minor traffic violations.¹⁰² Included in the revenue cap are violations amended from moving to non-moving status.¹⁰³ A municipality collecting more than the cap must pay any excess over to the state director of revenue to be distributed to school districts.¹⁰⁴ In computing the base for determining the cap, special purpose funds, as opposed to operating revenues, are excluded so that the base for measuring the cap remains close to the amount of the municipality's actual recurrent operating budget.¹⁰⁵ Historical reporting of misdemeanor violation revenue has been incomplete, and there is evidence that some municipalities raised more than thirty percent of their operating revenue from municipal court activity but did not pay the excess over to the state.¹⁰⁶

The new revenue caps and additional enforcement of the caps undoubtedly will cause revenue shortfalls in municipalities that lack adequate alternative revenue sources.¹⁰⁷ Since many municipalities have low housing values, real property taxes are an unlikely source to make up the shortfall and voters in Missouri often reject tax increases.¹⁰⁸ Voters in the City of Ferguson recently rejected a property tax increase while approving a sales tax increase.¹⁰⁹ Affluent suburbs

100. MO. REV. STAT. § 479.360 (2015) ([t]ruly agreed to and finally passed May 7, 2015, signed by the governor July 9, 2015).

101. MO. REV. STAT. §302.341.2 (2015). As originally passed, the statute applied a lower limit of 12.5 percent of operating budget to St. Louis County municipalities and the City of St. Louis but the Missouri Supreme Court held that portion of the statute invalid as an unconstitutional special law. *City of Normandy v. Greitens*, 518 S.W.3d 183, 188 (Mo. 2017).

102. See OFF. OF MO. ATTORNEY GEN., *supra* note 86 (driving no more than 19 miles over the limit is considered minor).

103. See Thomas Harvey et al., *supra* note 61.

104. MO. REV. STAT. § 479.359 (2015).

105. MO. REV. STAT. § 479.368 (2015).

106. Under the 2015 legislation, a municipality that fails to pay over excess collections loses its share of general sales tax revenue until it pays, and a mandatory disincorporation election is required under MO. REV. STAT. §479.368 (2015).

107. See Monica Davey, *Lawsuit Accuses Missouri City of Fining Homeowners to Raise Revenue*, N.Y. TIMES (Nov. 4, 2015), <https://www.nytimes.com/2015/11/05/us/lawsuit-accuses-missouri-city-of-fining-homeowners-to-raise-revenue.html?mcubz=1> (addressing the use of misdemeanor fines for home maintenance defects as revenue raising devices).

108. See *infra* note 133 (discussing that under the Hancock amendment to the Missouri Constitution, a vote of the people is required for new and increased taxes).

109. See *supra* note 19 and accompanying text.

have larger property tax bases from which to raise revenue for municipal operations than do non-affluent suburbs. In non-affluent suburbs, the real property tax base has tended to contract during recent years, further constricting the property tax revenue stream.¹¹⁰ The non-affluent suburbs depend more on retail sales taxes.¹¹¹ Even retail sales taxes decline as retail outlets close and shopping centers become vacant or close in poorer, less desirable spaces,¹¹² so that the same municipalities with low property tax bases have low retail revenue receipts to produce sales tax revenue and will be unable to make up the shortfall with sales taxes unless the municipalities can attract substantial amounts of new retail business. This decline in sales tax revenue was a matter of concern in Ferguson as city officials assessed the need to increase revenue from fines.¹¹³ Perhaps revenue shortfalls will encourage small municipalities to disincorporate and consolidate with St. Louis County, thereby spreading governmental costs over a broader base as the county government will provide police and essential other governmental services.

II. FINES, FEES, AND IMPLICIT TAXES

Separating fines, fees, and penalties from taxes and user fees is not uncomplicated. Legislatures use taxes to raise revenue and also to regulate behavior. The tax on tobacco products produces revenue but the tax increasingly has become a regulatory tax. Tobacco taxes increase the cost of engaging in smoking and presumably discourage people from smoking.¹¹⁴ Cigarette taxes tend to be regressive because they have a greater impact on the disposable income of low-income

110. Alexia F. Campbell, Reena Flores, & Stephanie Stamm, *St. Louis Is Growing More Diverse—Just Not in the Black Half of Town*, NAT'L J. (Oct. 20, 2015), <http://www.nationaljournal.com/next-america/population-2043/st-louis-is-growing-more-diverse-just-not-black-half-town>.

111. Unlike property taxes that are based on value of property – a measure of wealth – sales taxes are regressive relative to income and wealth because poorer people have to consume, subject to sales tax, more of their income for life's necessities while wealthier and higher income individuals may invest their disposable funds.

112. Tyler Durden, "The Retail Bubble Has Now Burst": A Record 8,640 Stores Are Closing In 2017, ZEROHEDGE NEWSLETTER (April 22, 2017), <http://www.zerohedge.com/news/2017-04-22/retail-bubble-has-now-burst-record-8640-stores-are-closing-2017> (statistics and charts showing retail closings and vacancies since 2000).

113. DOJ FERGUSON POLICE REP., *supra* note 8, at 10.

114. Frank J. Chaloupka et al., *Tobacco Taxes as A Tobacco Control Strategy*, 21 TOBACCO CONTROL 172 (2012), <http://tobaccocontrol.bmj.com/content/21/2/172.full.pdfhtml> (arguing that high cigarette taxes are an effective means to control tobacco use); Kenneth F. Warren, *Regulators Throughout American History Have Been Reluctant to Regulate Cigars and the FDA Still is, but Why?*, 8 PITT. J. ENVTL. & HEALTH L. 60 (2014).

individuals than they have on higher income individuals. Tax increases may not be as regressive, however, because low-income individuals may be most sensitive to price increases and may limit their smoking following a price increase while higher income smokers may be indifferent to price changes. If low-income individuals spend less on tobacco following a tax increase, they also may reap the health benefit that accompanies smoking less.¹¹⁵ A successful tobacco tax would eliminate its own revenue stream as people reduce and eventually stop smoking. While the tobacco tax serves a revenue raising function, it also, and sometimes predominantly, regulates behavior.

User fees defray the cost of providing otherwise public services. Regulators frequently impose the cost of their regulatory activity on those they regulate. The cost of inspecting a property to determine whether it complies with local building codes charges for the issuance of licenses necessary to engage in a specific activity, and penalties for failing to obtain a license when required or have a property inspected at the required time all raise revenue. The inspections and licensing payments may match the cost of issuing the license or making the inspection. If they do so, they are a proper exercise of the police power. If they raise revenue in excess of the actual cost of regulation, they may exceed the police power under which they are enacted. As early as 1871, the Missouri Supreme Court held that the city of St. Louis exceeded its policing powers when it imposed a license fee on insurance companies that was greater than the actual administrative cost of issuing the license.¹¹⁶ With that policing power limitation, a penalty often matches no identifiable cost to the regulator caused by tardy compliance with the regulation. Instead, it punishes the regulated person and raises revenue for the regulator. If punishment predominates, the penalty seems a valid exercise of policing power. If revenue production is its predominant function, the penalty is, if permissible at all, an exercise of taxing, rather than policing, power.¹¹⁷

Early decisions in the Missouri courts confirm the distinction between policing and taxing powers and limit exactions when the municipality exceeds its policing power. Following *City of St. Louis v. Boatman's*, a license fee was held invalid because it exceeded the cost

115. Chaloupka et al., *supra* note 112, at 176.

116. *City of St. Louis v. Boatmen's Ins. & Trust Co.*, 47 Mo. 150, 156 (1871).

117. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (discussing the "shared responsibility payment" for failure to obtain health insurance under the Affordable Care Act that the Supreme Court held to be a tax); *see also supra* note 107 and accompanying text.

of issuance of the license.¹¹⁸ Similarly, the Missouri Supreme Court held that an earnings tax was not an exercise of police power and was invalid without taxing authority.¹¹⁹ Authorization of the earnings tax under the City's taxing power followed. The taxing power enacted earnings tax reached the earnings of residents over whom the City had general, personal taxing authority, and, in the case of non-residents, only those earnings of non-residents derived from their earnings activity conducted in the city of St. Louis and subject to the City's taxing authority.¹²⁰ And with respect to parking meter fees, the Missouri Supreme Court confirmed that a facts and circumstances determination was necessary to uphold the validity of parking meter fees and fines from parking violations as an exercise of police power since parking meter fees are not an authorized taxing function.¹²¹ The court did not determine the validity of the fees under the police power since it invalidated the ordinance on other grounds.¹²² On the other hand, raising revenue with fees is permissible under a municipality's taxing power if the fees are uniform.¹²³

While the line between exercise of taxing powers and police powers is sometimes indistinct, it remains important to the validity of impositions. Fines for punishment and fees for rendition of governmental services represent exercise of a municipality's police functions while exactions for production of revenue are exercises of taxing power. Although regulation and taxation are both exercises of governmental powers, their primary functions remain discrete. A regulation may generate revenue in excess of cost but revenue production should not become the primary function of regulation. Use of regulatory funds for general governmental purposes is limited.¹²⁴ Although taxation may be designed to impact behavior just as regulation does, the concepts of taxation and regulation do not merge.

118. *Knox City v. Thompson*, 19 Mo. App. 523, 527 (1885).

119. *Carter Carburetor Corp. v. City of St. Louis*, 203 S.W.2d 438, 440–45 (Mo. 1947).

120. ST. LOUIS, MO., MUN. CODE art. I, § 4 (2017) (authorizing an earnings tax); ST. LOUIS, MO., 47063 § 2 (1954) (imposing the earnings tax).

121. *Auto Club of Mo. v. City of St. Louis*, 334 S.W.2d 355, 363 (Mo. 1960) (the court wrote: “[i]t is for the court to determine, on all the pertinent facts, whether the primary and fundamental purpose of the ordinance is regulation under the police power or revenue under the tax power.”)

122. *Id.* at 362 (finding an improper delegation of authority to an administrative body).

123. *City of St. Louis v. Green*, 7 Mo. App. 468, 481 (1879), rev'd, 70 Mo. 562 (1879).

124. *Haw. Insurers Council v. Lingle*, 201 P.3d 564 (Haw. 2008) (holding administratively imposed insurance assessments in excess of cost of services provided permissible but transfer of excess funds to general revenue violates separation of powers and is unconstitutional).

In many instances, one may substitute regulation for taxation and conversely taxation for regulation.¹²⁵ Yet, taxing power and regulatory power remain distinct governmental functions. Whether it raises revenue through taxes or fines may be a matter of indifference to the operational budgeting of a municipal government as long as the revenue source is relatively stable and predictable,¹²⁶ but it is not similarly a matter of indifference to the legal rules for enacting and enforcing the laws establishing the imposition. The municipal government must take care to separate its exercise of taxing and policing functions.¹²⁷

The breadth of taxing functions lends further support to the argument that taxing is far less confined than the simple production of revenue. The individual mandate¹²⁸ under the Patient Protection and Affordable Care Act of 2010,¹²⁹ serves to coerce individuals to purchase healthcare insurance. The mandate imposes on individuals who fail to maintain healthcare insurance a penalty referred to as a “shared responsibility payment.”¹³⁰ The individual makes that payment with his or her federal income taxes to the Internal Revenue Service in the same manner as a tax penalty.¹³¹ Unlike tax penalties, the shared responsibility payment is not enforceable with criminal sanctions. Despite the narrow base of the individual mandate and its selective imposition only on individuals who do not buy health insur-

125. Alexander Wu, *U.S. International Taxation in Comparison with other Regulatory Regimes*, 33 VA. TAX REV. 169, 171 (2013) (policies underlying regulation should underlie taxation and conversely as well).

126. Richard A. Posner, *Taxation by Regulation*, 2 BELL J. OF ECON. & MGMT. SCI. 22, 47 (regulation as serving distributive functions like taxation).

127. See *Unverferth v. City of Florissant*, 419 S.W.3d 76, 95–96 (Mo. Ct. App. 2013); *Ballard v. City of Creve Coeur*, 419 S.W.3d 109, 122 (Mo. Ct. App. 2013); *Edwards v. City of Ellisville*, 426 S.W.3d 644, 660–61 (Mo. Ct. App. 2013); *Damon v. City of Kansas City*, 419 S.W.3d 162, 185 (Mo. Ct. App. 2013); *Brunner v. City of Arnold*, 427 S.W.3d 201, 225–26 (Mo. Ct. App. 2013). Missouri courts determined that motorist plaintiffs all stated a claim for relief in arguing that municipalities installed red light cameras to produce revenue – a taxing function—rather than for traffic safety – a policing function. But, most or all the municipalities ceased to use the cameras following the decision in *Tupper v. City of St. Louis*, 468 S.W.3d 360, 376 (holding the cameras unconstitutional because they shifted the burden of proof to the vehicle owner in a criminal action). Similarly, in *Clean Water Coalition v. The M. Resort, LLC*, 255 P.3d 247, 250–51 (Nev. 2011), the Nevada Supreme Court held that a fund created to raise revenue for the state is a tax and must be uniform throughout the state. In Missouri, revenues from municipal courts in excess of percentage of revenue limitations must be paid over to the state and used for education so that a portion of the revenues support state functions. See *supra* notes 94 & 100 and accompanying text. Similarly, the Tenth Circuit held in *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007), the fee for distribution of vanity license plates to be a tax rather than a regulatory function because it produces revenue from the sale of a commodity within the control of the state.

128. 26 U.S.C. § 5000A (2010).

129. *Id.*

130. *Id.*

131. 26 U.S.C. § 5000A(b)(2) (2010).

ance, the Supreme Court, in *Nat'l Fed'n of Indep. Bus. v. Sebelius*,¹³² held the shared responsibility payment to be a tax imposed under Congress's taxing power.¹³³

Fines and related fees may provide a better source of revenue than do property, sales, and income taxes since the amount of revenue from fines remains substantially within the municipality's control. The governmental unit may expand or contract the amount of revenue the fines and fees generate as needed through more or less aggressive policing. The regular and predictable share of the operating budget attributable to fine revenue suggests that the fines indeed serve the same basic function as taxes. Fines provide the revenue needed to support governmental operations and services. In the city of Ferguson and other parts of St. Louis County, that revenue function has supplanted the public safety function of the municipal justice system. Public safety has become secondary or even irrelevant to the administration of the police and the municipal courts.¹³⁴ As so much of the caseload of the municipal courts in St. Louis County serves to produce revenue, those courts seem only minimally concerned with meting out justice in order to punish dangerous conduct or deter such conduct in the future. Where governmental revenue production rather than regulation is functionally primary, the means of production of that revenue would seem to be predominantly a tax and only secondarily a punishment.¹³⁵

Both behavior modification taxes and fines often are regressive.¹³⁶ As with behavior modification taxes like tobacco taxes,¹³⁷ the amount of the fines, fees, and related costs do not increase with afflu-

132. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 573 (2012).

