THE HYPOCRISY OF "EQUAL BUT SEPARATE" IN THE COURTROOM: A LENS FOR THE CIVIL RIGHTS ERA

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This article serves to examine the role of the courthouse during the Jim Crow Era and the early stages of the Civil Rights Movement, as courthouses fulfilled their dual function of minstreling Plessy's call for "equality under the law" and orchestrating overt segregation.

A. INTRODUCTION: THE RACIST COURTHOUSE AS THE UNHERALDED BATTLEGROUND OF THE CIVIL RIGHTS MOVEMENT

The year is 1961. You've been called into this southern state court[1] as a witness. Originally, the subpoena was a surprise, but you knew no other witness would likely testify in this defendant's case. You walk up the courthouse steps and fidget with the buttons of your "Sunday's best" suit. Your eyes sink towards the ground as you let the White women pass by first.[2] You enter and glimpse back at the courthouse lawn, recently fertilized with the blood of Herbert Lee.[3] You quickly say part of the Lord's Prayer to yourself, mourning internally. You are almost to the courtroom doors, but realizing you should relieve yourself before the trial begins, you head to the basement of the courthouse for the Black bathroom,[4] a tiny converted janitor's closet with corroded plumbing. Sauntering back upstairs, you then find the courtroom for the trial.

The pews are sparsely filled, and you nod towards the other Black spectators mouthing a "Good Morning" and slide in next to them, hoping not to get caught

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1 This article focuses on state courts because "[e]ven before *Brown*, federal courtrooms were not segregated." Hon. Constance Baker Motley, *Reflections on Justice Before and After Brown*, 32 FORDHAM URB. L.J. 101, 104 (2004).

2 *See* Margaret M. Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101, 2103 (2005) (discussing the murder of Emmett Till for alleged flirting with a White woman in a convenience store).

3 *See* Anthony Hall, *A Stand for Justice-Examining Why Stand Your Ground Laws Negatively Impact African Americans*, 7 S. REGION BLACK L. STUDENTS ASS'N L.J. 95, 102 (2013) (describing the killing of Herbert Lee as an example of unpunished racially motivated homicides).

4 *Segregated Bathrooms at the Courthouse in Clinton, Louisiana* (photograph) Bob Adelman, *available at* http://www.corbisimages.com/stock-photo/rights-managed/42-20700566/segregated-bathrooms-at-the-courthouse-in-clinton.

on a splinter on the unkempt "Black pews."[5] Looking up towards the judge's bench, you see the Confederate flag in the front of the room.[6] You also take a glimpse at the defendant, a shackled, fourteen-year-old Black boy, and his White defense attorney.[7] Shaking your head in anguish, you realize taking this morning off from work was pointless. The White prosecutor stands behind his table and waves at the defense counsel, who smiles and winks back in earnest.[8] The White bailiff carries a Bible in each hand,[9] and sits them on the counter with his paperwork. He passes by the door near your seat and you glimpse at the names on the witness list. Not surprisingly, the "Dr." from in front of your name is missing.[10] The jury enters, and you recognize a few of the all-White faces.[11] You rise to your feet as the Judge enters,[12] and the day's proceedings begin, immersed in the contradiction that *Plessy*[13] bestowed upon the courts.

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[5] *See* Johnson v. State of Va., 373 U.S. 61, 62 (1963) (desegregating courthouse seating); Wood v. Vaughan, 321 F.2d 480 (4th Cir. 1963) (desegregating courthouse seating).

[6] *See* Coleman v. Miller, 117 F.3d 527, 528 (11th Cir. 1997) (quoting Governor Marvin Griffin's 1956 state address that expressed his state's activist opposition to civil rights while denying an action to enjoin the flying of the Georgia state flag over Georgia's state office buildings).

[7] *See* Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1407 (1983) ("From the end of Reconstruction to the New Deal, virtually every embodiment of the legal process in the South, from the sheriffs and police to the prosecutors, to the courtroom functionaries, to defense counsel, to the judges, was white.). *See also* A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 526 (1990) ("[I]t is not surprising that a potential black client, who will be appealing to the discretion of the (white) courts, or seeking the leniency of the (white) sentencing judge, might be leery of having a black lawyer as his counsel-one whom the state brands so "inferior"' that he cannot even use the same toilets as whites.")

[8] *See* Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379 (2009) (explaining the risks that White lawyers took for defending black clients too vigorously).

[9] *Healing a Nation*, MEDICINE AT MICHIGAN, Summer 2000, at 40, *available at* http://medicineatmichigan.org/sites/default/files/matmmag/2000/summer/pdf/v4blackhistory.pdf. *See also* DIANE MCWHORTER, CARRY ME HOME 202 (2001); Garrett Epps, *The Other Sullivan Case*, 1 NYU J.L. & LIBERTY 783, 787 (2005) (noting that even the Bibles were segregated).

[10] *See* MARTIN LUTHER KING, JR., LETTER FROM THE BIRMINGHAM JAIL (1963) *available at* http://www.uscrossier.org/pullias/wp-content/uploads/2012/06/king.pdf (describing segregation in the South "when your first name becomes 'nigger' and your middle name becomes 'boy' (however old you are) and your last name becomes 'John,' and when your wife and mother are never given the respected title 'Mrs.').

[11] *See e.g.*, Aldridge v. United States, 283 U.S. 308 (1931); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Swain v. Alabama, 380 U.S. 202 (1965) overruled by Batson v. Kentucky, 476 U.S. 79 (1986). *See also* Strauder v. West Virginia, 100 U.S. 303, 308-09 (1879) (recognizing that an equal protection violation can occur where an all-white criminal jury is influenced by racial bias). For an examination of current tactics in creating all-white juries, see Robert M. O'Connell, *The Elimination of Racism from Jury Selection: Challenging the Peremptory Challenge*, 32 B.C. L. Rev. 433 (1991).

[12] *See* Steven Michael Selzer, *Civility Rules*, MD. B.J., SEPTEMBER/OCTOBER 2003, at 30 (discussing rising for the judge as a demonstration of respect for the judicial system). *See also In re* Dellinger,

This article serves as both a descriptive and somewhat persuasive discussion of the southern courthouse during the Jim Crow era and the early stages of the Civil Rights Movement, as judges were challenged by the dual function of minstreling *Plessy*'s call for "equality under the law" and orchestrating overt segregation. This hypocrisy plagued the courts until the reversal of *Plessy v. Ferguson* in the 1954 ruling of *Brown v. Board of Education.*[14] Put simply, the courthouses from *Plessy* to *Brown* exemplified Gunner Myrdal's conflict paradigm: "a conflict between liberty, equality, and the American idea of fair play on the one side, and prejudice, self-interest, and habit on the other."[15] Using the conflict paradigm to articulate the hypocrisy, the article examines wide-ranging practices of southern state courts during the Jim Crow era and the early Civil Rights movement. My analysis concludes with explaining the southern state courthouse as playing a tripartite role in American apartheid as a symptom, signal, and symbol of societal norms. An understanding of the court's role as such incorporates facets of overt discrimination and the battleground of the Civil Rights movement that, at times, was not captured within written case law.

B. THE CONFLICT PARADIGM

Before the Civil War, courts were instruments of the slaveholders, enforcing the Fugitive Slave Laws and, in *Dred Scott,*[16] holding unconstitutional the Missouri Compromise, one of the abolitionists' legislative victories.[17] In the Reconstruction era, Black people were a political force to be reckoned with, as Black men infiltrated both voting booths and state and federal legislatures[18] via the executed demands of the Fourteenth and Fifteenth Amendments of the U.S.

