

## THE RADICALISM OF *BROWN*

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*Brown v. Board of Education*<sup>1</sup> is usually seen as the most important decision in the last half of the twentieth century. It was more than that. It was the most radical and revolutionary decision in our constitutional history. It was brave, dramatic, and pathbreaking. It is *the* watershed decision of the twentieth century. Other decisions are as jurisprudentially important and significant, but none are as fundamentally radical.<sup>2</sup>

Despite its importance, or maybe because of it, *Brown* has been a target for some criticism, especially among legal academics.<sup>3</sup> It overturned a half century of settled law, which made some scholars at the time uncomfortable. Even some who disliked segregation wondered if the proper way to deal with it was through litigation.<sup>4</sup> The 1954 decision called for a fundamental change in the nature of public schools in more than a third of the nation, but did not actually provide a remedy or plan for implementations.<sup>5</sup> The Court postponed implementation for the following year, and then, in *Brown II*, offered an ambiguous admonition, that its order be carried out “with all deliberate speed.”<sup>6</sup> *Brown II* has been understood as being overly tentative and timid. In fact, implementation of *Brown* was slow and ultimately both incomplete and unsatisfying. This too has led to criticism of the decision. In addition, its author—Chief Justice Earl Warren—was a politician, with no judicial experience when he took the center chair, less than eight months before he wrote his opinion.<sup>7</sup> His opinion was neither scholarly nor an analytical tour de force. That has made it a target from the beginning.

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) [*Brown*].

2. The one exception, from a very different perspective, is *Scott v. Sandford*, 60 U.S. 393 (1857).

3. See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (arguing the Court’s decision stimulated violent attacks on blacks and that the court failed to enforce the decision). For a more detailed discussion of the critiques of *Brown* and a discussion of Klarman, see Paul Finkelman, *Civil Rights In Historical Context: Why Brown Was Correct*, 118 HARV. L. REV. (forthcoming 2004).

4. Hebert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

5. See *Brown*, 347 U.S. at 483.

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

7. See EARL WARREN, THE MEMOIRS OF EARL WARREN 275-76 (1977).

Despite this criticism, *Brown* was the right decision, and in many ways a brilliant opinion. It was not aimed at lawyers or law professors. Rather, it was aimed at the general public, at the citizens of the nation. In the spirit of John Marshall's opinion in *McCulloch v. Maryland*,<sup>8</sup> *Brown* was a state paper, designed to persuade the American people that desegregation was not only constitutionally correct, but that it was morally correct. Chief Justice Warren later wrote that the opinion in *Brown* was purposefully short, "so it could be published in the daily press throughout the nation without taking too much space. This enabled the public to have our entire reasoning instead of a few excerpts from a lengthier document."<sup>9</sup> In this context, balancing "speed" with "deliberate" in *Brown II* seemed obvious to the Court.

*Brown II* might have been more forceful and more direct. In hindsight we might argue that there should have been more emphasis on "speed" and less on "deliberate" in the opinion. But, even this hindsight is hardly 20-20. The Court went slowly in its implementation of *Brown* because Chief Justice Warren and his colleagues understood the danger of defiance and even violent opposition to the decision.<sup>10</sup> In addition to the original defendants, at least six other southern states opposed a speedy implementation of *Brown*.<sup>11</sup> John W. Davis's emotional arguments in *Brown II* put the Court on notice that the South might resist implementation of the decision.<sup>12</sup>

The Court must also have been aware of the changing, and delicate, nature of racial violence in the South. After World War I the nation suffered from large numbers of lynchings and race riots. The number of lynchings declined in the 1930s, but lynching did not disappear. African-Americans returning from World War II faced some racial violence, but not on the scale of the 1920s. The American South seemed to be moving away from lethal violence, at least on the same scale as earlier periods. In the decade between the end of the War and *Brown*, more blacks were rescued from lynch mobs than were lynched. There were a few attacks on black communities, such as occurred in East St. Louis, Illinois, in 1919 or Tulsa, Oklahoma, in 1921.<sup>13</sup>

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8. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

9. WARREN, *supra* note 7, at 3.

10. Warren reported that some citizens believed the Court had suppressed the dissenting opinions in the case, unable to believe that the decision was unanimous. *Id.* at 3. Some Southerners in Congress privately complained he had "stabbed them in the back." *Id.* at 4.

11. *Id.* at 287.

12. *Id.*

13. KLARMAN, *supra* note 3, at 181-85 (describing racial conditions after World War II); TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 61-68 (U.S. Gov't Printing Office 1947) [hereinafter THESE RIGHTS] (noting the decline in lynching in the period after World War II).