133. U.S. CONST. art. I, § 8, cl. 1.

134. DOJ Ferguson Police Rep., *supra* note 8, at 2.

135. *Tax*, WG&L Tax Dictionary (2006) ("an enforced contribution . . . for the purpose of raising revenue to be used for public or governmental purposes . . . and not a charge primarily imposed for the purpose of regulation"). As a working definition of tax, this definition might classify a tobacco tax structured to modify behavior, as primarily for regulation, Chaloupka, *supra* note 112, at 173; similar to the "shared responsibility payment" under the Affordable Care Act. *See also* *City of St. Louis v. Green*, 7 Mo. App. 468, 481 rev'd, 70 Mo. 562 (1879).

136. Without delving into questions of the marginal utility of money, an individual who has \$100,000 income who pays a fine of \$100 but gets no points affecting his insurance rates because of a plea bargain to a non-moving violation is less likely to feel the sting of the fine than is the individual with a \$20,000 income who is short on rent because of the \$100 fine and looks to an increase in her insurance cost because the moving violation conviction affects her driving record.

137. Chaloupka et al., *supra* note 112, at 173, 176 (observing that tobacco taxes tend to be regressive but increases in those taxes are not necessarily regressive); *see also* Warren, *supra* note 114.

ence.¹³⁸ Indeed, the overall expenditure in conjunction with a moving violation may well be greater for non-affluent than affluent individuals,¹³⁹ even though Missouri law contemplates scaling of fines to ability to pay.¹⁴⁰ Affluent individuals are more likely to negotiate change in the classification of the offense from a moving violation to a non-moving violation, and rarely do courts issue bench warrants for affluent individuals.¹⁴¹ While the guilty plea for a non-moving violation may result in an increased fine as part of the plea bargain, and the offender pays a legal fee, the court imposes no fees for issuance and service of a bench warrant, the offender's insurance rates do not increase, and with expedited disposition of the case as courtesy to counsel or even the freedom from required appearance of the offender, the offender rarely needs to miss work or pay for childcare in order to appear. With fines and penalties, the offender's ability to pay rarely influences the amount of the imposition, whether a tax or a fine.¹⁴² Misdemeanor fines and accompanying fees and costs impact non-affluent individuals more acutely than they impact affluent individuals. The fine amount may vary with the offense, but generally not the offender.

In the U.S., the current tension between taxes and penalties for regulation manifests itself in debate on legalization of marijuana and its by-products. Marijuana is ubiquitous but historically has been an illegal and untaxed product. It remains a controlled substance under federal law¹⁴³ but some states now tax rather than prohibit marijuana.¹⁴⁴ Most others penalize the distribution and consumption of

138. Cf. Suzanne Daley, *Speeding in Finland Can Cost a Fortune, if You Already Have One*, N.Y. Times (Apr. 26, 2015), <https://www.nytimes.com/2015/04/26/world/europe/speeding-in-finland-can-cost-a-fortune-if-you-already-have-one.html?mcubz=3> (discussing the overt correlation between income taxes and fines in Finland where speeding fines are a function of income and may be progressive).

139. DOJ Ferguson Police Rep., *supra* note 8, at 52–55.

140. MO. REV. STAT. §. 560.026.1 (providing for fines to be adjusted and payment plans available based on ability to pay).

141. See Harvey et al., *supra* note 61, at 12.

142. *U.S. v. Ferguson Consent Decree*, *supra* note 14, at ¶ 340 (requiring assessment of ability to pay in imposing fines, but not a proportional or progressive schedule of fines).

143. 21 U.S.C. § 812 (2012).

144. See Jack Healy, *Legal Marijuana Faces Another Federal Hurdle*, N.Y. TIMES (May 9, 2015), http://www.nytimes.com/2015/05/10/us/politics/legal-marijuana-faces-another-federal-hurdle-taxes.html?_r=0 (including Colorado, Washington, and others. But, the tax/prohibition split creates federal income tax problems for legal distributors who may not deduct their ordinary and necessary business expenses of production and distribution under IRC § 280E).

marijuana. In those that penalize small-quantity possession and use offenses draw a fine rather than incarceration.¹⁴⁵

Similarly, traffic law infractions draw fines, not incarceration, except to the extent municipalities might use incarceration to coerce payment of fines, costs and fees.¹⁴⁶ Like sin taxes, fines for traffic law infractions tend to be uniform by the specific offense and, as noted above, there often is a fine schedule publicly available.¹⁴⁷

Over the past twenty years or more, many municipalities in St. Louis County, including the city of Ferguson, suffered from declining property tax values.¹⁴⁸ At the same time, volume of retail sales activity in the same suburbs retreated as local strip shopping centers have yielded to large regional shopping malls and internet sales, so that neither real property taxes nor sales taxes produced sufficient revenue to support the municipal government.¹⁴⁹ Rather than dis-incorporate and rely on the countywide government for services, many of those municipalities looked to their police and courts to generate needed revenue.¹⁵⁰ Fines, court costs, and fees for summons and warrants filled the revenue gap and further impoverished the economically stressed, low-income, local community predominantly composed of people of color.¹⁵¹ The police forces in those suburbs were predominantly white. In other parts of the county, such as Creve Coeur and Ladue, Missouri, real property values increased at or above cost of living levels so that municipal governments could capture property tax

145. Nick Wing, *Police Arrested Someone For Weed Possession Every 51 Seconds In 2014*, HUFFPOST (September 28, 2015), http://www.huffingtonpost.com/entry/marijuana-arrests-2014_us_560978a7e4b0768126fe6506 (discussing costs of marijuana enforcement and declining penalties). Paul Armentano, *The 5 Worst States to Get Busted With Pot*, ALTERNET (May 13, 2011, 12:00 PM), http://www.alternet.org/story/150935/the_5_worst_states_to_get_busted_with_pot (discussing states that continue to use incarceration for marijuana possession).

146. S.B. 5, 98th Gen. Assemb., Reg. Sess. (Mo. 2015) (using incarceration to coerce payment is prohibited in Missouri beginning at the end of August, 2015).

147. See *Fine Schedule for Traffic Offenses*, Mo. CTS. (Aug. 28, 2017), <https://www.courts.mo.gov/page.jsp?id=1904>.

148. Bruce Katz and Elizabeth Kneebone, *On Ferguson, fragmentation, and fiscal disparities*, BROOKINGS, THE AVENUE (April 2, 2015), <https://www.brookings.edu/blog/the-avenue/2015/04/02/on-ferguson-fragmentation-and-fiscal-disparities/>.

149. *Id.*

150. *Id.*

151. Harvey et al, *supra* note 61, at 3–4. Administrative data from the municipal courts (available at <https://www.courts.mo.gov/file.jsp?id=83247>) showed that the affluent municipalities had average revenue in fines and court costs, including warrant fees, of \$70 per resident but an average of \$172 in non-affluent municipalities. Table 80 Circuit Court, FY 2014, Disbursements to Municipalities (2014), <https://www.courts.mo.gov/file.jsp?id=83247>. Among the non-affluent communities Pine Lawn reported the highest fine and fee revenue per capita of \$541. *Id.* Pine Lawn generated \$1,648,267 in traffic fines and \$156,424 in court costs. *Id.*

increases that matched or exceeded the rate of increase in general price levels.¹⁵² Similarly, suburbs like Creve Coeur were able to annex retail sales locations along major thoroughfares and increase revenue from retail sales taxes.¹⁵³ Those affluent suburbs did not need to increase revenue from fines to support the municipal government.¹⁵⁴ In the non-affluent suburbs, increasing and replacing lost revenue with traffic fines and accompanying fees demonstrates both the relationship between fines and taxes and the mutability of revenue sources. Fines and related fees have become taxes as they assume the role of revenue producers for municipal governments. As the next part of this Article illustrates, the shift to fines for revenue also proved a useful way to avoid the tax increase vote requirement of the Missouri constitution since fines, if not taxes, are not subject to that public vote requirement.

III. FINES AS TAXES: STATE CONSTITUTIONAL TAX LIMITATIONS

Even if, as this Article argues, the distinction between fines and taxes is somewhat vague, the use of fines in many municipalities serves a primary, or even exclusive, revenue raising function. A primary or exclusive revenue function, under Missouri decisional law, would classify such fines as the exercise of the taxing, rather than the policing, power of the municipality.¹⁵⁵ Since 1980, however, the taxing power of the state and its underlying political subdivisions has been circumscribed by express Missouri constitutional restrictions on governmental tax and fee collection.¹⁵⁶ Those constitutional provisions should limit or prohibit the fines and fees as municipalities currently impose them. Recent Missouri legislation restricting the portion of a

152. MO. CONST. art. X, § 22 requires that the tax rate be reduced to prevent collection of more tax than a price level increase. *See also* MO. CONST. art. X, §§ 16–23.

153. Creve Coeur, Missouri Code Art. III, Section 405.200 (available at <http://ecode360.com/28142091>) (providing for the zoning of annexed areas). Steven H. Goldberg, *Annexations in Urban Counties: Missouri's Scheme and a Plan for Reform*, 29 WASH. U. J. URB. & CONTEMP. L. 187 (1985) (discussing the annexation scheme in Missouri and the reform movement that led to creation of the State Boundary Commission to review annexations).

154. Mike Maciag, *Skyrocketing Court Fines Are Major Revenue Generator for Ferguson*, GOVERNING (Aug. 22, 2014), <http://www.governing.com/topics/public-justice-safety/gov-ferguson-missouri-court-fines-budget.html>. This is not to say that they did not increase fine revenue. Creve Coeur, for example, installed a red light camera at an entrance to a major expressway and is understood to have received a substantial amount of revenue from red light violations without a police presence necessary. The camera has been disabled following the decision in *Tupper*.

155. *See* discussion *supra* Part II.

156. MO. CONST. art. X, § 22.

municipality's operating budget that fines and related fees provide¹⁵⁷ becomes secondary to the constitutional restrictions. The new statutory ceilings would apply to limit only fines and fees to amounts the government units permissibly may collect under the constitution. State legislation may not override constitutional limitation, but it does suggest the importance of the revenue function of the fines and fees without connecting that revenue function to impermissible taxation under the constitutional limitations.

A successful initiative petition in 1980 amended the Missouri constitution to limit tax and fee increases.¹⁵⁸ This constitutional limitation, customarily known as the "Hancock amendment,"¹⁵⁹ permits increases in existing taxes and imposition of new taxes only with direct voter approval.¹⁶⁰ In the case of a tax imposed by the Missouri General Assembly, tax increases to the extent of general price level changes are permissible without voter approval.¹⁶¹ Increases in excess of the general price level change require voter approval.¹⁶² Without voter approval, the state must rebate tax collections that exceed the constitutional limitation by more than one percent with a pro rata payment relative to each individual's personal income tax. The state also must eliminate the impermissible increase prospectively.¹⁶³ While the tax increase limitation applies to county and municipal taxes as well as taxes imposed by the Missouri General Assembly,¹⁶⁴ the remedy for excess collections is less certain.¹⁶⁵ The operative language does not include express provision for rebate of the excess.¹⁶⁶ Despite the absence of an express remedy, taxpayers have the right to

157. See S.B. 5, 98th Gen. Assemb., Reg. Sess. (Mo. 2015).

158. MO. CONST. art. X, §§ 16–23.

159. See Melton Donald "Mel" Hancock, NEWS-LEADER (Nov. 8, 2011), <http://www.legacy.com/obituaries/news-leader/obituary.aspx?pid=154522835>. Mel Hancock was the public proponent of the initiative and later was elected to Congress. *Id.*

160. MO. CONST. art. X, § 16.

161. *Id.* § 18(a).

162. *Id.*

163. *Id.* § 18(b). *But see id.* § 18(e)(5), added in 1996, under which state officials and taxpayers may bring suit to enforce the limitations and the Missouri Supreme Court has original jurisdiction to hear the suit and fashion a remedy either by requiring a rebate or a prospective reduction in taxes, thereby undercutting the automatic rebate provision in MO. CONST. art. X, § 18(b). The automatic rebate is somewhat problematic in that it rebates through the personal income tax rather than rebating the actual excess collection.

164. *Id.* § 22.

165. *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 251–52 (Mo. 2013) (holding that a fee increase imposed by the Metropolitan St. Louis Sewer District to be impermissible without a vote, but did not order a rebate of the fee because MO. CONST. art. X, § 23 provided no express remedy).

166. *Id.*

bring suit in the circuit courts of Missouri to enforce the limitations and may recover attorneys' fees if they successfully do so.¹⁶⁷

Section 22, applicable to local governmental units provides in part:

(a) Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, . . . when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law . . . when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. If the definition of the base of an existing tax, license or fees, is broadened, the maximum authorized current levy of taxation on the new base in each county or other political subdivision shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.¹⁶⁸

This constitutional provision applies prospectively from enactment to municipalities and protects taxes in place at the time of enactment so that no vote became necessary for existing taxes. Undoubtedly, municipalities at the time of enactment of the Hancock amendment imposed fines, court costs and fees on traffic violators. While there may be misdemeanors that describe offenses for which no fine existed at the time of enactment of the Hancock amendment, in all likelihood those are far fewer in number than misdemeanors for which municipalities already exacted a fine at enactment. As taxes, the standardized fines within a municipality arguably constitute the "levy" for purposes of the constitutional limitation or, alternatively, the group of fines, fees, and court costs an aggregate "base." The municipality is prohibited from "increasing the current levy of an existing tax, license or fees, above that current levy authorized by law . . . when

167. MO. CONST. art. X, § 23; *see also* *Gilroy-Sims & Assoc. v. Downtown St. Louis Bus. Dist.*, 729 S.W.2d 504, 505 (Mo. Ct. App. 1987) (awarding attorneys' fees for successful suit blocking a special business district levy approved by the City of St. Louis without voter approval). In *Gilroy-Sims*, apparently, no tax was collected so the rebate question did not arise. *Id.*

168. MO. CONST. art. X, § 22.

this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.”¹⁶⁹ Or, if a “base,” the aggregate amount collected from misdemeanors in the base must be rolled back to its 1980 level.¹⁷⁰ Thus, increases in standard fines, court costs, and fees since 1980 violate the Hancock amendment if they are taxes. They seem to be taxes because their predominant function is production of revenue and most municipalities budget for the fines, fees and court costs in the same manner as the municipalities budget for taxes.