461 F.2d 389, 401 (7th Cir. 1972) (articulating that while court "may require such rising" at the beginning of a session and end of a recess, some symbolic acts of defiance may not amount to obstructions punishable as criminal contempt); *Ex parte* Krupps, 712 S.W.2d 144, 150-51 (Tex. Crim. App. 1986) (holding that refusal of pro se defendant and six spectators to rise upon entrance of judge, after being warned to do so, is proper ground for contempt).

13 Plessy v. Ferguson, 163 U.S. 537 (1896).

14 347 U.S. 483 (1954).

15 Anthony Asadullah Samad, *Post-Raciality in Education Revisiting Myrdal's "American Dilemma"*, HUM. RTS., FALL 2009, at 11, 13.

16 Dred Scott v. Sandford, 60 U.S. 393 (1856).

17 Id. at 450. (1856) (declaring the Missouri Compromise void because it deprived slaveowners of property in the free territories).

18 *See, e.g.,* BRUCE A. RAGSDALE & JOEL D. TREESE, BLACK AMERICANS IN CONGRESS, 1870-1989 (1990); Chuck Stone, *Up from Slavery: From Reconstruction to the Sixties*, in BLACK POLITICAL LIFE IN THE UNITED STATES 35, 40 (Lenneal J. Henderson, Jr. ed., 1972) (listing black representatives in the House and the U.S. Senate between 1870-1901). *See generally,* ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION (1996).

Constitution. Courts again became tools of segregationists to combat these progressive reforms before and immediately following the Civil War and passage of the Thirteenth Amendment.[19] Reconstruction was destroyed in the aftermath of 1877 and with the election of Rutherford B. Hayes, which led to the federal government pullback of its federal forces, allowing White supremacy to blossom in the South.[20] Perhaps not surprisingly, anti-segregationists, up until the NAACP's work in 1910, saw the ballot box and not litigation as a much more efficient weapon in the struggle for African-American freedoms.[21]

The legal hallmark of this post-Reconstruction system of racial segregation was *Plessy v. Ferguson,*[22] enumerating the mantra of "equal but separate."[23] *Plessy* was decided "on the edge of one of the most terrorist seasons in American history, the Post-Reconstruction era."[24] *Plessy* survived as the backdrop to explain the sentiments of the judiciary who used *Plessy*'s holding of "separate but equal before the law"[25] to construct a fictional neutrality of racial segregation's effects. *Plessy* deferred to the state to "established usages, customs, and traditions of the people."[26] With deference to social jurisprudence as its choice of judgment,[27]

[19] *See* H. HYMEN & WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 55-115, 473-517 (1982) (examining the constitutional and legal history of the periods immediately before, during, and after the Civil War, with particular emphasis on the Taney court).

[20] W. Lewis Burke, *Killing, Cheating, Legislating, and Lying: A History of Voting Rights in South Carolina After the Civil War*, 57 S.C. L. REV. 859, 866 (2006).

[21] Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1977 (2004).

[22] *Plessy*, 163 U.S. at 540. The role of *Plessy* as a factor is debated amongst historians. *See e.g.,* Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate but Equal" Doctrine, 1865-1896,* 28 AM. J. LEGAL HIST. 17, 20 (1984) (arguing that historians have overemphasized *Plessy* and have "largely ignored the development of judicial law legitimizing segregation in the latter third of the nineteenth century"); Otto H. Olsen, *The Thin Disguise: Turning Point* in NEGRO HISTORY, PLESSY V. FERGUSON at 27-28 (1967) (discussing the context of *Plessy* and invoking Justice Harlan's phrase in his *Plessy* dissent observing that the law's promise of equality in segregation was but a "thin disguise" for discrimination). Regardless of the importance of this individual case, the *Plessy* framework of "equal but separate" certainly illustrates the ethos of social norms in the Jim Crow era even if the case law's role as a causal factor is undetermined. Oberst, *The Strange Career of Plessy v. Ferguson,* 15 Ariz. L. REV. 389, 396-97 (1973) (noting that Plessy is considered now "one of the pivotal decisions of the Supreme Court").

[23] *Id.* at 540 (upholding a statute requiring "that all railway companies carrying passengers in their coaches in this state, shall provide *equal but separate* accommodations for the white, and colored races.") (emphasis added).

[24] J. Clay Smith, Jr, *Exact Justice and the Spirit of Protest: The Case of Plessy v. Ferguson and the Black Lawyer*, 4 HOW. SCROLL SOC. JUST. L. REV. 1, 6 (1999).

[25] *Plessy*, 163 U.S. at 544 (citing Roberts v. City of Boston, 59 Mass. 198, 206 (1849)).

[26] Id. at 550.

courtrooms were confines for both covert[28] and overt anti-Black sentiments throughout the post-Reconstruction era,[29] creating a convoluted battleground for the Civil Rights Movement.

From 1877 through the mid-1960s, during a period termed the "Jim Crow Era,"[30] a racial-caste system shaped the lives of United States citizens, discriminating against Black Americans. This system was legally enforced through the codification of "Jim Crow laws" and grounded in the holding of *Plessy*, which had the effect of legitimizing anti-black racism.[31] Jim Crow laws included segregation statutes for hospitals, prisons, schools, churches, cemeteries, public restrooms, and public accommodations.[32] Statutes also severely regulated social interactions between the races, making "Jim Crow etiquette" the social norm.[33]

Before the Civil Rights Movement, the court faced the conflict paradigm through one of its major functions in segregation: racial identity case law.[34] In the nineteenth century, southern state supreme courts showed that "race" was often

[27] Smith, *supra* note 24, at 4 (finding that "Justice Brown's framework for 'exact justice,' while flawed, established elements allowing courts to bend to an exclusionary social legal framework rather than an inclusive one under the Equal Protection Clause of the Fourteenth Amendment. In *Plessy*, the Court stamped its approval on social jurisprudence as the choice of judgment, thereby sealing race distinction in the fabric of American law as 'exact justice.'").

[28] *See* Surell Brady, *A Failure of Judicial Review of Racial Discrimination Claims in Criminal Cases*, 52 SYRACUSE L. REV. 735, 766 (2002) ("*Brown* has not proven as useful in combating forms of discrimination that are far less public, such as may be practiced during enforcement of criminal laws. That distinct kind of discrimination needs new judicial sensitivities.")

[29] *See supra* notes 56 to 121 and accompanying text.

[30] Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 445 (1982) ("Blacks in the South remained segregated and stigmatized by Jim Crow laws; disenfranchised by invidiously administered literacy tests, white primaries, and poll taxes; and victimized by a criminal process from whose juries and other positions of power they were routinely exclude").

[31] *See* Nicole S. Dandridge, *Racial Etiquette and Social Capital: Challenges Facing Black Entrepreneurs*, 32 W. NEW ENG. L. REV. 471, 472 (2010) (providing examples of Jim Crow tenants and describing prosegregation efforts).

[32] David Pilgrim, *What Was Jim Crow*, FERRIS STATE UNIVERSITY, http://www.ferris.edu/Jimcrow/what.htm (last visited Dec. 11, 2014).