But, the outcomes were less violent and the prognosis for the future more encouraging. In 1921, a mob, which included hundreds who had been recently deputized by the sheriff, attacked the black section of Tulsa, known as Greenwood. When the two-day riot was over some thirty-five blocks of Greenwood had been burned and at least sixty, and perhaps five times that many, blacks were killed by policemen and white vigilantes.<sup>14</sup> Rioters destroyed 39 businesses and 1,256 homes, while looting another 215 homes that were not burned.<sup>15</sup> This contrasts sharply with an incident in 1946, in Columbia, Tennessee, when police attacked an area known as Mink Slide, “ransacking stores and firing into buildings.”<sup>16</sup> While the police were rioting in the black neighborhood, two blacks who had been jailed were shot in their cells.<sup>17</sup> But, the police riot did not escalate into a wholesale slaughter as had happened a quarter century earlier at Tulsa. National Guard troops soon brought order to Columbia with no further loss of life. Columbia could have become another Tulsa, but it did not.

In hindsight it is possible to argue that lynching and murderous white attacks on black communities were truly on the decline by the early 1950s. But at the time this was far from clear. Between *Brown*, in 1954, and *Brown II*, in 1955, the Court saw the growing resistance to integration. The Justices believed that a more forceful mandate in *Brown II* would have given encouragement to those in the South ready to begin a reign of terror on blacks to prevent integration.

Taken together, *Brown* and *Brown II* constituted an attempt to radically alter American race relations with a gigantic, but peaceful, revolution. The ramifications of *Brown* were huge, and the danger of violent resistance was obvious. Thus, the criticism of *Brown II* might, in the end, be inappropriate. *Brown* and the civil rights revolution it spawned led to political stalling, massive resistance, and murderous violence. But, it is not unreasonable to imagine that a more forceful remedy in *Brown II* would have led to even more violence. It is also possible that a more forceful opinion in *Brown II* might have led to resistance by the Eisenhower administration. It is true that the administration argued for the result in *Brown*, and the amicus brief from the

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14. ALFRED BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921*, at 60 (2002); SCOTT ELLSWORTH, *DEATH IN THE PROMISED LAND: THE TULSA RACE RIOT OF 1921*, at 66, 70 (1982).

15. Larry O'Dell, *Riot Property Loss* (report prepared for the Oklahoma Commission to Study the Tulsa Race Riot of 1921), at <http://www.tulsareparations.org/Property.htm> (last visited Apr. 15, 2004).

16. ADAM FAIRCLOUGH, *RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915-1972*, at 109 (1995).

17. *Id.*

administration was an important part of the process that led to the decision. But, in hindsight we now know that Eisenhower himself was never enthusiastic about integration, and was very slow in acting to support it. Only the resistance in Little Rock led the President to act, and that was more to oppose the states' rights posturing of Governor Orville Faubus than to support integration. But, a demand for immediate integration in *Brown II* might have led Eisenhower to openly oppose the Court, or at least indicate his deep dissatisfaction with its decision. The "go slow" approach of the Court had the advantage of making the Court and integrationists seem accommodating and non-threatening, thus preventing the administration from siding with the segregationists. By giving the South a reasonable time to accept a change in race relations, the Court appeared to be moderate in the eyes of the nation. The "go slow" approach thus made the southern white resistance appear to be unreasonable and radical. Had Warren and his colleagues ordered immediate integration of all schools, the South might have been able to successfully portray itself as a "victim" of an oppressive Court, hurrying the South to make vast social changes overnight. This might have shifted public opinion in support of the segregation. However, like Rev. Martin Luther King's strategy of non-violence and passive resistance, the Court's strategy gave the public relations advantage to those seeking racial equality, and made the opponents of integration seem recalcitrant, reactionary, and needlessly violent. Thus, balancing "speed" with "deliberate" in *Brown II* may have been the best legal strategy to achieve what ultimately had to be a political solution.

The extraordinary radicalism of *Brown* helps us understand why the Court felt it had to explain the decision for the general public and why implementation had to be deliberate and careful. My goal here is to explain why *Brown* was jurisprudentially and substantively radical and why its implications were truly revolutionary.

Jurisprudentially, *Brown* did something on a massive scale that no other Supreme Court decision had ever done: it expanded the rights of a minority across an entire region of the country in the face of the overwhelming opposition of the majority to this change.<sup>18</sup> This change set the stage for giving fundamental equality to a minority that had traditionally been

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18. *Worcester v. Georgia* is perhaps the only other example of the Court attempting to extend constitutional rights and protections to a minority—Indians—at the expense of the majority. *Worcester v. Georgia*, 31 U.S. 515 (1832). I thank Professor Donald Laverdure for suggesting this point. However, *Worcester* failed miserably. The failure of the Court in *Worcester* makes *Brown* all the more radical, since the Court in *Brown* knew that like the *Worcester* Court, its decision could very well lead to an embarrassment if neither Congress nor the executive branch helped implement it.

segregated, subordinated, and isolated. At the time, most southern whites (and many in the North) considered blacks inferior and unfit for integration. This was not just the position of politicians or the under-educated. The year before *Brown*, the University of Texas Press published a book which argued that blacks were fundamentally different from, and inferior to, whites.<sup>19</sup> Unlike traditional civil liberties or civil rights claims, the outcome in *Brown* could only help one group—the minority of the population—while at the same time it would harm (at least in their eyes) the majority of the population.<sup>20</sup> This contrasts with even the most far-reaching civil liberties decisions of the first half of the twentieth century. A few examples will illustrate this.