However, also possible is that the fines and fees had to be reauthorized under the taxing power. As their use changed from deterrence and punishment that are policing functions to production of general revenue to support the municipality, the original authorization no longer supported the new function.¹⁷¹ If reauthorization under the taxing power were necessary, all the fines and accompanying fees violate the Missouri constitutional limitation because no public vote authorized them.¹⁷²

Otherwise, misdemeanors describing offenses that were not defined, or for which there were no fines in 1980, might be viewed as an expansion of an existing base of offenses on which fines as taxes are imposed. Article X, section 22 of the Missouri constitution requires the rollback of levies, i.e., decreases in fines as taxes, so that the amount of revenue from the base is no greater than it was at the time of enactment.¹⁷³ Only real property taxes may increase to reflect the change in the cost of living. Section 22 does not permit the substitution of one tax for another so that a municipality suffering a decrease in the real property tax base may not replace the lost revenue with an increased sales tax, for example, without the public vote. Accordingly, an increase in fines as taxes may not substitute for loss in reve-

169. *Id.*

170. *Id.*

171. Compare *City of St. Louis v. Green*, 7 Mo. App. 468, 481 (1879) *rev'd*, 70 Mo. 562 (1879) (invalidating licensing fee); *Carter Carburetor Corp. v. City of St. Louis*, 203 S.W.2d 438 (Mo. 1947) (earnings tax invalidated under police power).

172. In *Haw. Insurers Council v. Lingle*, 201 P.3d 564 (Haw. 2008), the Hawaii Supreme Court held that fees properly collected under regulatory (police) power could not be transferred to a general revenue fund as if they were taxes. *But see Barber v. Ritter*, 196 P.3d 238 (Colo. 2008) (holding that the transfer of special funds to a general revenue fund did not transform the regulatory collection of the special funds amounts under the police power to the use of the taxing power contrary to the Colorado constitution).

173. MO. CONST. art. X, § 22.

nues from other municipal tax bases without the affirmative vote of the electorate.

The municipal trend to increase revenue from misdemeanor arrests is unsurprising. Left to secure the affirmative vote of the electorate for increases in tax rates of existing taxes and new taxes to fill the need for revenue lost to declining property and sales tax bases, municipalities were confronted with a revenue dilemma. In general, voters have been reluctant to consent to new or increased taxes except taxes that did not impact them substantially like hotel taxes.¹⁷⁴ Often a committed constituency opposing a tax increase on a municipal ballot could get its voters out to the polls when general voter turnout in the election was otherwise quite low.¹⁷⁵ A relatively small percentage of the voters would defeat the tax increase or new tax in the presence of that low turnout. Even in high turnout elections, votes to increase one's taxes were difficult to obtain.¹⁷⁶ More generally, support for tax increases had become poisonous to politicians. In the 1992 Presidential campaign, Clinton used Bush's statement at the Republican convention: "[r]ead my lips: no new taxes" against Bush who had little choice but to support a tax increase during his presidency.¹⁷⁷

Thwarted at the ballot box, municipal governments sought revenue sources requiring no approval by the voters and, therefore, independent of the Hancock Amendment limitations. Increased fines generated by aggressive and racist policing, along with court costs, fees for bench warrant issuance and service of process for misdemeanors and other minor offenses replaced some or all of the loss in other tax revenue and provided funding for the municipal government. The state demanded its share of the revenue by limiting the amount of revenue from fines and fees a municipality could retain and requiring the excess to be paid over to the director of revenue for distribution to the schools.¹⁷⁸

174. See *Defeat Local Parcel Taxes*, HOWARD JARVIS TAXPAYERS ASSOCIATION, <https://www.hjta.org/resources/taxpayer-tools/defeat-local-parcel-taxes/>; see also John Matsusaka, *Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years*, 103 J. POL. EC. 587 (1995) (illustrating the effects of the initiative process); Mike Ford, *Letting The People Take The Initiative: Is I&R Good For Texas?*, VERITAS 26 (2001), <http://www.iandrinstute.org/docs/Ford-Letting-People-Take-Initiative-in-Texas-IRI.pdf> (discussing the low voter turnout experience for initiatives in Texas).

175. *Id.*

176. Ford, *supra* note 174.

177. *Top 10 Unfortunate Political One-Liners: Did He Just Say That? George H.W. Bush*, TIME (2016), http://content.time.com/time/specials/packages/article/0,28804,1859513_1859526_1859516,00.html.

178. MO. REV. STAT. § 302.341.2 (2014); *supra* note 94 and accompanying text.

Successful challenges to the fines as taxes lacks a retroactive remedy. Taxpayers may not compel a refund¹⁷⁹ but may claim their legal fees incurred in challenging the tax.¹⁸⁰ Rollback of the illegal tax to the permissible pre-increase level prospectively is the likely remedy.¹⁸¹ Rolling back fines to 1980 levels would require a significant increase in citations to produce comparable amounts of revenue to what the fines currently produce. In many county jurisdictions, police already are aggressively issuing citations, so that issuance of increased numbers in order to maintain revenue levels is likely to be a formidable task. Even if it were possible to write more tickets, the gross revenue limitation in section 22¹⁸² would thwart even that effort to match revenues to accompany a rollback of levies. Prohibiting the use of the fines to raise revenue by restricting them to their pre-1980 punishment function, without an affirmative vote of the people, would wipe out a significant portion of municipal budgets. Whether municipal governments would be able to replace the revenue remains doubtful. Correct application of the Hancock amendment to fines and related costs may lead to the disincorporation of municipal governments and consolidation of their territory with the county government. The 2015 Missouri legislation limiting fine revenue contemplates such consolidation as a possible remedy for failure of a municipality to comply with fine revenue limits.¹⁸³

Fines do not fit comfortably into the concept of user fees that might not be subject to constitutional tax limitations. Agencies and governmental units attach user fees to provision of specific governmental services provided to the fee payer. Fees for building inspections, for example, attach the fee to the provision of the inspection service even though users are required to use the service. Similarly, user fees imposed on industry participants often support specific agencies regulating the industry participants. User fees support specific governmental functions to which they relate or pay for specific services provided. *In Arbor Investment Co., LLC v. City of Hermann*, the Missouri Supreme Court held that utility charges based on use were not fees subject to Hancock limitations.¹⁸⁴ Fines and related fees

179. *See* *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223 (Mo. 2013).

180. MO. CONST. art. X, § 23 expressly provides for legal fees for taxpayers successfully challenging a tax or fee increase under MO. CONST. art. X, § 22.

181. *See* *Zweig*, 412 S.W.3d at 223.

182. MO. CONST. art. X, § 22.

183. MO. REV. STAT. § 479.368 (2015).

184. *See* *Arbor Inv. Co. v. City of Hermann*, 341 S.W.3d 673 (Mo. 2011).

in St. Louis County are not imposed to support the regulatory function to which they relate. Rather they become part of the general revenue of the municipality supporting all governmental functions of the municipality. The randomness of their imposition makes them more like taxes imposed on a limited base in this instance the operation of a motor vehicle within city limits. Accordingly, the fines, fees, and court costs more closely resemble taxes than user fees.

IV. MUNICIPAL JUSTICE AND THE U.S. CONSTITUTION

The system of municipal justice administration not only violates the Missouri constitution's taxing limitations but also may violate one or more provisions of the U.S. Constitution as applicable to the states. The Department of Justice correctly concluded that the city of Ferguson's policing and court administration violated the First and Fourth Amendments.¹⁸⁵ Listing a series of violations, such as arresting without probable cause and the use of excessive force both in violation of the Fourth Amendment¹⁸⁶ and arresting for speech critical of the police in violation of the First Amendment,¹⁸⁷ the Department of Justice also found that policing was discriminatory.¹⁸⁸ The Ferguson police randomly stop and detain people of color disproportionately to stopping whites without probable cause, a violation of Equal Protection and Due Process under the Fourteenth Amendment.¹⁸⁹ As a result of the random stops, police find expired driver's license infractions and other non-observable violations for which they issue citations. Resulting fines similarly fall disproportionately on people of color. To the extent fines and related fees leave people without sufficient means to pay for necessities, the punishment may be cruel and unusual in violation of the Eighth Amendment.¹⁹⁰

As taxes,¹⁹¹ the fines are discriminatory without any rational basis for that discrimination. Since they deprive low income individuals of funds necessary to meet basic needs, those taxes, in addition to violat-

185. DOJ FERGUSON POLICE REP., *supra* note 8, at 15–41, concludes that a variety of Ferguson's policing practices violate the First and Fourth Amendments to the U.S. Constitution. Fines stemming from those unconstitutional practices also would violate the First and Fourth Amendments.

186. U.S. CONST. amend. IV.

187. U.S. CONST. amend. I.

188. DOJ FERGUSON POLICE REP., *supra* note 8, at 4 (concluding there is evidence of racial bias in policing practices).

189. U.S. CONST. amend. XIV, § 1.

190. U.S. CONST. amend. VIII.

191. *See supra* Part III.

ing the Missouri constitution, may resemble other taxes that the courts have determined to be irreconcilable with the U.S. Constitution because they violate the Equal Protection clause of the Fourteenth Amendment.¹⁹² Enforcement of the fines with incarceration raises the specter of use of the municipal jails as debtors' prisons in violation of the Fourteenth Amendment.¹⁹³

CONCLUSION

Needless to say, this issue of revenue policing and courts is not unique to Missouri. Several states have constitutional limitations on tax increases and new taxes.¹⁹⁴ Whenever local governments transform what was historically a police and court law enforcement function into a revenue function, state constitutional taxing limitations should apply to prevent the use of police to raise revenue. As Missouri survey results demonstrate,¹⁹⁵ revenue-based policing undermines the legitimacy of and public respect for the police and the courts. Appropriate cynicism about the function of police stops, the issuance of citations, and the fairness of the courts, distances the population from the police and the remainder of the law enforcement structure. If police and courts only, or primarily, are interested in money, they are not useful, or reliable, to protect the public by enforcing the law. Their objectivity concerning law enforcement becomes questionable so that people follow their instructions only because of force of arms. The underlying question becomes whether an offender is an offender at all or merely a target wearing a dollar sign. Whatever the answer to that question, revenue-based justice administration threatens the maintenance of and respect for the rule of law in the United States.

192. *See Generally* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (determining that a poll tax is invidiously discriminatory under the Equal Protection Clause).

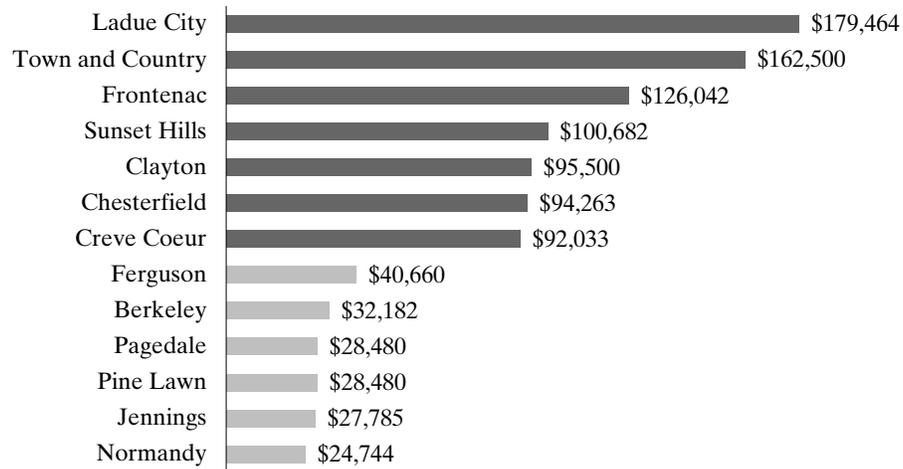
193. U.S. CONST. amend. XIV. *See generally* Bearden v. Georgia, 461 U.S. 660 (1983) (requiring assessment of ability to pay as a condition to incarceration); Andrea Marsh and Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y REV. 93 (2015).

194. Bert Waisanen, *State Tax and Expenditure Limits—2010*, NAT'L CONF. OF ST. LEGIS., <http://www.ncsl.org/research/fiscal-policy/state-tax-and-expenditure-limits-2010.aspx> (last visited Aug. 30, 2017).

195. *See* MUNICIPAL COURTS SURVEY, *supra* note 32 and accompanying text.

APPENDIX A

Graph. Median Household Income of Communities Where Municipal Court Systems Were Studied in Saint Louis County¹⁹⁶



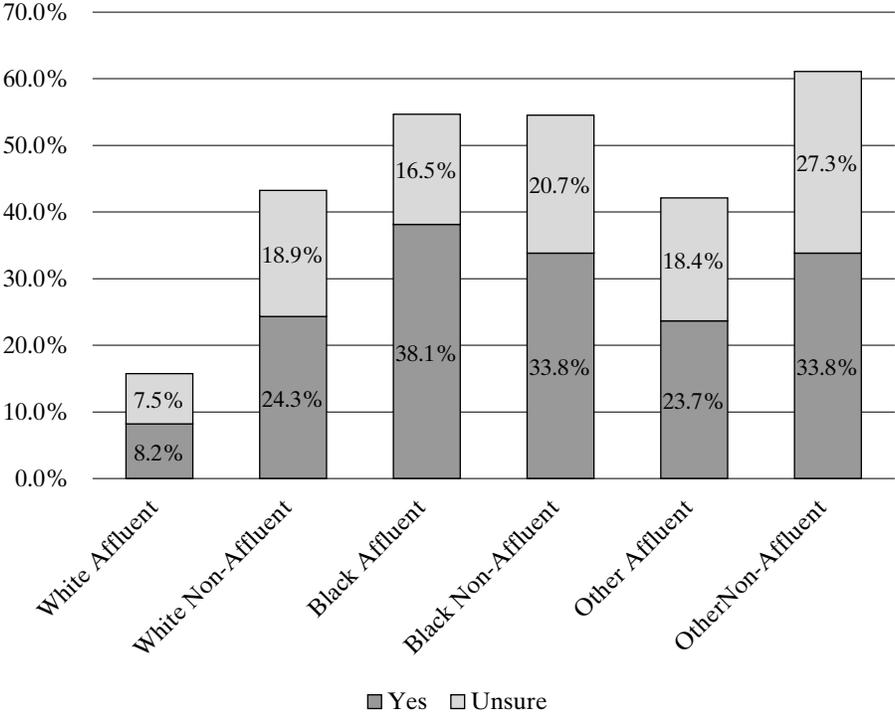
Source: U.S. Census Bureau, American Community Survey 2010-2014 Estimates

196. See generally MUNICIPAL COURTS SURVEY, *supra* note 32 fig.1.

APPENDIX B

The following graph reveals that a majority of both whites and blacks expressed the opinion that they were stopped more to raise revenue than to promote public safety. In the affluent communities, a similar percentage of whites (56.6%) and blacks (58.2%) felt that they were stopped “more to simply raise revenue for the city” than “to promote public safety.”