[33] *Id.*

[34] *See generally,* RANDALL KENNEDY INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION (2003); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109, 120, 181-85 (1998) (document the racial identity case law); Laura Miller, *Are You White Enough? From Jim Crow Laws to Workplace Discrimination, the History of Race and the American Courtroom Is Incendiary*, MONT. LAW., NOVEMBER 2008, at 22, 23 (explaining the role of the courts in the antebellum South and the characteristics that the court took into account when litigating race).

determined as much by individuals' reputation and conduct as by appearance, "blood," or other presumably scientific evidence.[35] In each case, the "racial identity" of a person was disputed, and a determination of whether the person was White or Black was relevant to the outcome of the litigation.[36] Then later, two critical cases in the height of the Jim Crow-era, *Ozawa* (1922)[37] and *Thind* (1923),[38] forced the Supreme Court to specify the judiciary's criterion to determine race.[39] The racial identity cases confirmed the courts role as the arbiter of segregation as *Plessy* allowed the courts to be the fact-finder as deciding who and what was separate under the law.[40] The Supreme Court furthered that enforcement role in *Gong Lum v. Rice*,[41] as it held that states possess the right to define a Chinese student as non-white for the purpose of segregating public schools.[42]

A prolific example of the role of state courts as race referees was *Green v. City of New Orleans*.[43] *Green* is the story of Jacqueline Henley, a mixed-race child whose racial classification foiled her adoption due to a Louisiana law prohibited adoption across racial lines.[44] In *Green*, the court and authorities refused to change the child's race on her birth certificate,[45] as reclassifying her race required

35 Gross, *supra* note 34 at 181-85.

36 *Id.*

37 Takao Ozawa v. United States, 260 U.S. 178 (1922).

38 United States v. Bhagat Singh Thind, 261 U.S. 204 (1923).

39 Prior to 1922, two competing doctrines characterized the racial-prerequisite cases: the common-knowledge test and the scientific-evidence inquiry. The common-knowledge standard relied upon "popular, widely held conceptions of race and racial divisions" based entirely on perceptions that might or might not be grounded in physical appearance. This methodology contrasted sharply with the scientific-evidence test, previously in vogue, which had relied upon "supposedly objective, technical and specialized knowledge for racial determination." Sharona Hoffman, *Is There A Place for "Race" As A Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1131 (2004). When viewed in isolation, the common law standard arose victorious. However, when applied, racial determination became a "system of white performance interpreted through the eyes of judges." For a closer dissection of these two cases, *see also* John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 821-22 (2000).

40 Most remarkable was the role of the courts in interracial intimacy cases. See generally, KENNEDY, *supra* note 34; Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, Adoption*, 17 HARV. BLACKLETTER L.J. 57-83 (2001).

41 Gong Lum v. Rice, 275 U.S. 78 (1927).

42 Id. at 83.

43 88 So. 2d 76 (La. Ct. App. 1956) *disapproved of by* Doe v. State, Through Dep't of Health & Human Res., Office of Vital Statistics, 479 So. 2d 369 (La. Ct. App. 1985).

44 *Id. See also* Kennedy, *Interracial Intimacies*, supra note 40, at 57 (explaining back story and facts of the case).

45 *See* Petition for Writ of Mandamus at 1, Green v. City of New Orleans, No. 337-854 (La. Dist. Ct. Aug. 22, 1955).

proof beyond a reasonable doubt.[46] In racial identity case law, "[f]ew cases illustrate more vividly the cruel lunacy of American pigmentocracy."[47] Not only was "equal but separate" the applicable standard, but it was the role of the courts to referee the minutiae of "separate."

When faced with the conflict paradigm, notions of fact-based equality were far from the conscious of the judiciary until education-based cases such as *Pearson v. Murray* [48] and its progeny[49] laid the framework for inequality as the rhetoric that debates surfaced around. Instead, case law and the physical logistics of the courtroom revolved around maintaining segregation and the "separate" requirement of *Plessy*. The conflict paradigm was infused into the court's DNA, and Civil Rights-era litigation unveiled both apparent and clandestine effects of the conflict paradigm in the courtroom.

The African-American Civil Rights Movement[50] encapsulates the major campaigns of civil resistance from the 1950's to the early 1970's to secure legal recognition and federal protection of the citizenship rights enumerated in the constitutional amendments adopted after the Civil War.[51] In addition to boycotts, marches, and civil disobedience of the Movement, litigation attacked a wide spectrum of practices of the segregation regime.[52] Civil Rights litigation, predominantly led by the National Association of Colored People ("NAACP"), had its first major victory in 1910.[53] In 1954 the litigation reached its capstone in

46 *See Green*, 88 So. 2d at 77.

47 Randall Kennedy, *Race Relations Law in the Canon of Legal Academia*, 68 FORDHAM L. REV. 1985, 1990 (2000) (citing Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 24 (1998) (discussing and defining "pigmentocracy")).

48 182 A. 590 (Md. 1936) (notably argued by Thurgood Marshall and Charles Hamilton Houston).

49 *See e.g.*, State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 345 (1938); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948), *mandamus denied sub nom.*, Fisher v. Hurst, 333 U.S. 147 (1948); McLaurin v. Okla. State Regents, 87 F. Supp. 526, 527 (W.D. Okla. 1948); Sweatt v. Painter, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950); Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954). *See generally* RICHARD KLUGER, SIMPLE JUSTICE (1975) for an excellent, readable account of the NAACP's strategy in the pre-*Brown* cases.

50 I also refer to this period as the Civil Rights Era throughout this paper.

51 Juan F. Perea, *An Essay on the Iconic Status of the Civil Rights Movement and Its Unintended Consequences*, 18 VA. J. SOC. POL'Y & L. 44, 44 (2010) (describing the era as the "African-American social movement that began in the mid-to-late 1950s or early 1960s and ended sometime in the late 1960s").

52 Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1012 (1989).

53 Guinn v. United States, 238 U.S. 347 (1915) (upholding the trial courts ruling by striking down an Ohio grandfather clause voting restriction and helping establish the NAACP's importance as a legal advocate).

Brown v. Board of Education,[54] the most famous Supreme Court decision of the twentieth century. Landmark impact litigation, as an engine in the Civil Rights Movement, is well-documented, debated, and interpreted by legal historiographies.[55] Regardless of the chosen narrative surrounding that litigation, the debates still reiterate the broader impact of constitutional law through litigation and legislation in bringing drastic social change for Blacks across the country. However, the courthouse itself is an unheralded battleground and critical forum of the Civil Rights Movement, as the development of the Jim Crow courthouse and the courthouses' place in the Civil Rights Movement provides a means for depicting various structures of segregation and its demise.

C. EXAMPLES OF RACISM IN THE COURTROOM: RACIAL SEGREGATION AND OVERT DISCRIMINATION

The courtroom was one of the rare forums forced to directly face the conflicting values of segregation and equality. The courts were theoretically supposed to treat Black Americans explicitly as "equals" before the law. But at the same time, the courts created their own Jim Crow-era tactics of overt discrimination through all-White juries,[56] segregated physical accessories of the courtroom (such as the Bible used for oath-taking),[57] and spatial segregation, including segregated bathrooms and pews.[58] Other forms of racism similarly mimicked anti-Black cultural sentiments through disrespectful verbal cues[59] and the belittlement of Black attorneys.[60]

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[54] 347 U.S. 483 (1954). *See* Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

[55] *See* Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 258 (2005) (offering a comprehensive summary of the numerous interpretations of Civil Rights Movement litigation). *See e.g.,* Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975 (2004); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); Philip Elman Norman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817 (1987); Gerald N. Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS U. L.J. 1147 (2005) (discussing the interplay between legislation and adjudication in creating the Civil Rights Act of 1964).

[56] *See supra* note 11.

[57] *See supra* note 9.

[58] *See supra* note 5.

[59] For examples of verbal disrespect, see the repeated use of 'nigger' to refer to the defendant revealed in the record in Franklin v. South Carolina, 218 U.S. 161 (1910). *See also* R. BAKER, FOLLOWING THE COLOR LINE 47, 97 (1906).

[60] *See infra*, notes 107-121 and accompanying text.

1. All-White Juries

Arguably, one of the first segregated mechanisms in the courthouse to fall was the jury box.[61] In a series of cases from 1879 to 1942 starting with *Strauder*,[62] the Supreme Court "declared unequivocally that defendants in criminal cases are entitled to non-discriminatory selection of the grand jurors... and petit jurors... at trial."[63] Blacks could no longer be totally excluded from jury lists by statute.[64] Instead, in the early 1900's, states would use the processes of the jury selection itself to shield its process from Equal Protection's pre-*Shelley v. Kramer*[65] requirement of state action.[66] The exclusion of Blacks from southern juries was virtually absolute.[67]

During the Jim Crow era, juries served as one of the simplest demise of criminal justice for Black Americans.[68] Not only were Blacks facing criminal sanctions,

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[61] *See* Surell Brady, *A Failure of Judicial Review of Racial Discrimination Claims in Criminal Cases*, 52 SYRACUSE L. REV. 735, 763 (2002) ("In a series of cases between 1879 and 1942, the Supreme Court declared unequivocally that defendants in criminal cases are entitled to non-discriminatory selection of the grand jurors who issue indictments and of the panels of petit jurors who ultimately determine guilt or innocence at trial."); Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1420 (1983) highlighting the "incongruity between *Strauder*'s doctrinal strength and its functional impotence).

[62] *Strauder*, 100 U.S. at 304 *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

[63] *See* Brady, *supra* note 61.

[64] Sandra Guerra Thompson, *The Non-Discrimination Ideal of Hernandez v. Texas Confronts A "Culture" of Discrimination: The Amazing Story of Miller-El v. Texas*, 25 CHICANO-LATINO L. REV. 97, 98 (2005).

[65] State action doctrine was extremely limited in civil rights litigation until *Shelley v. Kraemer* in 1948. 334 U.S. 1 (1948). In *Shelley*, the Court held that judicial enforcement of a private racially-based restrictive covenant constituted state action under the Equal Protection Clause because it had been judicially enforced. *See* John Dorsett Niles et. al., *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885, 891 (2011).

[66] In five cases, the Court held the Fourteenth Amendment's Equal Protection Clause (as understood at that time) was only authorized only for actions challenging state laws. Therefore, federal courts lacked jurisdiction over the jury selection cases because the alleged discrimination occurred through the actions of state officers and not by operation of state law. See Brady, *supra* note 61, at 802 (citing Franklin v. South Carolina, 218 U.S. 161 (1910) (upholding state law requirements that electors--from whom grand jurors were selected--must meet literacy, residence and poll tax requirements)).

[67] Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1407 (1983); THE BOOKER T. WASHINGTON PAPERS 29 (L.R. Harlan ed. 1974) ("In the whole of Georgia & Alabama, and other Southern states not a negro juror is allowed to sit in the jury box in state courts."). See also Sandra Guerra Thompson, *The Non-Discrimination Ideal of Hernandez v. Texas Confronts A "Culture" of Discrimination: The Amazing Story of Miller-El v. Texas*, 25 CHICANO-LATINO L. REV. 97, 102 (2005) (describing surveys and statistics regarding racial diversity in juries before the Civil Rights Movement).

[68] *See* Brady, *supra* note 61, at 765 (2002) ("State criminal justice systems became a primary tool

but White plaintiffs were acquitted charges for crimes against Blacks.[69] Judges around the South were able to place themselves a single iteration away from inequitable criminal remedies by relying on all-White juries within the *Plessy* framework of "equality under the law."[70] As Blacks were kept out of jury service, the democratic safeguard of the jury system was turned into a means of minority subjugation.[71]

The intersection of jury formation and responsibilities of the juries in creating unjust trial outcomes is only one prong of the effects of this racist practice. The formation of the all-White jury box also fit into the larger pattern of deficiency of legal protections for Blacks.[72] This injustice in the jury selection process furthered the general feeling of uncertainty, arbitrariness and inequality.[73] Jury duty, as a prong of civil service, was a sign of sound judgment and upright citizenry. The uniform exclusion of Blacks from jury service perpetuated the

for enforcing the subjugation of blacks.")

[69] Describing discriminatory acquittals, a historian notes, "[f]rom the Emmett Till trial to that of Rodney King, there is a long history of juries acquitting white defendants charged with violence against black victims." Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75 (2009). *See e.g.,* Jeffrey S. Adler, *"The Killer Behind the Badge": Race and Police Homicide in New Orleans, 1925-1945*, 30 LAW & HIST. REV. 495, 503-04 (2012) (noting a 1931 newspaper clipping that documented "as far as some white juries are concerned, the killing of innocent Negroes by policemen is no graver an offense than killing a rat or an insect") (citations omitted); Douglas O. Linder, UNIVERSITY OF MISSOURI KANSAS-CITY, *The Emmett Till Murder Trial: An Account*, http://law2.umkc.edu/faculty/projects/ftrials/till/tillaccount.htm (last visited Dec. 11, 2014) (detailing the trial in which an all-White jury returned a "Not Guilty" verdict after just an hour of deliberation despite clear evidence that two white men murdered a Black child). The author describes the jury selection process in the Emmett Till murder trial of two White men:

In 1955, none of the black residents of Tallahatchie County were registered voters and thus, under the jury selection rules then in place, no black was eligible to serve as a juror. During the six hours of jury selection, the county's sheriff-elect assisted the defense team, advising the lawyers as to which jurors were "doubtful" and which were "safe." All of the twelve white men seated for the jury seemed safe. One of the defense attorneys said later, "After the jury was chosen, any first-year law student could have won the case."

[70] Kelly Miller, a prominent Black mathematician and sociologist during the early 1900's, noted: "The Negro feels that he cannot expect justice from Southern courts where white and black are involved. In his mind accusation is equivalent to condemnation. For this suspicion the jury rather than the judge is responsible." Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1410 (1983) (citing K. MILLER, RACE ADJUSTMENT: ESSAYS ON THE NEGRO IN AMERICA 79 (1908)).

[71] *Id.* at 1409.

[72] *Id.*

[73] GUNNER MYRDAL, AMERICAN DILEMMA 524 (1944) (emphasis added).

belief that "the black race . . . were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries."[74]

As more diverse jury lists were compiled, the jury selection process signified one of the first shifts in the courthouse towards even further coded discrimination. The fall of the all-White jury list propelled a move towards covert discrimination through tactics such as racially-based preemptory challenges.[75] By removing the all-White jury from the courthouse's playbook, equality under the law thus faced another covert hurdle.

2. The "Colored" Bible

The hypocrisy of the *Plessy* mandate is perhaps clearest as reflected in an anecdote from a North Carolina Court. In 1947, a Black doctor was summoned to the New Hanover County Court House in Wilmington, North Carolina to testify regarding a patient involved in an insurance liability case.[76] As he took the witness stand, the bailiff asked him to swear the customary oath on a Bible — a battered Book wrapped with a strip of dirty adhesive tape and labeled "Colored."[77] Describing that incident as "unconscionable," the doctor later explained his feelings when he walked out of the courthouse:

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[74] *See* Hill v. Texas, 316 U.S. 400, 405 (1942) (quoting Neal v. Delaware, 103 U.S. 370, 397 (1880)).

[75] *See, e.g.*, Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 821-22 (1997); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 502-03, 484 N.109 (listing citations); Vivien Toomey Montz & Craig Lee Montz, *The Peremptory Challenge: Should It Still Exist?: An Examination of Federal and Florida Law*, 54 U. MIAMI L. REV. 451 (2000). Many others have offered solutions short of eliminating the peremptory challenge. *See, e.g.*, Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J. L. & PUB. POL'Y 323, 343 (2003) (proposing blind questionnaires for use of peremptories); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet The Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 505 (1999) (arguing that all peremptories should have some rational basis to pass constitutional muster); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1110 (1994) (recommending a number of reforms); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1698-99 (1985) (proposing that a minimum of three black jurors is necessary to guarantee a fair jury verdict when the accused is black).

[76] *Healing a Nation*, MEDICINE AT MICHIGAN, Summer 2000, 38-41. *See also* DIANE MCWHORTER, CARRY ME HOME 202 (2001); Garrett Epps, *The Other Sullivan Case*, 1 N.Y.U. J.L. & LIBERTY 783, 787 (2005) (noting that even the Bibles were segregated).