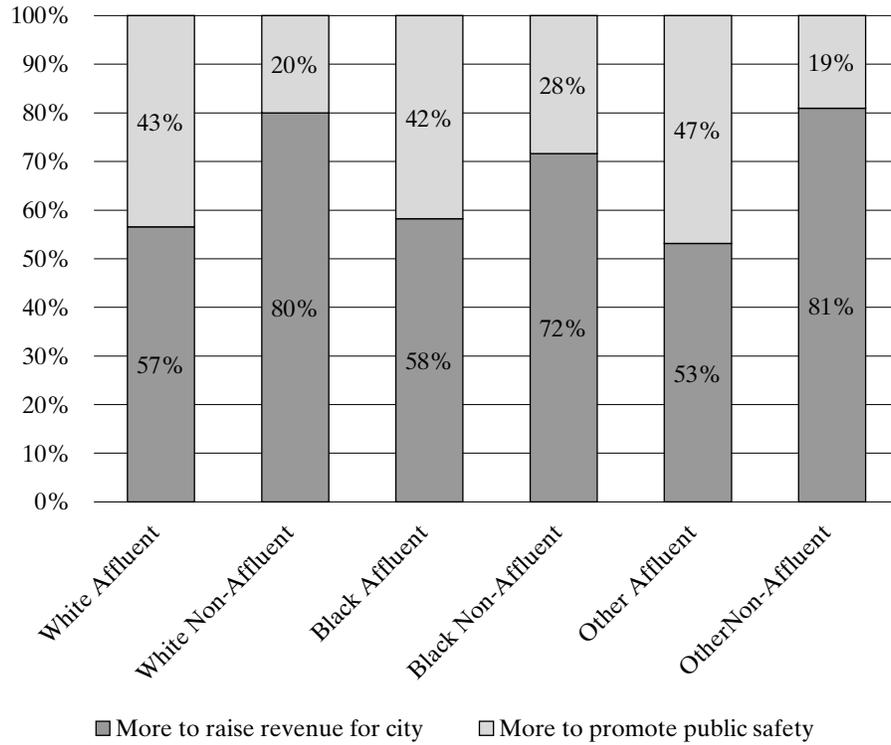
Graph. Ticketed to promote public safety or to raise revenue¹⁹⁷



197. *Id.* fig.13.

APPENDIX C

Graph. Racial profiling played a role in the traffic stop¹⁹⁸



198. *Id.* fig.9.

Religious Freedom: The Original Civil Liberty

LOREN E. MULRAINE*

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*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”*¹

INTRODUCTION

What exactly is a “civil right?” What is a “civil liberty?” Are they synonymous? To the average American, the term “civil rights” conjures up images of the Jim Crow south, Rosa Parks, the Montgomery Bus Boycott, James Meredith’s integration of the University of Mississippi, the March on Washington, the Edmund Pettus Bridge, and the Freedom Riders in Mississippi. Indeed, these are some of the most iconic events and individuals in modern U.S. history. The legal area known as “civil rights” has traditionally revolved around the ba-

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1. U.S. CONST. amend. I.

sic right to be free from unequal treatment based on certain protected characteristics such as race, gender or disability in settings such as employment and housing. The term “civil rights” also refers to the individual’s rights as a citizen to participate freely and equally in politics and public affairs in order to actively promote his or her preferred public policy alternatives. This is often done through lobbying policy-makers and/or through personal participation in the electoral process.² The term “civil liberties” generally refers more specifically to the protection of the individual’s rights to form and express his or her own preferences or convictions and to act freely upon them in the private sphere without undue or intrusive interference by the government. So there is a distinction to be made between “civil rights,” i.e., the basic right to be free from unequal treatment, and “civil liberties,” which are basic freedoms guaranteed by the Bill of Rights or interpreted through the years by courts and lawmakers.³ Examples of “civil liberties” include:

- Freedom of speech
- Freedom of the press
- Freedom of peaceful assembly
- Freedom of religion
- The right to bear arms
- The right to privacy
- The right to be free from unreasonable searches and seizures of property
- The right to a jury trial
- The right to travel freely
- The right to be free from self-incrimination
- The right to marry
- Freedom from cruel and unusual punishments
- The right to legal counsel
- The right to vote.

Some of these rights are directly stated in the Bill of Rights or subsequent amendments, while others were developed over the course of decades or centuries of case law.

2. Dr. Paul M. Johnson, *A Glossary of Political Economy Terms*, AUBURN U., http://www.auburn.edu/~johnspm/gloss/civil_rights_civil_liberties (last visited Sept. 4, 2017).

3. Mark Percy, *What are Civil Liberties? – Definition, Examples & Cases*, STUDY, <http://study.com/academy/lesson/what-are-civil-liberties-definition-examples-cases.html> (last visited Sept. 4, 2017).

Civil liberties are freedoms that belong to every individual, simply because they are human beings. The Declaration of Independence asserts the creed of the American people, as it declares that all men are endowed with certain inalienable rights, such as life, liberty, and the pursuit of happiness.⁴ However, civil liberties are not gifted by governmental action – they are rights of birth. The government cannot take away or change these rights by making or eliminating legislation.⁵ So an essential difference between civil rights and civil liberties revolves around who is being affected and what right is being affected.

We generally consider the birth of modern civil rights as occurring some time during or around the mid-twentieth century. It was during this period that our nation experienced growing pains as it evolved from the acceptance of segregation and disenfranchisement into a nation in which all citizens possess equal opportunities in education, housing, employment and socio-economics.

The birth of civil liberties in the United States can be traced back to the very birth of this nation. In fact, the original colonists to the “new world” were motivated in part by a search for civil liberties. One of the most essential of these civil liberties, the one we could in fact call the original civil liberty, was the right to the freedom of religion.

This article discusses the legal and cultural reasons for the original protections of religious freedom and the heightened necessity to protect religious freedom as we enter into a period of deep geopolitical unrest and a predictable conflict and controversy between diverse faiths – a diversity that is often highlighted by ethnic differences and myopic nationalism. Ultimately, the article calls for a renewed vigilance by those who respect the foundation on which our nation was built, that of respect for the individual’s right to choose if, when, and how they worship – without interference from, or coercion of government forces.

I. HISTORY

On December 16, 1689, the Parliament of England passed the English Bill of Rights, thereby creating a separation of powers, limiting the powers of the king and queen, enhancing the democratic elec-

4. *Civil Liberties*, LEGAL DICTIONARY, <https://legaldictionary.net/civil-liberties/> (last visited Sept. 4, 2017).

5. *Id.*

tion and bolstering freedom of speech.⁶ The English Bill of Rights guaranteed certain rights to the citizens of England from the power of the crown.⁷ This bill was later enhanced by the Act of Settlement in 1701.⁸ Both of these acts contributed to the establishment of parliamentary sovereignty, giving the legislative body of Parliament absolute sovereignty and making it supreme over all other government institutions.⁹ The United States Bill of Rights was modeled after the English Bill of Rights,¹⁰ which shrunk many of the powers of the crown.¹¹

When the British settlers came to the new world and established the thirteen original colonies, they brought along with them the British thought process on government. A major element of this process was the importance of ensuring that the government would protect the personal rights of its' citizens.¹² This led to many of our modern civil liberties being incorporated into the Bill of Rights.¹³

The Second Continental Congress met at the Pennsylvania State House, Philadelphia's Independence Hall, in July of 1776. During this meeting, the Congress voted to adopt what became known as the Declaration of Independence, a document originally drafted by Thomas Jefferson and subsequently edited by Congress. Originally, Congress had voted to declare independence on July 2, 1776, more than a year after the outbreak of the American Revolutionary War, but the final document declaring independence was approved on July 4, thus resulting in what is celebrated today as Independence Day.¹⁴

The preamble to the Declaration of Independence states:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalien-

6. Jennifer Williams, *What is the English Bill of Rights? – Definition, Summary & History*, STUDY, <http://study.com/academy/lesson/what-is-the-english-bill-of-rights-definition-summary-history.html> (last visited Sept. 4, 2017).

7. *Id.*

8. *Id.*

9. *Id.*

10. *English Bill of Rights 1689—An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, YALE L. SCH., http://avalon.law.yale.edu/17th_century/england.asp (last visited Sept. 4, 2017).

11. *Id.*

12. Jennifer Williams, *Origins of Civil Liberties in the United States: History & Timeline*, STUDY, <http://study.com/academy/lesson/origins-of-civil-liberties-in-the-united-states-history-timeline.html> (last visited Sept. 4, 2017).

13. *Id.*

14. Robert J. Allison, *The History of America's Independence Day*, HARV. U., <https://www.extension.harvard.edu/inside-extension/history-americas-independence-day> (last visited Sept. 4, 2017).

able Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government. . . .”¹⁵

Chief among these rights, as evidenced by the impetus for the migration of many of the first British colonists, was the right to freely practice religion, without the interference of the government.¹⁶ To be clear, the flight from religious persecution was not the sole reason for immigration to the “New World.” Many European settlers came to the Americas to increase their wealth and broaden their influence over world affairs.¹⁷ The Spanish were among the first Europeans to explore the New World and the first to settle in what is now the United States.¹⁸ The first British colony was founded at Jamestown, Virginia, in 1607 and by 1650 England had established a dominant presence on the Atlantic coast.¹⁹ British settlers migrated to escape some of the challenges that were plaguing their homeland including overpopulation, economic challenges, religious persecution and poverty. England’s issues at the time included an unstable economy as inflation and poverty grew, leading many early immigrants to seek out new sources of economic prosperity in the New World.²⁰ Many were indentured servants who worked in the colonies to pay off their debts to the British government. There were, also, an estimated 50,000 convicts sent by Great Britain to the American colonies during the seventeenth century.²¹

Even with a myriad of reasons for migrating to the New World, religious freedom was a leading motive for the colonists.²² The Puritans, Pilgrims, and other groups sought to establish their religion in their new homeland, away from the unrest, oppressive political climate, and rampant persecution that existed at that time in England.²³

15. U.S. CONST. art. II, § 1, cl. 3.

16. *Colonial America*, LIBRARY OF CONGRESS, http://www.americaslibrary.gov/jb/colonial/jb_colonial_subj.html (last visited Sept. 4, 2017).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Why Did Colonists Come to America?*, REFERENCE, <https://www.reference.com/history/did-colonists-come-america-a695efc511db9738> (last visited Sept. 4, 2017).

21. *Id.*

22. *Id.*

23. *Id.*

In the centuries immediately before and contemporaneous to U.S. colonization, various religious sects had engaged in persecution of those who did not share their beliefs.²⁴ Often, these persecutions were governmentally authorized – as Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one form of belief had persecuted Catholics of another form of belief, and both Catholics and Protestants had from time to time persecuted Jews.²⁵ The consequences for offenses such as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines and failure to pay taxes and tithes could include fines, jail sentences, torture, and even death.²⁶

It is with this backdrop that the founding fathers labored to establish a new government that would protect civil liberties and personal rights of individuals, including freedom of religion. It is clear that the founders²⁷ possessed a strong belief that individual rights pre-date the establishment of a government, a notion supported by the powerful language “[w]e hold these truths to be self-evident,” indicating that the founders adamantly believed these rights were not just for colonists, but were in fact universal.²⁸ The writers of the Declaration believed, and we today should share the same belief, that the government’s power arises from its ability to protect the rights of its people.²⁹ Because these rights are natural rights, not reliant upon a

24. *Everson v. Bd. of Edu.*, 330 U.S. 1, 8–9 (1947).

25. *Id.* at 9.

26. *Id.*

27. The original signers of the Declaration of Independence included representatives from each of the thirteen colonies: Delaware – George Read, Caesar Rodney, Thomas McKean; Pennsylvania – George Clymer, Benjamin Franklin, Robert Morris, John Morton, Benjamin Rush, George Ross, James Smith, James Wilson, George Taylor; Massachusetts – John Adams, Samuel Adams, John Hancock, Robert Treat Paine, Elbridge Gerry; New Hampshire – Josiah Bartlett, William Whipple, Matthew Thornton; Rhode Island – Stephen Hopkins, William Ellery; New York – Lewis Morris, Phillip Livingston, Francis Lewis, William Floyd; Georgia – Button Gwinnett, Lyman Hall, George Walton; Virginia – Richard Henry Lee, Francis Lightfoot Lee, Carter Braxton, Benjamin Harrison, Thomas Jefferson, George Wythe, Thomas Nelson, Jr.; North Carolina – William Hooper, John Penn, Joseph Hewes; South Carolina – Edward Rutledge, Arthur Middleton, Thomas Lynch, Jr., Thomas Heyward, Jr.; New Jersey – Abraham Clark, John Hart, Francis Hopkinson, Richard Stockton, John Witherspoon; Connecticut – Samuel Huntington, Roger Sherman, William Williams, Oliver Wolcott; and Maryland – Charles Carroll, Samuel Chase, Thomas Stone and William Paca.

28. Matthew Clement, *We Hold These Truths to be Self-Evident*. . . , FREEDOMWORKS (July 10, 2010), <http://www.freedomworks.org/content/we-hold-these-truths-be-self-evident%E2%80%A6>.

29. *Id.*

gift from the government, it follows logically that the government does not have the authority to take these rights away.³⁰

The principle of distinguishing the rights of the church from the rights of the state, declared in the First Amendment to the U.S. Constitution,³¹ does not require an individual to agree with the beliefs and practices of another religion. However, it does require acceptance of divergent beliefs, provided they do not infringe upon the rights of others.³² Separating the rights and powers of the church from the rights and powers of the government “simply means that the government should be secular; the place for religion is in one’s home, church, synagogue, or mosque.”³³ “Separating religious rights from state authority and power is not an expression of hostility to religion, but instead affirms the lessons that history teaches about the importance of the government being strictly secular.”³⁴ This principle was established to resolve issues related to diverse faiths in America, however, efforts to achieve religious liberty have been a source of dramatic conflict throughout history.³⁵

It is ironic that historically, the very colonists who sought asylum in the New World to freely practice their religion became oppressors themselves of those whose religious beliefs differed from their own. For example, Roger Williams was exiled for advocating respect for all religious faiths and for advocating delineation of the freedom to practice religion from powers of the government to authorize or control such practice in any manner, a principle not found in European cultural heritages.³⁶

To establish Old World practices, dominant religious groups expected their faith to be designated as the established church of their colony and to be supported by an allotment of local tax dollars.³⁷ Religious intolerance was so widespread that most colonies enacted blasphemy laws against those who were not of the colony’s dominant

30. *Id.*

31. U.S. CONST. amend. I.

32. KENT L. KOPPELMAN, UNDERSTANDING HUMAN DIFFERENCES: MULTICULTURAL EDUCATION FOR A DIVERSE AMERICA 135 (Linda Bishop et al. eds., 4th ed. 2017).