[77] *Healing a Nation*, 38-41.

> I was stunned. My eyes fogged, my ears hummed and a quiver ran down my spine. I almost gasped . . . The charge built up in me by years of racial prejudice had finally exploded . . . There were measly black schools, segregated hospitals, segregated tennis courts, all-[W]hite government, segregated libraries, and segregated Bibles.[78]

The separate Bibles for Black and White witnesses to swear their oaths captures the racial protocol of the Jim Crow South and demonstrates not only the banality of its evils but also the absurdity of its tactics.[79] The segregated Bible reflects the depths at which discrimination was engrained in the courthouse -- as if the oath taken while swearing on different bibles created a Black truth and a White truth. As a purely figurative tactic of segregation this again encapsulates the hypocrisy of *Plessy*'s "equal but separate," insisting that the judiciary ignore the power of symbolism.

3. Spatial Segregation of Facilities

Spatial desegregation was a major battlefront in the Civil Rights Era as physical "segregation emphasized such presumed differences by relegating Blacks to unmistakably inferior facilities. . . [S]igns were not the only physical reminders of separation . . . The physical inequality [became] a symbol of the essential racial status and [was] defended with great determination."[80] Courthouses were no different than other public spaces plagued with Jim Crow apartheid as courthouse pews, bathrooms, and water fountains[81] were segregated. In some courts, witnesses even testified from segregated witness boxes.[82]

The classic fiction novel *To Kill a Mockingbird* accurately portrayed the segregation of the southern state courthouse facilities:

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78 *Id.*

79 Michael Patrick Brady, *'The Warmth of Other Suns': A Time When the Bible Itself Was Segregated*, http://www.popmatters.com/review/131505-the-warmth-of-other-suns-by-isabel-wilkerson/ (reviewing ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION (2010)).

80 Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOW. L.J. 1, 14 (2006).

81 *Segregated drinking fountains labeled "white" and "colored" in the Dougherty County Courthouse of Albany, Georgia* (photograph), *in* TWENTY-FIVE PHOTOGRAPHS FROM THE SOUTHERN CIVIL RIGHTS MOVEMENT (1994), *available at* http://www.loc.gov/pictures/item/00650612/.

82 Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1408 (1983) (citing Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444 (1982)).

> There, [the three White children] went up a covered staircase and waited at the door. Reverend Sykes came puffing behind [them], and steered [them] gently through the [B]lack people in the balcony. Four Negroes rose and gave [the three White children] their front-row seats. The Colored balcony ran along three walls of the courtroom like a second-story veranda, and from it [they] could see everything.[83]

From an architectural standpoint, courthouses and their layout of restrooms often represent the last physical vestiges of segregation.[84] In *Hernandez v. Texas*, the Supreme Court agreed the segregation of courthouse bathrooms was evidence as "Mexican" as a class of persons distinct from Whites,[85] detailing "two men's toilets, one unmarked, and the other marked 'Colored Men' and 'Hombres Aqui' ('Men Here')."[86] Notably in *Green v. New Orleans*,[87] there was no bathroom in the courthouse (located in the all-White French Quarter of New Orleans) for the Black witness, Herbert Stanton, the alleged father of the mixed-race child.[88] Because segregation was a functioning tool of discriminatory practices, "the marking of racially-separate restroom facilities was an official public statement that those in power thought [B]lack people were inferior."[89]

In 1948, the Mississippi Supreme Court addressed segregated seating in the death penalty appeal of *Murray v. State*.[90] The court considered whether to reverse the murder conviction of a Black man tried in a courtroom that segregated Black spectators, allowing them to sit only in the balcony. The court's language reveals the long tradition of courthouse segregation: "It is asserted that the seating arrangement, suggested pursuant to a custom whose immemorial usage and

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83 HARPER LEE, TO KILL A MOCKINGBIRD 164 (1960).

84 *See* Robert R. Weyeneth, *The Architecture of Racial Segregation: The Challenges of Preserving the Problematical Past*, in 27 THE PUBLIC HISTORIAN 41, (Fall 2005) (with a photograph of the Douglas County Courthouse in Douglasville, Georgia in August 2002).

85 Hernandez v. State of Tex., 347 U.S. 475 (1954) ("Substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from 'whites'. . . by showing the attitude of the community.") (Footnote omitted). *See also,* Juan Francisco Perea, *Mi Profundo Azul: Why Latinos Have a Right to Sing the Blues*, *in* COLORED MEN AND HOMBRES AQUÍ: HERNANDEZ V. TEXAS AND THE EMERGENCE OF MEXICAN AMERICAN LAWYERING 100, (Michael A. Olivas ed., 2006).

86 Hernandez v. State of Tex., 347 U.S. 475, 479-80 (1954).

87 88 So. 2d at 76.

88 Kennedy, *Interracial Intimacies*, *supra* note 42, at 61 (2001) ("Unable to find toilets other than those reserved for whites, [Stanton and Green] were forced to leave the courthouse and wander through the surrounding French Quarter in search of relief.")

89 Higginbotham, *supra* note 7, at 526.

90 Murray v. State, 202 Miss. 849, 33 So. 2d 291 (1948) (en banc).

sanction has made routine, resulted in a concentration in the balcony of those of the same race as the defendant."[91]

In affirming the conviction, the court implicitly approved of that "routine" tradition, and its decision permitted its continuance: "Assuming that this seating arrangement was insisted upon and deemed prejudicial to such as were piqued thereby-as to which there is no showing-such reactions may not be magnified into a fancied denial of constitutional rights and thereupon made assignable to the defendant."[92]

After a plethora of Civil Rights Movement litigation sensitized the judiciary to the derogatory use of segregation and its hindrance of equal protection, the Supreme Court addressed segregated courthouse seating in *Johnson v. State of Va.*[93] In traffic court in Richmond, Virginia, the bailiff and judge had instructed a Black gentleman to move from the section reserved for Whites. The Supreme Court held that the practice of segregating spectators by race in a courtroom was a "manifest violation of the State's duty to deny no one the equal protection of its laws,"[94] following the Equal Protection mandate of *Brown*. The courthouse seating remains at issue in present day as the Court has refused to conclude that the racist seating of a courtroom could, in any possible manner, affect the administration of justice.[95]

4. Overt Discrimination in the Courtroom

While practices of social segregation are addressed in case law, in many instances, overt discrimination in the courtroom was not necessarily captured by litigation and the paper trail that followed.[96] Racism in the courts was also reflected in the court's treatment of participants, particularly Black witnesses and lawyers.

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[91] *Id.* at 857, 33 So. 2d at 292.

[92] *Id.*

[93] 373 U.S. 61, 62 (1963)

[94] Johnson v. State of Va., 373 U.S. 61, 62 (1963). *See* The Honorable Constance Baker Motley, *The Historical Setting of Brown and Its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 16 (1992) (detailing the context *Brown* and the series of equally historic decisions that struck down racial segregation in other areas of American public life).

[95] *See* State v. Cox, 244 La. 1087, 1108 (1963) (The Louisiana Supreme Court, in considering appellants' claim that racial segregation in the courtroom had denied him a fair trial in violation of his due process and equal protection rights, acknowledged that the courtroom in question had been segregated for many years but affirmed the conviction). Later, the United States Supreme Court reversed Cox's conviction on first amendment grounds but did not discuss the question of the segregation of the courtroom. State v. Cox, 379 U.S. 536 (1965).

[96] *See* Bracy v. Gramley, 81 F.3d 684, 702 (7th Cir. 1996) (Rovner, J., dissenting), *rev'd* 520 U.S. 899 (1997), *vacated sub nom.* Collins v. Welborn, 520 U.S. 1271 (1997) (noting that "[s]o much goes

Black defendants and witnesses were routinely addressed by their first names, called "boy" or "nigger," or other terms of condescension, and derided as untrustworthy and simple-minded.[97] One example of the repeated use of 'nigger' to refer to the defendant is the trial record in *Franklin v. South Carolina*.[98] Similarly, in a major 1904 peonage prosecution, *United States v. McClellan*,[99] the Attorney General-elect of Georgia represented the defendants. The federal district Judge Emory Speer made a rare admonishment of counsel:

> Don't you think the future Attorney-General of the state of Georgia can spare us this 'nigger, nigger, nigger'? It sounds so unworthy of a great court of justice, and so unworthy of your own position at the bar to be alluding to these poor unfortunate creatures constantly in the lowest terms of degradation.[100]

This unusual moment captured the common practice amongst White attorneys, the perpetual berating of Black victims, witnesses, and courtroom participants, with the goal of bringing the social stratification and norms of the Jim Crow era to the forefront of the courtroom conscience.[101]

The southern courts also failed to accord to Black witnesses the formal civilities accorded to White witnesses. The case of Miss Mary Hamilton squarely addresses one such form of disrespect through the lack of titles used by questioning attorneys.[102] After the *Brown* decision, a young Black woman named Mary Hamilton challenged such customs. Hamilton was on the witness stand in a Birmingham state court for an offense stemming from participation in a civil rights demonstration. The state's attorney continued to address her as "Mary" even as she insisted on being addressed as Miss Hamilton, so she refused to answer any of the state attorney's questions.[103] The judge held her in contempt of

on in the courtroom that the written record can never reveal.")

[97] Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1408 (1983).

[98] 218 U.S. 161 (1910). *See also* R. BAKER, FOLLOWING THE COLOR LINE 47, 97 (1906).

[99] 127 F. 971 (S.D. Ga. 1904).

[100] *A Recent Georgia Peonage Case: Throwing a Sidelight on Legal and Social Conditions in the South*, 23 THE GREEN BAG 525, 528 (1911).

[101] Higginbotham, *supra* note 7, at 543 ("Appellate courts have upheld convictions despite prosecutors' references to black defendants and witnesses in such racist terms as 'black rascal,' 'burr-headed nigger,' 'mean negro,' 'big nigger,' 'pickaninny,' 'mean nigger,' 'three nigger men,' 'niggers,' and 'nothing but just a common Negro, a black whore.')

[102] See *Ex parte Hamilton*, 275 Ala. 574, 574 (1963), *rev'd*, 376 U.S. 650 (1964). For an acknowledgement that the use of first names for black persons was part of the Southern caste system, *see also* King, *supra* note 10.

[103] *Id.*

court.[104] The Supreme Court reversed with no oral argument, citing *Brown* and *Johnson v. State of Virginia*.[105] Miss Mary Hamilton's request was simple: treatment with the same dignity accorded to White witnesses in the court.[106]

Discrimination against lawyers came in two forms in Jim Crow courts: exclusion and ill-treatment. First, Blacks were generally excluded from the occupation of the practice of law. African-Americans were completely underrepresented in the legal profession, particularly in the South:

> In 1930 less than 1 per cent of all lawyers were Negroes. Almost two-thirds of the 1,200 Negro lawyers resided outside the South. Most Negro lawyers are the products of [W]hite law schools in the North. In Mississippi there were but 6 Negro lawyers, as against more than 1,200 [W]hite lawyers. The corresponding figures for Alabama were 4 and 1,600, respectively. Of all those in the South only a minority are believed to devote themselves to their law practice, and rarely do they appear in court to defend Negro clients against [W]hite parties. Their main legal work concerns internal Negro affairs, such as those connected with churches, fraternal associations, domestic relations and criminal matters.[107]

Not only was the Black defendant pleading for understanding from White judges, White prosecutors, White police officials, and White juries, but the defendant was also unable to secure Black counsel as they largely did not exist in the Jim Crow South.[108] Not until *Gideon v. Wainright*[109] in 1963 did the Supreme Court begin requiring the states to provide counsel for indigent defendants in criminal cases.[110] Right to court-appointed counsel in state courts was dependent

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[104] *Id.*

[105] *Id.*

[106] Higginbotham, *supra* note 7, at 527.

[107] MYRDAL, *supra* note 73, at 326.

[108] The exception to the rule of White supremacy in the judicial administration during the Jim Crow-era and early Civil Rights Movement is Miami's "Negro Municipal Court," established in 1950 as the United States' first, and perhaps only, court ever set up on purely racial lines. *See* Ernesto Longa, *Lawson Edward Thomas and Miami's Negro Municipal Court*, 18 ST. THOMAS L. REV. 125 (2005) (detailing the history and arguing for the significance of this court).

[109] Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth and Fourteenth Amendments require the states to provide counsel to all indigent defendants). The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

[110] For assistance in civil cases, indigent persons must turn to three sources of counsel: the private bar, organized private legal aid, and public legal assistance. Alan J. Stein, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 546 (1967).

on a laundry list of manipulable factors.[111] Black defendants were left to fend for themselves.

The few lawyers that appeared before Jim Crow and early Civil Rights-era southern courts faced a myriad of discriminatory tactics.[112] Anecdotes from Federal District Court Judge Constance Baker Motley's distinguished career as a trial attorney exposed courtroom inequities: "Often a southern judge would refer to the men attorneys as Mister, but would make a point of calling me 'Connie,' since traditionally Black women in the South were called only by their first name."[113]

In Miami, Florida in the mid-1930's, Black attorneys were limited to work that did not require court appearances.[114] When a young Black attorney, Lawson Edward Thomas, attempted to appear on Thanksgiving Day in 1937 and sat in at the front of the courtroom, the bailiff order him to take a seat "with the rest of the niggers" or be thrown from the sixth floor window.[115] In partially an act of defiance and in part to distinguish himself as an attorney, Thomas went into the hallway and waited for the judge to take the bench.[116] Later that day, Thomas reentered the courtroom, and became Miami's first Black attorney to present his case at trial.[117]

In the epic study in 1944, *The American Dilemma by Gunnar Myrdal,* Myrdal contemplates the plight of Black lawyers. Myrdal simply states, "the Negro attorney often has little chance before a Southern court." Not even "respectable" Black attorneys could procure the justice of the court, but instead, Myrdal comments that it would take a "respectable" White attorney to garner the respect

111 To limit the right of appointment, the Court manipulated two factors: the complexity of the trial situation, and the defendant's stake in the proceedings (in right to counsel cases between Betts v. Brady, 316 U.S. 455 (1942), and Gideon v. Wainwright, 372 U.S. 335 (1963)). "Against the complexity of each case it set off the defendant's abilities to master it—his intelligence, youth, experience, etc." Stein, *supra* note 110, at 549. For exhaustive review of these cases, *see* BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 160-91 (1955).

112 For comprehensive historical review of the African-American lawyers in the century after 1844, *see* CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944 (1999).

113 K.B. MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1683 TO THE PRESENT 161 (1986).

114 *See* Ernesto Longa, *Lawson Edward Thomas and Miami's Negro Municipal Court*, 18 ST. THOMAS L. REV. 125, 126 (2005) (citing Ellyn Ferguson, *To Him, Overtown Is Not 'Over There'*, MIAMI HERALD, Feb. 16, 1983, at 1B.)

115 *Id.*

116 *Id.*

117 *Id.*

of the court on behalf of a Black client.[118] The limited availability of Black lawyers further undermined due process for the majority of Black criminal defendants.[119]

With that backdrop in mind, a critical Civil Rights Era benefit was the confrontation of Black attorneys in the face of justice – where they previously rarely appeared. Moreover, "[t]he mere presence of [B]lack attorneys contradicted the prevalent racist notions about black inferiority."[120] As entities such as the NAACP shifted from White attorneys to Black attorneys in the 1930s, trials presented one of the few arenas in the South where Black professionals could meet their White counterparts in open competition.[121]

Overall, the Black courtroom experience in the South during the Jim Crow Era and early portion of the Civil Rights Movement indicates the courts' discrimination within the hypocritical notions of "equal but separate." Blacks were far from equal in their treatment in the courthouse – from entry through the courthouse doors to the adjudication of the legal issue at hand.