33. ERWIN CHEREMINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 104 (2010).

34. *Id.*

35. *Id.*

36. Edward J. Eberle, *Roger Williams’ Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 461–62 (1999).

37. KOPPELMAN, *supra* note 32, at 135–36.

faith.³⁸ The Massachusetts Puritans had such disdain for the Quakers that their blasphemy laws, designed to force the Quakers out of the colony, threatened death as a punishment. If exiled, when the Quakers returned they were promptly arrested.³⁹ Four Quakers were actually executed between 1659 and 1661.⁴⁰ A 1699 Maryland law punished blasphemers by branding them with a “B” for a first offense, having a hole burned through their tongue with a red-hot iron for a second offense, and property seizure and confiscation for a third offense.⁴¹ Some colonies, under the guise of humanitarian charity, allowed blasphemers to avoid punishment by publicly asking to be forgiven.⁴² Preachers from the non-dominant denominations were often forced to refrain from preaching. Those who didn’t could face severe consequences, as demonstrated in a 1771 incident in which a sheriff and Anglican minister disrupted a church service by arresting a Baptist minister and whipping him in a field.⁴³

Even the colonies that were established as refuges for religious freedom for all faiths had their speed bumps. Rhode Island’s Roger Williams, Pennsylvania’s William Penn and Maryland’s Lord Baltimore sought to create environments where diverse faiths would be welcome and could thrive, and while their colonies were certainly more tolerant than others, minority denominations were still met with resistance.⁴⁴

While attending elementary school at P.S. 78 in the Bronx, New York, I had no idea the historical magnitude of the school’s namesake. The school, in the Eastchester section of the Bronx, is named for Anne Hutchinson, one of the most significant figures in the religious freedom history of America.⁴⁵ When the Puritans came to the New World, they sought to practice their religion freely. Antithetically,

38. *Id.* at 136.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* Lord Baltimore originally intended Maryland to be a refuge for English Catholics. “Baltimore’s commitment to religious tolerance attracted immigrants from diverse faiths, but Maryland’s experiment failed when the Church of England became its established church in 1702. Because three other faiths (Presbyterians, Anabaptists, and Quakers) had more members, the Church of England was established on condition that religious tolerance would be maintained” for current groups, but when Jews and Unitarians migrated there, they were not allowed to settle in Maryland. *Id.* at 137.

45. Stevenson Swanson, *Who Was Anne Hutchinson?*, PATCH (June 10, 2011), <https://patch.com/new-york/pelham/who-was-anne-hutchinson>.

they had no intention of allowing others the same freedom.⁴⁶ When Anne Hutchinson expressed sentiments contrary to Puritan beliefs, she was excommunicated and exiled.⁴⁷ Hutchinson was a Puritan spiritual adviser and a participant in the Antinomian Controversy, also known as the Free Grace Controversy in the Massachusetts Bay Colony from 1636 to 1638.⁴⁸ According to historian Emery Battis, Anne Hutchinson was at the center of “a theological tempest, which shook the infant colony of Massachusetts to its very foundations.”⁴⁹ Hutchinson, along with her brother-in-law, Pastor John Wheelwright, Boston minister John Cotton, and Henry Vane, a magistrate and governor of the colony, dared to espouse the theory of the covenant of grace, which was in direct conflict with the prevailing Preparationist viewpoint preached by the Puritans.⁵⁰ In other words, Hutchinson and the other Antinomians preached that salvation was achieved by grace as opposed to salvation by works.⁵¹

According to the Preparationist theology, there were a number of “works” that were necessary before a person could believe in Jesus Christ.⁵² John Cotton and Anne Hutchinson regarded Preparationism as a covenant of works, which led to Hutchinson being banished from the Massachusetts Bay Colony in 1638.⁵³ Historian Perry Miller called the controversy a “dispute over the place of unregenerate human activity, or ‘natural ability,’ preparatory to saving conversion.”⁵⁴ After Hutchinson’s exile from Massachusetts, she and her family settled in Providence, Rhode Island and she eventually made her way to New Netherlands (New York) after her husband’s death.⁵⁵ The Hutchin-

46. KOPPELMAN, *supra* note 32, at 135.

47. *Id.*

48. Anne Hutchinson, AMERICAN HISTORY USA, <https://www.americanhistoryusa.com/topic/anne-hutchinson/> (last visited Sept. 5, 2017).

49. EMERY BATTIS, SAINTS AND SECTARIES: ANNE HUTCHINSON AND THE ANTINOMIAN CONTROVERSY IN THE MASSACHUSETTS BAY COLONY 6 (1962).

50. DOROTHY CARPENTER, WILLIAM VASSALL AND DISSENT IN EARLY MASSACHUSETTS 45–47 (2004), <http://home.gwi.net/~sscarmen/vassall/Vassall.pdf>.

51. *Anne Hutchinson and the Puritan Trials*, AMERICAN HISTORY USA, <https://www.americanhistoryusa.com/anne-hutchinson-and-puritan-trials> (last visited Sept. 4, 2017).

52. *See generally* MICHAEL J. McClymond & GERALD R. McDERMOTT, THE THEOLOGY OF JOHNATHAN EDWARDS (2011).

53. *Id.*

54. William K.B. Stoeber, *Nature, Grace and John Cotton: The Theological Dimension in the New England Antinomian Controversy*, 44 CHURCH HIST. 22, 22 (1975).

55. EVA LEPLANTE, AMERICAN JEZEBEL: THE UNCOMMON LIFE OF ANNE HUTCHINSON, THE WOMAN WHO DEFIED THE PURITANS 228 (2006).

son River, the Hutchinson River Parkway and various schools are among the existing tributes to Anne Hutchinson's legacy.⁵⁶

The Anne Hutchinson story is just one of the many that underscore the origins and the importance of the principle of protecting free exercise of religion from the intrusions of the government. Her story underscores that any political movement that allows for the government to prefer one religion or religious practice over another is an unacceptable intrusion by the government into an individual's personal spirituality.

Even though the majority of the founding fathers were European Protestants, there was little reference to religion in the original Constitution.⁵⁷ In fact, they intentionally chose to turn away from their European traditions and create the first secular government.⁵⁸ Rather than follow the tradition of most European governments whose federal documents cited the authority of God, the authors of the U.S. Constitution cited "We the People" as the source of the new government's power and authority, deliberately excluding any reference to God.⁵⁹ James Madison, in particular, saw the danger of entwining religion with government and lobbied against the establishment of a national religion. Madison and others recognized that coercion is inevitable unless there is a clear distinction between the civil liberty rights of individuals and the authority of the government with regard to religious practice and establishment.⁶⁰ The Supreme Court has long held that coercing a person into participating in religious activities violates both the Free Exercise and the Establishment clauses of the First Amendment.⁶¹ Ultimately, the framers of the Constitution affirmed the principle of religious freedom by stating "[n]o religious test shall ever be required as a qualification to any office or public trust under the United States."⁶²

56. Swanson, *supra* note 45. Hutchinson and her family had the misfortune and bad timing of settling in the tiny settlement just north of Pelham Bay. They were ultimately brutally murdered by native warriors who went on a rampage in the tiny settlement above Pelham Bay, where the Hutchinson family lived to show their displeasure with the leadership of the Dutch governor William Kieft, who was said to be inhumane and treacherous.

57. *See generally* U.S. CONST.

58. KOPPELMAN, *supra* note 32, at 123.

59. RON CHERNOW, *ALEXANDER HAMILTON* 235 (2004).

60. Rob Boston, *James Madison and Church-State Separation: What the Father of the Constitution Thought About "Faith-Based" Government Programs*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND ST. (Mar. 2011), <https://www.au.org/church-state/march-2001-church-state/featured/james-madison-and-church-state-separation>.

61. CHERMERINSKY, *supra* note 33, at 113.

62. U.S. CONST. art. IV, § 3.

Thomas Jefferson used the “Statute for Religious Freedom” he had written for Virginia’s legislature in 1786 when he drafted the First Amendment’s explicit guarantee of religious freedom.⁶³ At that time, Virginia’s government had become dominated by the church and the colonists recognized that individual religious liberty could be achieved best under a government which was stripped of the power to tax, support, or assist any religious groups or interfere with the beliefs of any religious individual or group.⁶⁴ By this time, many states had established preferences for various denominations, if not specifically declaring state religions (*see Chart 1 below*).⁶⁵

Chart 1
COLONIES WITH STATE RELIGIONS

COLONY	DENOMINATION	DISESTABLISHED
Connecticut	Congregational	1818
Georgia	Church of England	1789
Maryland	Church of England	1776
Massachusetts	Congregational	1834
New Hampshire	Congregational	1790
North Carolina	Church of England	1776
South Carolina	Church of England	1790
Florida	Church of England	1783
Virginia	Church of England	1786

Church leaders and political leaders alike supported the separation of church and state largely because they had likely seen religious persecution up close and personal. They equated religious persecution with political persecution and cited the biblical passage in Mark 12 as support for the separation of church and state:

And when they were come, they say unto him, Master, we know that thou are true, and carest for no man: for thou regardest not the person of men, but teachest the way of God in truth: Is it lawful to give tribute to Caesar, or not? Shall we give, or shall we not give? But he, knowing their hypocrisy, said unto them, Why tempt ye me? Bring me a penny, that I may see it. And they brought it. And he

63. D. L. ECK, *A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION* 40–43 (2001).

64. *Everson v. Bd. Of Edu.*, 330 U.S. 1, 11 (1947).

65. Table information was taken from a Wikipedia page. *See Separation of Church and State in the United States*, WIKIPEDIA (Sept. 5, 2017 6:13PM), https://en.wikipedia.org/wiki/Separation_of_church_and_state_in_the_United_States.

saith unto them, Whose is this image and superscription? And they said unto him, Caesar's. And Jesus answering said unto them, Render to Caesar the things that are Caesar's, and to God the things that are God's. And they marveled at him.⁶⁶

Leading evangelicals were content that religion should at all times be a matter between God and individuals, and supported Thomas Jefferson's letter encouraging a "wall of separation between church and state."⁶⁷ James Madison was equally lyrical in expressing his support for the separation of church and state. When the 1785-86 Virginia legislature was in the process of renewing Virginia's tax levy for the support of the established church, Madison wrote his "Memorial and Remonstrance Against Religious Assessments."⁶⁸ Madison argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.⁶⁹

By the time the U.S. Constitution was ratified, freedom of religion was among the most widely recognized "inalienable rights," protected by various state laws.⁷⁰ In the words of James Madison, "[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society."⁷¹ Madison was among the most vociferous proponents of separating the rights of freedom of religion from government intrusion. He agreed with Thomas Paine that toleration is despotism. In 1785, he stated it this way: "[w]ho does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects."⁷²

66. *Mark* 12:14-17 (King James).

67. DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 7 (2002).

68. *Everson*, 330 U.S. at 12.

69. *Id.*

70. Frederick Gedicks & Michael McConnell, *The Free Exercise Clause*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-i/the-free-exercise-clause/interp/32> (last visited Sept. 4, 2017).

71. *Id.*

72. JAMES MADISON, JAMES MADISON'S MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS 2 (1785).

Madison had experienced with his own eyes the persecution that religious tyrants had imposed upon those who dared to disagree. He had seen the jailing of those who had published their religious sentiments that were not aligned with the predominant church.⁷³

Madison's Memorial and Remonstrance, drafted in 1785, was authored to convince the General Assembly of the Commonwealth of Virginia of the dangers of intermingling government with religion. This document is one of the two major foundational pieces for the First Amendment.⁷⁴ Madison's impetus for creating the document was to fight back against "[a] Bill establishing a provision for Teachers of the Christian Religion."⁷⁵ In an abbreviated form, here are the fifteen points that James Madison articulated as he remonstrated against the bill:

We remonstrate against the bill,

Because, we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe it our Creator and the Manner of discharging it can be directed only by reason and conviction, not by force or violence.

Because, if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body.

Because, it is proper to take alarm at the first experiment on our liberties.

Because, the bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached.

Because the bill implies either that the Civil Magistrate is a competent Judge of Religions truth; or that he may employ Religion as an engine of Civil policy.

Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion.

Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had contrary operation.

Because the establishment in question is not necessary for the support of Civil Government.

73. Boston, *supra* note 60.

74. Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia 1776-1786: New Light on the Jeffersonian Model of Church State Relations*, 69 N.C. L. REV. 159, 172-73 (1990).

75. See *Everson*, 330 U.S. at 63-64; See MADISON, *supra* note 72.

Because the proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens.

Because, it will have a like tendency to banish our Citizens.

Because, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects.

Because, the policy of the bill is adverse to the diffusion of the light of Christianity.

Because attempts to enforce by legal sanctions, acts obnoxious to so slacken the bands of Society.

Because a measure of such singular magnitude and delicacy ought not to be imposed without the clearest evidence that it is called for by a majority of citizens: and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured.

Because, finally, “the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience is held by the same tenure with our other rights. If we recur to its origin it is equally the gift of nature . . .”⁷⁶

Madison’s Memorial and Remonstrance resulted in the legislation being tabled until the next session, at which time it died in committee and birthed the assembly’s enactment of the “Virginia Bill for Religious Liberty” originally written by Thomas Jefferson.⁷⁷

The preamble to the Virginia Bill for Religious Liberty read:

Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . .; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.⁷⁸

76. *Id.* at 63–71.

77. *See id.* at 12.

78. *Id.* at 12–13.

The statute itself enacted:

That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or beliefs; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.⁷⁹

On November 4, 1796, the United States signed the Treaty of Tripoli, which included the following language:

As the Government of the United States of America is not, in any sense, founded on the Christian religion; as it has in itself no character of enmity against the laws, religion, or tranquility, of Mussulmen (Muslims); and as the said States never entered into any war or act of hostility against any Mahometan nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.⁸⁰

Unanimously ratified by the Senate on June 7, 1797, and signed by President John Adams on June 10, 1797, this treaty became incorporated as part of “the supreme Law of the Land.”⁸¹

With the language of the First Amendment protecting the “free exercise of religion,” courts have from the beginning faced a challenge defining the parameters of the rights of believers who claim rights to unconventional religious practices. Among the early notable cases was *Reynolds v. United States*, where the U.S. Supreme Court ruled against the practice of polygamy by members of the Church of Jesus Christ of Latter-day Saints.⁸² The Court held that “laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”⁸³ The Court in *Reynolds* makes it clear that the ruling is speaking to the concern that allowing believers to disobey general laws would undermine the value of government laws applied to society as a whole.⁸⁴ The Court published a lengthy section from Jefferson’s letter and concluded that the

79. *A Bill for Establishing Religious Freedom*, FOUNDERS ONLINE NATIONAL ARCHIVES (June 18, 1799), <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082#TSJN-01-02-0224-fn-0002>.

80. Treaty of Peace and Friendship, Libya-U.S., Nov. 4, 1796, 8 Stat. 154.

81. *Id.*

82. *See Reynolds v. United States*, 98 U.S. 145, 168 (1878).

83. *Id.* at 166.

84. *Gedicks, supra* note 70.

letter “may be accepted almost as an authoritative declaration of the scope and effect of the Amendment thus secured.⁸⁵ Congress was deprived of all legislative power over mere religious opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.⁸⁶ The Court then summarized Jefferson’s intent for separation of church and state: “[t]he rightful purposes of civil government are for its officers to interfere when principles break out into overt acts against peace and good order. In [this] . . . is found the true distinction between what properly belongs to the church and what to the State.”⁸⁷

II. THE TWENTIETH CENTURY AND BEYOND

A. The Establishment Clause

Justice Robert Jackson, in his opinion for the majority in the 1943 case *West Virginia v. Barnette*, wrote:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein If there are any circumstances which permit an exception, they do not now occur to us.⁸⁸

The twentieth century found the Court continuing the debate over the original understanding of the Religion Clauses – the name often applied to the combined Establishment and Free Exercise Clauses which enunciate that “Congress shall make no law respecting an *establishment* of religion or prohibiting the *free exercise* thereof.”⁸⁹ Typically, a governmental action that is viewed to benefit religion is challenged under the Establishment Clause, while a governmental action that burdens or disfavors religion gives rise to a challenge under the Free Exercise clause.⁹⁰

In *Cantwell v. Connecticut*, while the Court recognized that governments may not “unduly infringe” religious exercise, the Court cited *Reynolds* in reiterating that conduct remains subject to regulation for

85. *Reynolds*, 98 U.S. at 164.

86. *Id.*

87. *Id.* at 163.

88. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

89. U.S. CONST. amend. I (emphasis added).

90. ARTHUR D. HELLMAN ET AL., *FIRST AMENDMENT LAW: FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION* 867 (2d. ed. 2010).

the protection of society.⁹¹ In *Wisconsin v. Yoder*, a case involving Amish families who refused to send their children to school beyond the age of 14, the Court held that the government may not enforce even a religiously neutral law that applies generally to all or most of society unless the public interest in enforcement is compelling.⁹²

Justice Black's interpretation was that the framers of the Constitution clearly intended a wall of separation as evidenced by his opinion in the seminal case *Everson v. Board of Education*.⁹³ Justice Rehnquist, on the other hand, viewed the issue differently than Justice Black and Thomas Jefferson. Rehnquist, in his dissent in *Wallace v. Jaffree*, favored a non-preferentialist approach among religions that would allow government to favor religion over irreligion.⁹⁴ Justice Rehnquist found himself in the 5-4 minority in *Wallace*, a case where the Court held that a state law authorizing a one-minute period of silence in all public schools "for meditation or voluntary prayer" violated the Establishment Clause.⁹⁵ Seven years after *Wallace* was decided, in his concurring opinion in *Lee v. Weisman*,⁹⁶ Justice Souter made clear his interpretation of the Constitution opposed the non-preferentialist approach of Justice Rehnquist, and instead supported maintaining Jefferson's high and impregnable "wall of separation" between church and state.⁹⁷ In a 5-4 decision, the Court in *Lee v. Weisman* held that inviting a member of the clergy to offer a prayer at an official public school graduation ceremony violated the Establishment Clause.⁹⁸

Many of the cases challenging the Establishment Clause have dealt with financial aid to religiously affiliated institutions such as schools. In a 1930 Supreme Court of Louisiana case, *Cochran v. Board of Education*, the court upheld a Louisiana law that provided for the purchase of textbooks dealing with secular subjects for use by children enrolled in parochial schools in the state.⁹⁹ Here, the court reflected what later came to be known as the "child-benefit theory," which came to prominence seventeen years later in Justice Black's

91. See *Cantwell v. Conn.*, 310 U.S. 296, 303-04 (1940).

92. See *Wisconsin v. Yoder*, 406 U.S. 205, 215, 220, 234 (1972).

93. See *Everson*, 330 U.S. at 16.

94. See *Wallace v. Jaffree*, 472 U.S. 38, 113-14 (1985).

95. See *id.* at 60-61.

96. See *Lee v. Weisman*, 505 U.S. 577, 616 (1992).

97. HELLMAN, *supra* note 90, at 868.

98. *Lee*, 505 U.S. at 588.

99. *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370, 373, 375 (1930).

majority opinion in *Everson v. Board of Education*.¹⁰⁰ In *Cochran*, the appellants, as citizens and taxpayers of the State of Louisiana, brought suit to restrain the State Board of Education and other state officials from expending any part of the severance tax fund in purchasing schoolbooks and in supplying them free of cost to the school children of the State.¹⁰¹ The state statutes directed the Board of Education to provide “school books for school children free of cost to such children.”¹⁰² The Supreme Court of Louisiana, following its decision in *Borden v. Louisiana State Board of Education*,¹⁰³ held that these acts were not repugnant to either the state or the Federal Constitution.¹⁰⁴ The state argued that the appropriations were made for the specific purpose of purchasing schoolbooks for the use of the school children of the state, free of cost to them.¹⁰⁵ It was for their benefit and the resulting benefit to the state that the appropriations were made. The state further argued that the children alone were the beneficiaries and not the schools themselves.¹⁰⁶ In affirming the Supreme Court of Louisiana, the U.S. Supreme Court held that:

[V]iewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.¹⁰⁷

Oftentimes, this aid is an indirect benefit as was the case in *Everson v. Board of Education*.¹⁰⁸ In *Everson*, a citizen challenged a New Jersey statute that reimbursed parents for the actual costs of transportation to and from elementary and secondary schools.¹⁰⁹ This reimbursement went to parents of school-aged children, regardless of whether they attended private parochial schools with religious affiliations.¹¹⁰ The Court found the statute did not violate the Establish-

100. *Id.* at 347–75.

101. *Id.* at 373.

102. *Id.* at 374.

103. *Id.*

104. *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370, 374 (1930).

105. *Id.*

106. *Id.* at 375.

107. *Id.*

108. *Everson*, 330 U.S. at 1.

109. *Id.* at 3.

110. *Id.*

ment Clause.¹¹¹ Justice Hugo Black in his opinion invoked both the “no aid” principle – [n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion; and the “equal aid” principle – [the state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith or lack thereof, could be prohibited from receiving the benefits of public welfare legislation.¹¹² “This principle guarantees equality among religions as well as equality between religious and secular interests; it prohibits both discrimination in favor of religion and discrimination against religion.”¹¹³ Justice Black wrote that New Jersey, in providing state funding for bus transportation to parochial school students, had not violated the Establishment Clause but noted that the Clause “means at least this: [n]either a state nor the Federal Government can pass laws which aid one religion, aid all religions, or prefer one religion over another.”¹¹⁴ Relying on Jefferson’s “wall of separation” metaphor, Justice Black employed a “child benefit” theory as the reason to uphold the New Jersey practice, a practice that “requires the state to be neutral” but not an adversary.¹¹⁵

In a 1971 Supreme Court case, *Lemon v. Kurtzman*,¹¹⁶ the Court spoke to the three main evils against which the Establishment Clause was intended to afford protection: “sponsorship, financial support, and active involvement of the sovereign in religious activity.”¹¹⁷ *Lemon* established a three-part test, later modified by the holding in *Agostini v. Felton*.¹¹⁸ For inquiries into legislative purpose, the Lemon Test requires that the statute first must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster “an excessive government entanglement with religion.”¹¹⁹ *Lemon*, struck down two state statutes, one in Rhode Island and the other in Penn-

111. *Id.* at 18.

112. HELLMAN, *supra* note 90, at 897.

113. *Id.*

114. *Everson*, 330 U.S. at 15.

115. THE CONSTITUTION & RELIGION: LEADING SUPREME COURT CASES OF CHURCH AND STATE 47 (Robert S. Alley ed. 1999).

116. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

117. *Id.* at 612; *see also* *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970).

118. *See generally* *Agostini v. Felton*, 521 U.S. 203 (1997).

119. *Lemon*, 403 U.S. at 612–13.

sylvania, that provided state aid to church-related elementary and secondary schools.¹²⁰

The Rhode Island Salary Supplement Act appropriated salary supplements up to 15% for teachers of secular subjects in nonpublic elementary schools, to be paid directly to the teacher, so long as the teacher's salary plus state supplement did not exceed the maximum paid to teachers in the state's public schools¹²¹ Approximately 25% of the state's students attended nonpublic schools; approximately 95% of these pupils attended Roman Catholic parochial schools.¹²² All of the teachers who applied for the supplement were employed by Catholic schools¹²³ The Pennsylvania Nonpublic Elementary and Secondary Education Act authorized the State to directly reimburse nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials¹²⁴ More than 96% of the affected students attended church-related schools, and most of these schools were affiliated with the Roman Catholic church.¹²⁵

Agostini v. Felton,¹²⁶ which originally held a New York statute to be unconstitutional using *Lemon* as the precedent, was later overturned by the U.S. Supreme Court.¹²⁷ In *Agostini*, the Court held that New York's Title I program did not run afoul of any of the "three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."¹²⁸ Subsequently it was held that "a federally-funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards" such as those present in the instant case.¹²⁹

Following the lead of *Agostini*, the Court held in *Mitchell v. Helms*¹³⁰ that aid received under Chapter 2 of the Education Consoli-

120. *Id.* at 613–14.

121. HELLMAN, *supra* note 90, at 898.

122. *Id.*

123. *Id.*

124. *Id.* at 899.

125. *Lemon*, 403 U.S. at 610.

126. *Agostini*, 521 U.S. at 203.

127. *See generally* *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

128. *Agostini*, 521 U.S. at 234.

129. *Id.*

130. *Mitchell v. Helms*, 530 U.S. 793 (2000).

dation and Improvement Act of 1981 satisfied the *Agostini* requirements, in that the aid is allocated on the basis of neutral, secular criteria; the aid is supplementary and cannot supplant non-Federal funds; no Chapter 2 funds ever reached the coffers of religious schools; the aid must be secular; any evidence of actual diversion is *de minimis*; and the program includes adequate safeguards.¹³¹ Like many of these cases, the decision in *Mitchell* was a razor thin 5-4 majority.¹³² The minority, Justices Rehnquist, Scalia, Kennedy, and Thomas took the position that the government should be able to provide any aid to religious schools, even if it is used for religious indoctrination, so long as the government does not discriminate among religions.¹³³ Justice Thomas wrote the dissent, joined by Rehnquist, Scalia, and Kennedy, and argued that “to deny such aid to religious schools was impermissible hostility to religion and violated the Establishment Clause.”¹³⁴ Under Thomas’ view, “any government aid to religion is allowed, even if used for expressly religious purposes, so long as all religions are treated the same.”¹³⁵

It is important in all Supreme Court cases to not only look at the vote and digest the majority opinions, but also the minority or dissenting opinions as well. It is often by counting the justice’s votes and scrutinizing the dissents that we get a glimpse of just how secure or precarious the precedent will be. The case, *Van Orden v. Perry*,¹³⁶ involved a challenge to the display of a Ten Commandments monument on the grounds of the Texas State Capitol in Austin, Texas.¹³⁷ The petitioner, Van Orden, brought the suit on the grounds that the monument violated the Establishment Clause of the First Amendment. During the same Supreme Court session, the Court heard a case from Kentucky, *McCreary County v. ACLU*,¹³⁸ where a county in Kentucky had passed a resolution requiring the posting of the Ten Commandments in county buildings.¹³⁹ After the ACLU sued, the county passed another resolution requiring that the Ten Commandments be accompanied by nine other displays that highlighted the role

131. *Id.* at 798.

132. *Id.*

133. CHEMERINSKY, *supra* note 35, at 121.

134. *Id.*

135. *Id.*

136. *Van Orden v. Perry*, 545 U.S. 677 (2005).

137. *Id.* at 681.

138. *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

139. *Id.* at 850–51.

of religion in American history.¹⁴⁰ All of these displays were given the same size and framing.¹⁴¹ The Court voted 5-4 that there was a Constitutional violation in *McCreary*,¹⁴² because the Ten Commandments in the county buildings in Kentucky violated the Establishment Clause.¹⁴³ Justice Souter's opinion stressed that the Ten Commandments are inherently religious and the county's primary purpose was impermissibly to advance religion.¹⁴⁴ However, in *Van Orden*,¹⁴⁵ the vote was 5-4 that the display was not unconstitutional as it did not violate the Establishment Clause.¹⁴⁶ Justice Breyer, who had voted that *McCreary* was unconstitutional, was on the other side in *Van Orden*, and in his concurring opinion stated that the Ten Commandments display did not "promote the kind of social conflict the Establishment Clause seeks to avoid."¹⁴⁷ Justice Scalia's dissent in *McCreary* was troubling, as it approached the Establishment Clause from the perspective of protecting the majority population, when in fact it should be viewed as a protection for those with minority viewpoints.¹⁴⁸ For example, Scalia noted that Christianity, Judaism, and Islam account for 97.7% of believers, and since all three of those religions believe the Ten Commandments were given to Moses by God, the display did not violate the Establishment Clause.¹⁴⁹ This is indeed a troubling interpretation. It is certainly reasonable that one who sees the Ten Commandments prominently displayed at the seat of state government would draw the conclusion that the state of Texas endorses the religious views expressed on it.¹⁵⁰

As I am writing this article in early 2017, considering the ages of the current justices, the ideology of the current executive branch, and the configuration of the Congress, it is likely that in the coming years, the Court will shift further to the right, placing the holding in *McCreary* in jeopardy. Moreover, Justice Thomas' viewpoint will likely prevail, that is, the Court will likely move in the direction that failure to provide religious schools the same aid that is given to secular pri-

140. *Id.* at 852-54.

141. *Id.* at 855.

142. *Id.*

143. *McCreary*, 545 U.S. at 883.

144. *Id.*

145. *Van Orden*, 545 U.S. at 677.

146. *Id.*

147. *Id.* at 699; *see also McCreary*, 545 U.S. at 844.

148. *McCreary*, 545 U.S. at 900 (Scalia, J., dissenting).

149. *Id.* at 894.