D. COURTHOUSE RACISM AS A SYMPTOM, SIGNAL, AND SYMBOL OF RACISM IN BROADER SOCIETY

From the previous exploration of the segregation and racism in the courts, segregation in the courtroom augmented, confirmed, and approved those dominant social norms of White supremacy outside the courtroom walls. In similar tertiary analysis, the racism in the courthouse preceding the Civil Rights era stood as a symbol, signal, and symptom of racism in broad society.[122] Racism in the courts can be symptomatic of societal racism: reflecting the ideologies, attitudes, myths, and assumptions of anti-Black social norms.[123] Segregation can also signal to the courtroom participants to partake in racism, triggering and mobilizing racist attitudes and stereotypes in the judgment and actions of the judge, jury, and attorneys.[124] Lastly, discrimination and segregation in the courts

[118] MYRDAL, *supra* note 73, at 326.
[119] Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers As Social Engineers*, 47 STAN. L. REV. 161, 188 (1994).
[120] *Id.*
[121] Kennedy, *supra* note 52 at 1034.
[122] Higginbotham, *supra* note 7, at 545-551.
[123] *Id.* at 545-46.
[124] *Id.* at 546.

are "powerful symbols, acting to reinforce, legitimate, and perpetuate racism in the broader society."[125]

1. Courthouse Racism as a Symptom

Courthouse racism was a symptom of societal norms as the judiciary participated in racism in a manner plagued with the distinguishing features of Jim Crow social conditions. The characteristics of the 1950's era courtroom mirrored the micronorms of segregated America as "the law articulate[d] and the institutional structures embod[ied] the formal racial dogmas."[126] As Randall Kennedy termed the "etiquette of segregation," the Jim Crow micropolitics of day-to-day living highlighted the infiltration of segregation into all aspects of life.[127] Segregation was not just in the classrooms, buses, and dining rooms, but imposing an abundance of taboos and etiquettes in personal contacts.[128] Segregation was a national phenomenon, albeit in less virulent forms in Northern states.[129] Myrdal noted that the rules of segregation were often enforced beyond statutory obligations, pointing out that courts were active in enforcing not just law, but also customs far outside those set down in legal statutes.[130] The segregation and discrimination of the courthouse rose beyond mere symbolic participation in Jim Crow-era tactics; but rather, the underlying racist ideology (with symptoms previously examined in this article) was a disease engulfing the judiciary.

2. Courthouse Racism as a Signal

Courthouse racism acted as signals for those participants in the courtroom, triggering reactions from judges, juries, attorneys, and witnesses. The courtroom

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125 *Id.*

126 E. B. Reuter, Address, *Why the Presence of the Negro Constitutes a Problem in the American Social Order*, 8 J. NEGRO EDUC. 291, 297 (1939).

127 Kennedy, *supra* note 52 at 1010. *See also* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 349-50 (1991) ("Jim Crow was established both by the operation of law, including the black codes and other legislation, and by an elaborate etiquette of racially restrictive social practices.")

128 Samad, *supra* note 15, at 11-12.

129 RICHARD WORMSE, THE RISE AND FALL OF JIM CROW page xii. *See e.g.,* Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L. REV. 677 (1996-1997); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (both noting the history little violence in the North as compared to the South after Brown, and noting the diversion of national attention from the South following episodes of violence in Northern cities); P. FIELD, THE POLITICS OF RACE IN NEW YORK: THE STRUGGLE FOR BLACK SUFFRAGE IN THE CIVIL WARE ERA (1982) (examining black struggles for civil rights in a northern state during the Civil War).

130 Samad, *supra* note 15, at 13.

is filled with customs, traditions, time-honored practices, and rules of etiquette.[131] As one judge explained, the courtroom is a "uniquely contrived atmosphere where the ultimate human drama unfolds."[132] Both judges and jurors are impacted by impressions of attorneys in their appearance and conduct.[133] Furthermore, the appearance of justice intertwines with integrity of the courtroom that the Court has sought to preserve in its due process jurisprudence.[134] Leon Higginbotham explained succinctly:

> Instances of racism in the courtroom tap into the ideology of societal racism. A racist remark or insinuation by a judge or prosecutor acts as a signal, triggering and mobilizing a host of attitudes and assumptions which may be consciously held, or unconsciously harbored, by the judge, jury, and lawyers in the courtroom. The effect of the racist act or statement permeated beyond its immediate context by tripping other racist assumptions at other junctures in the proceeding.[135]

A significant example of signaling through courthouse racism was the use of segregated Bibles for witness oaths. The use of an inferior "Black Bible" served as an incessant reminder to all courtroom participants that Blacks were fundamentally different and inferior to Whites and did not enjoy the benefit and protection of the laws for White citizens.[136] Segregated Bibles augmented the overt attacks by counsel on the credibility of Blacks as witnesses and defendants using references to stereotypical notions of Blacks as either fools, liars, or violent.[137] In a similar manner, addressing Black witnesses in informal terms and requiring Black attorneys to litigate from a different area triggered further

131 Hon. Daniel A. Procaccini, *First (and Lasting) Impressions*, R.I.B.J., September/October 2010, 15. For further discussion of professionalism in the courts, *see* Catherine Therese Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945 (1991).

132 Procaccini, *supra* note 131, at 15.

133 *Id.*

134 *See* Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. RACIAL & ETHNIC JUST. 125, 152 (2011) citing Estes v. Texas, 381 U.S. 532, 561 (1965) ("[T]he courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to "the integrity of the trial" process.)

135 Higginbotham, *supra* note 7, at 548-49.

136 *Id.* at 549 (1990) (using similar analysis to separate counsel table in South Africa).

137 Due to sheer volume, I have not included the plethora of case law with mere references to the race of a defendant or witness. Another large group of cases includes racially derogatory prosecutorial appeals. *See id.* at 529 (documenting racially derogatory prosecutorial statements).

stereotypes about Blacks that ushered into the conscious and unconscious minds of courtroom participants.

3. Courthouse Racism as a Symbol

During the Civil Rights Movement, the symbolic importance of the courtroom was no different than it is today. The stigmatization of blacks that resulted from overt and covert racist treatment in the courtroom was a particularly powerful symbol, legitimizing and reinforcing the general societal perceptions of blacks as inferior."[138] Segregation was an unrelenting means of "performing" the tenets of White supremacy.[139]

In the 1963 law review article, *Racial Discrimination and the Federal Law: A Problem in Nullification*, Louis Lusky categorizes two separate mechanisms of oppression.[140] Lusky deems discrimination linked to some particular relationship, such as student, voter, neighbor, passenger, customer, as narrow-spectrum devices.[141] This discrimination is limited to when a Black American would seek to utilize the relevant forum such as voting booth, school, or mode of transportation.[142] The second mechanism is broad-spectrum devices of discrimination.[143] Broad-spectrum discriminatory tactics remind and convince Blacks that they are an "intrinsically inferior order of being[s] who cannot justly claim equal treatment."[144] Systematic inequalities in the administration of the law squarely fall in that category through "exclusion of Negroes from jury panels and juries, courtroom segregation, unduly light punishment of Negroes convicted of crimes against other Negroes, and cruel and unusual punishment of Negroes convicted of crimes against [W]hites, and of convicted [W]hites who have aided Negro protests."[145]

The best example of courthouse racism as a symbol tool is the treatment of lawyers in the courtroom. Case law recognizes the importance of the legal occupation. In a more recent case, *Friedman v. District Court*, the court plainly observed the power of the legal profession:

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[138] *Id.* at 572.
[139] GRACE ELIZABETH HALE, MAKING WHITENESS 284 (1999).
[140] Louis Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1173 (1963).
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* (citations omitted).