150. CHEMERINSKY, *supra* note 33, at 127.

vate schools would violate the First Amendment.¹⁵¹ In the foreseeable future, religious symbols on government property will likely be allowed. Additionally, Justice Scalia's viewpoint, even in his absence, will likely prevail, specifically that the Court should defer to the majority's desire for religion in government over the minority's desire for a secular government.¹⁵²

While the courts in *Lemon v. Kurtzman*, *Agostini v. Felton*, and *Mitchell v. Helms* deal with government aid to religious schools, the school voucher cases deal with aid to students or parents of students at religious schools.¹⁵³

The late twentieth and early twenty-first centuries have brought school vouchers to the forefront of the litigation involving religious clause cases. Some have proposed school voucher systems as a solution to underperforming public schools.¹⁵⁴ The vouchers allow parents to choose where their children attend school, including private, public, or parochial schools. Theoretically, "by introducing choice into the system, vouchers force schools to compete with each other, and hopefully lead to a better educational system."¹⁵⁵ Professor Jesse Choper argued that "governmental financial aid may be extended directly or indirectly to support parochial schools without violation of the Establishment Clause so long as such aid does not exceed the value of the secular educational service rendered by the school."¹⁵⁶ I would suggest that while the purported goal is to give parents school choice, the reality is that school voucher systems prove troublesome in two very important ways: first, they redirect tax payers dollars from neighborhood public schools to private schools; second, they create unnecessary entanglement between the government and private parochial schools. The former is an obvious problem in that the end result is the weak performing public schools would likely fail if instead of investing more into these schools, the government takes funding away. The latter issue, however, is the most urgent matter with regard to religious liberty issues.

To be certain, anytime you have private church-based schools required to accept tuition funding from the government and thus accept

151. *Id.* at 128.

152. *Id.*

153. See RUSSELL L. WEAVER, UNDERSTANDING THE FIRST AMENDMENT 302 (5th ed. 2014).

154. *Id.*

155. *Id.*

156. See Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 265–66 (1968).

any students that wish to attend, there is a danger that the school will be pressured into providing an education that does not accurately reflect the church's mission. Even in the event that the school avoids that pressure, the end result is that taxpayers are paying for private religious schools to indoctrinate students in the religious practices of the church.

In a precursor to the school voucher cases, the Court applied the *Lemon* test in striking down a New York law that provided partial tuition reimbursements and tax benefits to the parents of children attending elementary or secondary non-public schools.¹⁵⁷ The Court concluded that both programs failed the "effect" test, holding that "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and non-ideological purposes, it is clear from our cases that direct aid in whatever form is invalid."¹⁵⁸

School vouchers have taken center stage in several high profile cases addressed by the U.S. Supreme Court. The 1983 case *Mueller v. Allen*, was a Minnesota case challenging a state law that allowed taxpayers, in computing their state income tax, to deduct actual expenses incurred for the "tuition, textbooks and transportation" of dependents attending elementary or secondary schools.¹⁵⁹ A deduction could not exceed \$500 per dependent in grades K-6 and \$700 per dependent in grades seventh through twelfth. The Court upheld the law, relying on *Everson* and using the *Lemon* three-part test stating:

A state's decision to defray the cost of educational expenses incurred by parents . . . regardless of the type of schools their children attend . . . evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated.¹⁶⁰

The Court also found that the "primary effect" of the program did not advance religion.¹⁶¹ Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, dissented, arguing that the "Establish-

157. See *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 780-83 (1973).

158. *Id.* at 780.

159. See *Mueller v. Allen*, 463 U.S. 388 (1983).

160. *Id.* at 395.

161. *Id.* at 402.

ment Clause prohibits a State from subsidizing religious education, whether it does so directly or indirectly,” and noting that the vast majority of the taxpayers eligible to receive the benefit are parents whose children attend religious schools.¹⁶²

In *Zelman v. Simmons-Harris*, the State of Ohio established a pilot program that allowed parents of students who were zoned in failing Cleveland school districts to either receive voucher for tuition for grades K-3 to the private school of their choice, or alternatively, to receive private tutoring should their child remain in the locally zoned public school.¹⁶³ Respondents Simmons-Harris filed suit in 1999 to enjoin the program on the ground that it violated the Establishment Clause.¹⁶⁴ The District Court eventually granted a summary judgment for respondents and the Court of Appeals affirmed.¹⁶⁵ However, after granting certiorari, the U.S. Supreme Court reversed the Court of Appeals.¹⁶⁶ The Court’s rationale in an opinion authored by Justice Rehnquist, was that the program is entirely neutral with respect to religion; it provides benefits directly to a wide spectrum of individuals defined only by financial need and residence in a particular school district; it permits such individuals to exercise genuine choice among options public and private, secular and religious.¹⁶⁷ The Court thus found the program is one of true private choice and does not offend the Establishment Clause.¹⁶⁸ Justices Souter, Stevens, Ginsburg, and Breyer dissented.¹⁶⁹ Justice Stevens in his dissent referenced the impact of religious strife on the decision of our forbears to migrate to this continent and stated “whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy”¹⁷⁰ Justice Souter noted that the program funds would be spent on tuition – thus it will pay for eligible students’ instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue

162. *Id.* at 404–05 (Marshall, J., dissenting).

163. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

164. *Id.* at 648.

165. *Id.*

166. *Id.*

167. *Id.* at 662.

168. *Zelman v. Simmons-Harris*, 536 U.S. 639, 640 (2002).

169. *Id.* at 684.

170. *Id.* at 686.

teaching in all subjects with a religious dimension.¹⁷¹ Justice Souter wrote:

Viewed with the necessary generality, the cases can be categorized in three groups. In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient's religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.¹⁷²

B. The Free Exercise Clause

The U.S. Supreme Court has consistently held that the government cannot interfere with the free exercise of religion unless it can show that a crucial interest would be served and that there is no other way to accomplish the objective.¹⁷³ In *Sherbert v. Verner*, the Court held that the Free Exercise Clause requires that the government would have to demonstrate both a compelling interest and a narrowly tailored law, before denying unemployment compensation to Adell Sherbert.¹⁷⁴ As a Seventh-Day Adventist, Ms. Sherbert observed the Saturday Sabbath and refused to work on her Sabbath at a textile mill in South Carolina.¹⁷⁵ After Sherbert was discharged from her job, she filed for unemployment benefits.¹⁷⁶ The state refused to grant her benefits because she had failed, without good cause, to accept "suitable work when offered by the employment office or the employer."¹⁷⁷ In ruling for Sherbert, the Court held that although the state was not

171. *Id.* at 687.

172. *Id.* at 688–89.

173. *See* *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

174. *Id.*

175. *Id.* at 399–00.

176. *Id.*

177. *Id.* at 401.

prohibiting her from practicing her religion and observing her Saturday Sabbath, the government was significantly burdening it by making her choose between her religion and an income.¹⁷⁸ The state failed to meet the strict scrutiny standard, and the government's ruling was not sufficient to achieve a compelling state interest.¹⁷⁹ Under the *Sherbert* three-prong test it must be determined whether the government has burdened the individual's free exercise of religion.¹⁸⁰ If the government limits the individual with a choice that pressures the forgoing of a religious practice, by imposing a penalty or withholding a benefit, the government has burdened the individual's free exercise of religion.¹⁸¹

Even with the first prong being satisfied (i.e., even if the government has burdened the individual's free exercise), the government may still constitutionally impose the burden if the government can show a compelling interest, i.e., it possess some compelling state interest that justifies the infringement, and the imposition is narrowly tailored, i.e., no alternative form of regulation can avoid the infringement and still achieve the state's end.¹⁸²

While *Sherbert* has not been overtly overruled, the Court has cast a foreboding shadow over this line of Free Exercise in the 1990 case *Employment Division v. Smith*.¹⁸³ In *Smith*, the Court held that free exercise exemptions were not required from generally applicable laws.¹⁸⁴ Congress responded by passing the Religious Freedom Restoration Act of 1993 (RFRA) to reinstate the *Sherbert* Test as a statutory right.¹⁸⁵ Four years later the Court struck down the RFRA as applied to Constitutional interpretation, holding in *City of Boerne v. Flores*,¹⁸⁶ that as applied to the states, RFRA exceeded Congress's power under Section V of the Fourteenth Amendment.¹⁸⁷ As if to continue this game of serve and volley, Congress used a parliamentary procedure known as unanimous consent to re-enact RFRA's provisions in 2000, while adding a similar statutory test to the Religious

178. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

179. *See id.* at 406–09.

180. *Id.* at 403.

181. *Id.* at 404.

182. *Id.* at 407–08.

183. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

184. *Id.* at 872–73.

185. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.A.N. (107 Stat.) 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997).

186. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

187. *Id.* at 536.

Land Use and Institutionalized Persons Act (RLUIPA).¹⁸⁸ It remains to be seen whether this narrower protection of religious freedom will survive review by the Supreme Court.

What about the separation of church and state as applied to an actual place of worship?

C. The Johnson Amendment

We have seen what happens when government entanglement occurs with regard to schools, but what happens when it instead crosses into actual places of worship? The Johnson Amendment is a provision in the U.S. tax code that prohibits all 501(c)(3) non-profit organizations from endorsing or opposing political candidates.¹⁸⁹ Although this amendment was not designed to limit religious speech, it has been a constant of the discussion on separation of church and state in American politics for decades.¹⁹⁰ The Johnson Amendment, originally introduced by then-Senator Lyndon B. Johnson on July 2, 1954, became part of the Internal Revenue Code that year.¹⁹¹ The impetus for the creation of the amendment was a senate campaign in Texas where Senator Lyndon B. Johnson was embroiled in a tight race with a thirty-year old first term state senator named Dudley Dougherty.¹⁹² Johnson had initially won the senate seat in 1948 in a race that was decided by eighty-seven votes, earning Johnson the unflattering nickname “Landslide Lyndon” after his close victory.¹⁹³ His bid for reelection was going well until two powerful and conservative secular nonprofit organizations, the Facts Forum and the Committee for Constitutional Government, began supporting his opponent.¹⁹⁴ Johnson investigated whether these organizations were violating the federal income tax code, which prohibited lobbying by 501(c)(3) organizations. He subsequently drafted his amendment to the code, which included prohibitions on influencing political campaigns for public office.¹⁹⁵ It

188. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C.A. § 2000cc (Westlaw through Pub. L. No. 115-45).

189. See I.R.C. § 501(c)(3) (2015).

190. Jeremy W. Peters, *The Johnson Amendment, Which Trump Vows to “Destroy,” Explained*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/us/politics/johnson-amendment-trump.html>.

191. *Id.*

192. Erik W. Stanley, *LBJ, the IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, 24 REGENT U. L. REV. 237, 244 (2012).

193. *Id.*

194. *Id.* at 244–45.

195. *Id.* at 246–47.

is reasonable to surmise from these facts that Johnson's motivation for creating the statute was to silence his opposition. The statute prohibits tax-exempt entities from directly or indirectly participating in any political campaign on behalf of, or in opposition to, any candidate.¹⁹⁶ When this is applied to churches, ministers are restricted from endorsing or opposing candidates from the pulpit. If they do, they risk losing their tax-exempt status.¹⁹⁷ Conservatives have argued that the law violates the protections of free speech and free exercise but courts have not agreed.¹⁹⁸ Regardless of what Johnson's motivation for drafting the amendment may have been, I believe the courts' interpretation of this law as applying to speech of pastors from the pulpit is correct.

There are well-defined limits to 501(c)(3) organizations' participation in the political arena, and violating these limitations can cause serious consequences. An organization exempt from federal income taxation under 501(c)(3) is organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . and these organizations cannot participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.¹⁹⁹ Under the Johnson Act, charitable organizations may not make statements, either oral or written, supporting or opposing any candidate for elective public office, any slate of candidates, political party or PAC.²⁰⁰ This includes statements made in speeches, bulletins, or editorials in charitable organization periodicals, and the distribution of filled-in sample ballots. In addition, charitable organizations should avoid statements that indirectly support or oppose a particular candidate, e.g., labeling a candidate as pro-life or anti-family, using plus (+) or minus (-) or similar signs that indicate candidates' agreement (or lack thereof) with the organization's positions on the issues.²⁰¹ Any violation of the restriction may result in revocation of exempt status and consequent loss of deductible contributions.²⁰²

Opinions vary across the spectrum on whether this statute is a welcomed rumble strip protecting both the organizations and the pub-

196. *Id.* at 243–44.

197. *Id.* at 246–47.

198. *Id.*

199. I.R.C. § 501(c)(3) (2015).

200. Stanley, *supra* note 192, at 249.

201. David Menz, *Charities, Churches, Campaigns & Candidates*, 39 THE ARK. LAW. 8, 10 (2004).

202. *Id.* at 14.

lic from veering off the roadway, or an unnecessary intrusion into the arena of freedom of speech and freedom of religion. Scholars who believe that it is an unnecessary intrusion point to the fact that before the law was enacted, churches traditionally were free to play an unrestricted role in politics, and accordingly they should be returned to their rightful place and their “historically accurate role of the church in politics.”²⁰³ They contend that the Johnson Amendment violates the Constitution of the United States because the government becomes excessively entangled with the church by enforcing the provisions of the amendment.²⁰⁴ However, that argument is weakened by the fact that this amendment is not solely designed to quell political speech at churches – it affects all 501(c)(3) organizations equally. An additional contention is that the Johnson Amendment further violates the Establishment Clause because it forces the government to scrutinize not only religious speech concerning the qualifications of a candidate, but also religious speech on moral issues. But again, the counter to that argument is that religious speech on moral issues is not at risk here – moral issues are inherently preached in any sermon or worship meeting discussing biblical principals, including but not limited to any of the ten commandments, the travails and triumphs of the Children of Israel, the Old Testament words of the major and minor prophets, the New Testament letters of Paul, and the teachings of Jesus, to name just a few. Moral issues do not by definition include promoting political agendas from the pulpit. The argument regarding the Johnson Amendment violating Free Speech fails for the same reasons set forth in the previous sentence. Finally, there is the argument that this amendment violates the Free Exercise clause by limiting what a pastor can say. But does that actually rise to the level of a free speech violation? After all, the pastor is free to say whatever he wants politically – just not in the pulpit, which is essentially a time, place, and manner restriction. And again, the restriction on this speech is not limited to churches and pastors.

The Court of Appeals for the District of Columbia considered the First Amendment free exercise issue as well as a Fifth Amendment due process claim of selective prosecution in *Branch Ministries v. Rossotti*.²⁰⁵ In *Branch*, the church had placed full-page advertisements in

203. David Abbondanza, *The Pulpit Initiative: Fighting to Return America's First Freedom to Her Churches*, 12 RICH. J. L. & PUB. INT. 225, 231 (2009).

204. *Id.* at 232.

205. *Branch Ministries v. Rossotti*, 211 F.3d 137, 139 (D.C. Cir. 2000).