> Attorneys occupy a different position in relation to the courts than do ordinary citizens. Attorneys are officers of the court. The privilege of practicing law is subject to certain conditions among which is that an attorney must observe reasonable rules of courtroom behavior and decorum.[146]

Although the *Friedman* court was referring to attorney conduct, the pedestal that attorneys sit on as professionals is crucial in their role as community leaders. The void of Black attorneys in the list of great leaders of the Civil Rights Movement[147] is a result of anti-Black policies in both law schools[148] and bar associations.[149] But the rarity of the Black lawyer makes him even more symbolically important in the courthouse, drawing crowds with their courtroom appearances.[150] Similar with respect to public accommodations and Title 2 of the 1964 Civil Rights Act, the ostracization of Blacks even in merely symbolic places of public accommodation had a concrete effect on the texture of Black lives.[151] The courtrooms provided one of the first forums in American history in which a cadre of Blacks—the Civil Rights Movement's Black lawyers—consistently and publically bested Whites in an intellectual-professional setting.[152] Similarly,

146 Friedman v. District Court, 611 P.2d 77, 78 (Alaska 1980).

147 "Although black lawyers have served the black community as role models, providers of legal services, and protectors of property and civil rights, many of the best-known and most influential black leaders have not been lawyers. . . . [In fact,] there are very few lawyers who can be considered among the greatest leaders in African-American history." Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers As Social Engineers*, 47 STAN. L. REV. 161, 189-90 (1994). Notably, Malcolm X recalls a childhood story from grade school when he told his eight-grade English teacher, Mr. Ostrowski, that he wanted to become a lawyer when he grew up. ALEX HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 36 (1965). His teacher responded, "Malcolm, one of life's first needs is for us to be realistic. Don't misunderstand me, now. We all here like you, you know that. But you've got to be realistic about being a nigger. A lawyer--that's no realistic goal for a nigger. You need to think about something you can be. You're good with your hands--making things. Everybody admires your carpentry shop work. Why don't you plan on carpentry? People like you as a person--you'd get all kind of work." *Id.* After the career of Malcolm X as a civil rights leader, we should perhaps thank Mr. Ostrowski.

148 *See* Finkelman, *supra* note 147, at 167 (noting that thirty-four of the eighty-eight accredited law schools in 1939 had anti-Black admissions policies).

149 *See* Charles H. Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUCATION 49, 51 (1935) (noting that southern Black lawyers are uniformly excluded from the benefits of membership in bar associations).

150 *See* Finkelman, *supra* note 147, at 187-190 (describing packed courtrooms witnessing Black attorneys at trial in both the antebellum North and Jim Crow-era South).

151 *See* Daniel v. Paul, 395 U.S. 298, 307-08 (1969) (explaining "the overriding purpose of Title II 'to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public.") (quoting H.R. Rep. No. 88-914, at 18 (1964).

152 Kennedy, *supra* note 52 at 1064 (citing GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983); GILBERT WARE, WILLIAM

litigation victories forced segregationists to go outside the law to maintain their power. The Civil Rights Movement's litigators "helped to erode the façade of inevitability that surrounded the segregation regime and to create the perception of a gap between right and reality, authority and force."[153]

Civil Rights Movement litigation also acted as symbolic impetus for societal change. Commenting on the effects of *Brown* and other legal reforms, Judge Robert Carter noted:

> [T]he psychological dimensions of America's race relations problem were completely recast. Blacks were no longer supplicants seeking, pleading, begging to be treated as full-fledged members of the human race. . . . They were entitled to equal treatment as a right under the law; when such treatment was denied, they were being deprived—in fact robbed—of what was legally theirs. As a result, the Negro was propelled into a stance of insistent militancy.[154]

Through racist tactics, the illegitimacy of Blacks was reinforced within every tangible and intangible part of the judiciary. Some argue that the litigation during the Civil Rights Movement was merely a formality and detracted from the Civil Rights Movement by deradicalizing that movement.[155] But even if the litigation composed "mere formalities,"[156] symbolism in the courtroom was integral to the Civil Rights Movement.[157]

HASTIE: GRACE UNDER PRESSURE (1984); Randall Kennedy, *A Reply to Philip Elman*, 100 Harv. L. Rev. 1938 (1987)).

153 Kennedy, *supra* note 52, at 1065.

154 DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 461 (1st ed. 1973). On the importance of litigation in the shaping of consciousness more generally, see *Note, Judicial Right Declaration and Entrenched Discrimination*, 94 YALE L.J. 1741 (1984).

155 *See, e.g.*, K. BUMILLER, THE CIVIL RIGHTS SOCIETY (1988); Moore, *Brown v. Board of Education: The Court's Relationship to Black Liberation*, in LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER, AND THE COURTS 62-64 (R. Lefcourt ed. 1971) ("The needs of Blacks are fundamentally incompatible with the central role and function of the judicial system. . . . When Blacks look closely at American jurisprudence on questions of race, they find that little progress, if any, has been made after generations of litigation."); Steel, *Nine Men in Black Who Think White*, N.Y. TIMES MAG. (Oct. 1968).

156 I personally believe the legal apparatus during the Civil Rights Movement was more than "mere formalities. Kennedy, *supra* note 52, at 1062 ("Formal rights matter [and] . . . are now sometimes referred to as 'mere' formalities were anything but 'mere' in the context that King confronted.")

157 Mary Ellen Maatman, *Justice Formation from Generation to Generation: Atticus Finch and the Stories Lawyers Tell Their Children*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 207, 225 (2008) ("The ways in which physical spaces were divided and maintained told a story: 'For whites . . . African Americans were . . . most publicly inferior because they sat in inferior waiting rooms, used

E. CONCLUSION

As the discriminatory practices evolved, including those previously explored in this paper, racial issues still influenced the judiciary, but in more covert ways. Mimicking the rhetoric of discrimination after the legislation and litigation of the Civil Rights Movement, courthouse injustice shifted from overt to covert bias. To understand the depths at which injustice pervades the courthouse requires inspecting the overt discriminatory practices of recent American history in the Jim Crow and Civil Rights eras. Courthouse racism, including tactics not visible in case law, captures some of the origins of that overt bias as a symptom, signal, and symbol of Jim Crow-era societal norms.

The hypocrisy of *Plessy* and conflict paradigm is apparent when applied to the courthouse, as public officials segregate this formal public facility while allegedly dispensing the American notion of "equality." This open-segregation also reveals the overall trend of evolving into a more complex social issue following the Civil Rights Movement. In the Jim Crow courthouse, interactions between Whites and Blacks were inevitably framed by the racial issues made chronically salient by laws, openly-held prejudicial attitudes, and discriminatory practices.[158] Further more, "the explicit, pervasive nature of racial prejudice rendered race a salient issue whenever Whites made judgments about Blacks." Accordingly, race was viewed as a relevant issue in almost all trials of Black defendants.[159] The discriminatory and racist practices within the courthouse affirmed that social ideology in one of the most formal forums. The courts defied the impossible "equal but separate" mandate of *Plessy* not just in the holdings of case law, but also in the actual treatment of Black Americans within their walls.

inferior restrooms, sat in inferior cars or seats, or just stood.'") (citing GRACE ELIZABETH HALE, MAKING WHITENESS 284 (1999)).

[158] Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 202-03 (2001).

[159] *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 90 (1997) (using Dorsey v. State, 108 Ga. 477 (1899) to highlight the pervasiveness of racism in society and its influence on the legal system through the tendency of trial judges to allow differential treatment of White and Black defendants without violating the letter of the law).