USA Today and the Washington Times with the headline “Christians Beware,” claiming that candidate Governor Bill Clinton’s positions on “abortion, homosexuality and the distribution of condoms to teenagers in schools violated Biblical precepts.”²⁰⁶ The advertisement contained text at the bottom listing sponsors such as: “the Church, its senior pastor and other churches and Christians nationwide, and stated: ‘Tax-deductible donations for this advertisement gladly accepted. Make donations to: The Church at Pierce Creek.’”²⁰⁷ Hundreds of contributions were sent to the Church and the ensuing media attention caught the eye of the IRS’s Regional Commissioner.²⁰⁸ Ultimately, the IRS revoked the Church’s 501(c)(3) status, leading to the lawsuit.²⁰⁹ The Church claimed its right to free speech and right to exercise its religion were violated under the First Amendment and the Religious Freedom Restoration Act (RFRA).²¹⁰ In response to the First Amendment and RFRA claims, the court analyzed whether the “government has placed a substantial burden on the observation of a central religious belief or practice, and, if so, whether a compelling governmental interest justifies the burden.”²¹¹ The Church failed to meet the test when the court held that the burden on free exercise was not conditioned upon religious conduct, but upon political conduct.²¹² As such, application of the Johnson amendment to churches has not only been held to be constitutional, but it is pragmatically in the best interests of the citizens of the United States, as it prevents unnecessary entanglement between the church and the government.

III. CONTEMPORARY STATE ISSUES

The majority of states have proposed laws protecting religious institutions from general laws that violate the tenets of the religion.²¹³ These protections are critical if the concept of free exercise is to be realized. The issues have grown from the proverbial spark to a flame in recent years, and often revolve around balancing the rights of reli-

206. Siri Mielke Buller, *Lobbying and Political Restrictions on § 501(c)(3) Organizations: A Guide for Compliance in the Wake of Increased IRS Examination*, 52 S.D. L. REV. 136, 149 (2007).

207. *Id.*

208. *Rossotti*, 211 F.3d at 140.

209. *Id.*

210. *Id.* at 140–41.

211. *Id.* at 142.

212. *Id.*

213. Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 673, 677 (1979).

gions to recognize protection for their doctrinal beliefs from the authority of the states to pass general laws for the citizens. When drafted properly, these laws should be recognized. Imagine this – State “X” has always recognized the rights of its citizens to wear hats outdoors, but has prohibited hats being worn indoors. State “X” passes a new law allowing all citizens to wear hats indoors and outdoors. If a religious denomination’s fundamental beliefs provide that no hats should be worn indoors, the denomination should be allowed to prohibit this activity in their churches. Certainly any religious organization that believes doing so would violate their faith should be exempted from this law as it applies to services in their sanctuary. Forcing the denomination to recognize the indoor hat right would be crossing the line of government intrusion into free exercise of religion. On the other hand, a legislature should not be able to pass laws for the general body of citizens under the guise of a religious purpose. Many of the recent proposed bills are targeted at same-sex marriage. While the U.S. Supreme Court has upheld the right for same-sex couples to marry,²¹⁴ government acknowledgment of this right should not be taken to preclude a religious institution or individual from rejecting the request to conduct a ceremony of this kind. Such a requirement would certainly be an entanglement with the free exercise clause. On the other hand, any attempt to craft a bill solely to circumvent the *Obergefell* ruling would undoubtedly fail constitutional scrutiny. Some of the state bills have failed while others have been passed. Still others are proceeding through their state’s legislative process. A sampling of these laws:

Alaska

Alaska SB120 would allow anyone who is authorized to perform a wedding ceremony to refuse to participate in a marriage celebration without threat of punishment. These officials would also be exempted from providing accommodations, facilities or other goods related to the ceremony. The bill was introduced in the Senate and assigned to a committee in January 2016.²¹⁵

Colorado

Two religious freedom bills were introduced: HB1180 was an attempt to create a state-level Religious Freedom Restoration Act. This

214. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

215. S. 120, 29th Leg., 2d Sess. (Alaska 2016).

bill was postponed indefinitely.²¹⁶ HB1123 would have exempted clergy members, ministers and religiously affiliated organizations from participating in any ceremony, including a marriage, that conflicted with their beliefs. This bill failed.²¹⁷

Florida

Florida's HB43²¹⁸ states that religious organizations, including churches and some schools, and faith leaders do not have to participate in any marriage ceremony that violates their religious beliefs. It was signed by Governor Rick Scott and went into effect July 1, 2016.²¹⁹

Hawaii

Three Hawaii bills were designed to protect religious institutions from general laws, HB1337,²²⁰ HB2532²²¹ and HB2764.²²² HB1337 excludes religious facilities from the definition of "place of public accommodation" to exempt those facilities from the law regarding discrimination in public accommodations.²²³ HB2532 protects the free exercise of religious beliefs and moral convictions by prohibiting the State from taking any discriminatory action against a person based on the person's sincerely held religious belief or moral conviction.²²⁴ The bill also provides a cause of action for a violation of the Act.²²⁵ HB2764 provides that government should not substantially burden religious exercise without compelling justification.²²⁶ The bill establishes protections for religious freedom, including in the laws concerning public accommodations and marriage. All three of these bills failed to pass.

Illinois

The Illinois Religious Freedom Defense Act, SB2164, prohibits the State and local governments from taking discriminatory action against a person if the person believes or acts under a religious belief or moral conviction that marriage is only between one man and one

216. H.R. 16-1180, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016).

217. H.R. 16-1123, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016).

218. H.R. 43, 2016 Leg., 118th Reg. Sess. (Fla. 2016).

219. *Id.*

220. H.R. 1337, 2015 Leg., 28th Reg. Sess. (Haw. 2015).

221. H.R. 2532, 2015 Leg., 28th Reg. Sess. (Haw. 2015).

222. H.R. 2764, 2015 Leg., 28th Reg. Sess. (Haw. 2015).

223. Haw. H.R. 1337.

224. Haw. H.R. 2532.

225. *Id.*

226. Haw. H.R. 2764.

woman, or that sexual relations are properly reserved to such a marriage.²²⁷ The Act allows a person to assert a claim or defense under the Act in a judicial or administrative proceeding for damages, injunctive relief, declaratory relief, or other appropriate relief against the State or local government.²²⁸ This bill failed, which is not a surprise considering the language is vague and overbroad.

Kansas

Kansas' SB175 allows religiously affiliated student groups on college campuses to limit membership to people who espouse certain beliefs.²²⁹ This is a clear example of a well-written, succinct bill, which protects religious freedom without being overbroad. The bill was signed into law by Governor Sam Brownback and went into effect on July 1, 2016.²³⁰

Kentucky

HB17 was proposed to exempt persons, officials, and institutions with religious objections to same-sex marriage from any requirement to solemnize, or to issue or record licenses for such marriage.²³¹ HB14 and HB 28 proposed to exempt persons, officials, and institutions with religious objections to same-sex marriage from any requirement to solemnize such marriages.²³²

Louisiana

Louisiana's HB597 described as a "Pastor Protection Act," would prevent religious organizations, employees of religious organizations and members of the clergy from having to solemnize or provide services for a marriage ceremony that violates their religious beliefs.²³³

Mississippi

Mississippi's "Religious Liberty Accommodations Act," HB1523, prevents the government from discriminating against a person (broadly defined as an individual, religious organization, association, corporation, and other kinds of businesses) for acting on their religious convictions regarding sexuality and marriage.²³⁴

New Jersey

227. S. 2164, 99th Gen. Assemb., 1st Reg. Sess. (Ill. 2015).

228. *Id.*

229. S. 175, 86th Leg., Reg. Sess. (Kan. 2015).

230. *Id.*

231. H.R. 17, 2016 Leg., Reg. Sess. (Ky. 2016).

232. H.R. 14, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 28, 2016 Leg., Reg. Sess. (Ky. 2016).

233. H.R. 597, 2016 Leg., 42d Reg. Sess. (La. 2016).

234. H.R. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

While same-sex marriage has been legal in New Jersey since 2013, New Jersey's A1706 would provide an exemption for faith leaders and religious organizations, allowing them to avoid blessing same-sex marriages and civil unions.²³⁵ Under this bill, "no member of the clergy of any religion and no religious society, institution or organization in this State shall be required to solemnize any marriage or civil union in violation of the free exercise of religion guaranteed by the First Amendment to the United States Constitution"²³⁶ It further provides that "no religious society, institution, or organization in this State shall, other than when providing a place of public accommodation . . . be compelled to provide space, services, advantages, goods, or privileges related to the solemnization, celebration, or promotion of a marriage or civil union if such solemnization, celebration or promotion of a marriage or civil union is in violation of the beliefs of such religious society, institution or organization."²³⁷

Ohio

The Ohio legislature is currently considering two bills with similar protections: HB286 would allow people of faith not to participate in same-sex weddings for religious reason.²³⁸ This bill restates First Amendment protection for religious leaders to decline to perform weddings. It goes further by allowing religious societies to deny the use of religious buildings and property for the use of any wedding they feel does not adequately conform to their religious beliefs.²³⁹ HB296²⁴⁰ would grant that same protection to wedding-related businesses such as bakeries and photographers.²⁴¹

Oklahoma

In a bill which under the guise of religious freedom seems to fly in the face of the separation of church and state, SB973, also referred to as the "Preservation of Sovereignty and Marriage Act," seeks to prohibit the use of any state funds for any act related to same-sex marriage.²⁴² It would also prohibit state employees or local government

235. Gen. Assemb. 1706, 217th Leg., Reg. Sess. (N.J. 2016).

236. *Id.*

237. *Id.*

238. H.R. 286, 131st Gen. Assemb., Reg. Sess. (Ohio 2015).

239. *Id.*

240. H.R. 296, 131st Gen. Assemb., Reg. Sess. (Ohio 2015).

241. *Id.*

242. S. 973, 55th Leg., 2d Reg. Sess. (Okla. 2016).

entities from recognizing or granting a same-sex marriage license.²⁴³ It is highly suspect that this act could survive constitutional scrutiny.

Tennessee

The Tennessee legislature is even more transparent in their entanglement than Oklahoma. Again, under the guise of religious freedom, the legislature is seeking to prohibit same-sex marriages by proffering two bills, which taken in combination effectively override the U.S. Supreme Court's ruling in *Obergefell v. Hodges* on same-sex marriage.²⁴⁴ HB2375/SB2329 would protect clergy members and religiously affiliated organizations (and their employees) from having to solemnize or take part in a same-sex marriage ceremony if doing so would violate their beliefs.²⁴⁵ Fair enough. . .until you read HB2379/SB2462, which would prohibit public officials from performing marriages, allowing only clergy to conduct such ceremonies. Certainly, this does not have a wholly secular purpose.²⁴⁶

Virginia

Virginia's SB41 provides protections for clergy members and religiously affiliated organizations who wish to be exempted from same-sex marriage ceremonies.²⁴⁷ The bill passed both houses but was vetoed by Governor Terry McAuliffe.²⁴⁸

Many of these bills can be viewed as reasonable efforts to protect the separation of church and state. Specifically, marriage is a contractual relationship endorsed under state law, i.e., government. However, religious beliefs, specifically as to what a particular faith believes, are personal to the individuals and the religion, and as such deserve protection from uninvited entanglement by the government. As such, laws that allow religions and their clergy to refuse to perform a ceremony that violates the tenets of their religion should pass constitutional scrutiny. Laws seeking to override the state's rights to endorse contracts, under the guise of religious liberty, are not likely to survive constitutional muster.

243. *Id.*

244. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

245. H.R. 2375, 109th Leg., Reg. Sess. (Tenn. 2016); *see also* S. 2329, 109th Leg., Reg. Sess. (Tenn. 2016).

246. Tenn. H.R. 2379; *see also* Tenn. S. 2462.

247. S. 41, 2016 Leg., Reg. Sess. (Va. 2016).

248. *Id.*

CONCLUSION

It is easy to understand why some groups bristle against the separation of church and state. After all, while Thomas Jefferson and James Madison offered impassioned pleas to the state and federal legislatures to avoid entangling church and state, and while Jefferson coined the phrase “the wall of separation between church and state,” this phrase itself is not included in the language of the Constitution or any of its amendments. It is clear, however, that Jefferson and Madison were deeply concerned about this potential entanglement. This concern was birthed from historical precedent, both pre and post-colonial. The annals of history are replete with instance after instance of religious oppression that often starts in a seemingly benign way, then grows to outright persecution and violence against those who are in the minority. Have we lost our way on religious liberty in the United States? It remains to be seen. But one thing is clear – opportunities for oppression and persecution are greatly diminished when the law provides protection against majority viewpoints squelching the voices of those in the religious minority. While it may seem that a school prayer is harmless, it may not be to one who believes in a different deity. While one may not understand why there is a problem with the Ten Commandments being displayed in a state facility – there may be if only the signs and markings of the Christian faith are displayed. Religion is often the most personal aspect of a person’s life. That includes the choice of which religious practice to follow, as well as whether to follow any religious practice at all. Allowing this decision to be made in the hearts of men and women without undue pressure or inspection by the government, is the surest way to ensure a more perfect union.

APPENDIX A:
FOREIGN COUNTRIES WITH ESTABLISHED
STATE RELIGIONS

COUNTRY	STATE RELIGION
Costa Rica	Roman Catholic
Liechtenstein	Roman Catholic
Malta	Roman Catholic
Monaco	Roman Catholic
Vatican City	Roman Catholic
Dominican Republic	*Roman Catholic
El Salvador	*Roman Catholic
Panama	*Roman Catholic
Paraguay	*Roman Catholic
Peru	*Roman Catholic
Poland	*Roman Catholic
Greece	*Eastern Orthodoxy
Georgia	*Eastern Orthodoxy
Bulgaria	*Eastern Orthodoxy
England	Anglican
Isle of Man	Anglican
Jersey	Anglican
Guernsey	Anglican
Tavalu	Calvinism
Scotland	Calvinism
Denmark	Lutheranism
Faroe Islands	Lutheranism
Greenland	Lutheranism
Iceland	Lutheranism
Norway	Lutheranism
Finland	Lutheranism
Sweden	Lutheranism
Tonga	Methodism
France	Judaism, Roman Catholicism, Lutheranism, Calvinism
Hungary	Christian
Zambia	Christian
Bangladesh	Islam
Djibouti	Islam
Iraq	Islam
Pakistan	Islam
Tunisia	Islam
Afghanistan	Sunni Islam

Religious Freedom

Algeria	Sunni Islam
Brunei	Sunni Islam
Comoros	Sunni Islam
Egypt	Sunni Islam
Jordan	Sunni Islam
Libya	Sunni Islam
Maldives	Sunni Islam
Malaysia	Sunni Islam
Mauritania	Sunni Islam
Morocco	Sunni Islam
Qatar	Sunni Islam
Saudi Arabia	Sunni Islam
Somalia	Sunni Islam
United Arab Emirates	Sunni Islam
Iran	Shi'a Islam
Ibadi	Shi'a Islam
Kuwait	Shia and Sunni
Yemen	Shia and Sunni
Bahrain	Shia and Sunni
Cambodia	Buddhism
Sri Lanka	Buddhism
Myanmar	Buddhism
Bhutan	Vajrayana Buddhism
Israel	Jewish

*Indicates these religions are given preference but are not official state religions.²⁴⁹

249. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., International Religious Freedom Report (2016).