In *Cantwell v. Connecticut* the Court sided with a despised minority to support its claims for religious freedom.<sup>21</sup> While the immediate beneficiaries of the decision were the Jehovah's Witnesses, the expansion of rights in the decision would be available to all Americans.<sup>22</sup> Similarly, *West Virginia State Board of Education v. Barnette*, the second flag salute decision, provided a precedent that any American might want to use, not because most Americans might refuse to salute the flag, but because Americans might want to assert the rights of free speech, and by implication, of free exercise, protected in this decision.<sup>23</sup> Moreover, neither of these rights-expanding decisions undermined very much state and local law. This is in marked contrast to *Brown*, which affected the public schools and state universities in seventeen states, and by implication challenged a huge body of law unrelated to schools in those states. It is hard to imagine how anyone was harmed—or even felt they were harmed—when Jehovah's Witnesses refused to salute the flag after the decision in *Barnette*. However, it is clear that white southerners thought they were harmed when forced to attend school with blacks.

Other expansions of civil liberties have similarly been victories that potentially affect all people. The cases expanding freedom of speech, press, religion, or the rights of the accused created greater rights, not just for the individual plaintiffs, but for all Americans. Most people never expect to have to assert their *Miranda* rights,<sup>24</sup> but virtually every American knows about

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19. ROGER J. WILLIAMS, *FREE AND UNEQUAL: THE BIOLOGICAL BASIS OF INDIVIDUAL LIBERTY* 124, 127-28 (1953).

20. Many years after the Civil Rights Revolution ended, some southern politicians who had vigorously opposed integration admitted that segregation was harmful to the South and that ending it was good for the region. But, in the mid-1950s, few, if any, southern whites took this position or accepted it.

21. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

22. *Id.* at 300, 310.

23. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

24. *Miranda v. Arizona*, 384 U.S. 436, 437 (1966) (stating that a person in custody “must first be

these rights. Chief Justice Warren believed that his most important decisions were the reapportionment cases,<sup>25</sup> *Baker v. Carr*<sup>26</sup> and *Westberry v. Sanders*.<sup>27</sup> In his memoirs, Warren argued that these were more important than *Brown* because they expanded basic political representation, and thus guaranteed that the votes of all people would be equally important.<sup>28</sup> Those cases gave political equality to the majority of the population in each state, while taking away the unfair political advantage that a minority of the voters had because the allocation of representatives was not based on the idea of one person, one vote.<sup>29</sup> This was hardly a radical move, since it endorsed traditional American values of democratic elections and popular sovereignty. Shortly after they were announced there was great opposition to those decisions from entrenched politicians who faced the loss of their seats because of reapportionment. But, once the reapportionment had taken place, the majority in each state was overwhelmingly satisfied with the results.

These decisions, all critical to our modern constitutional order, and all important landmarks of our legal culture, contrast sharply with *Brown*. All of these decisions ultimately expanded the rights of the majority of people. Those decisions expanding civil liberties expanded the rights of *all* Americans. *Brown*, on the other hand, did not, in the most obvious sense, expand the rights of most Americans. *Brown* made it possible for African-American children to attend school with whites; moreover, it signaled the beginning of the end for all other forms of segregation. While a few whites may have considered integration a benefit, and would have argued that *Brown* benefitted them, most whites, especially in the South, surely did not believe this. They understood that *Brown* would alter their lives in ways they did not want, just as blacks understood *Brown* would alter their lives in ways they did want. *Brown* fundamentally changed the entire social structure, indeed, the entire way of life, for the citizens of more than a third of the states. Moreover, it gave rights and justice to a minority in each of those states at the expense (at least as they perceived it) of the majority. This result made the decision by Warren and his colleagues the most revolutionary decision of the century, challenging entrenched social forces that had dominated American culture since the country began.

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informed that he has a right to remain silent”).

25. See WARREN, *supra* note 7, at 306-12.

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

27. *Westberry v. Sanders*, 376 U.S. 1 (1964).

28. See WARREN, *supra* note 7, at 306-12.

29. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

I. RACIAL SEGREGATION IN THE ERA OF *BROWN*

A full understanding of the revolutionary nature of *Brown* becomes clear when we look at the place of race in southern and northern society on the eve of the decision. The United States in the early 1950s was a profoundly segregated country. The majority of blacks, virtually 70 percent,<sup>30</sup> lived in the South, where segregation was deeply entrenched in the law and culture of the society. Blacks in the North did not face the day-to-day *de jure* segregation of the South; but they lived in a society in which informal and *de facto* segregation affected their lives in myriad ways. Despite racial prejudice, some northern states banned discrimination and segregation. In 1947, the President's Committee on Civil Rights reported that "New York State, in particular, has an impressive variety of civil rights laws on its statute books"<sup>31</sup> and that "[a] few other states and cities have followed suit, especially in the fair employment practice field."<sup>32</sup> However, many, perhaps most, privately owned businesses ignored such laws and rarely had to defend their actions in the courts. Blacks reported that despite laws which prohibited discrimination it was "difficult to find a meal or a hotel room in the downtown areas of most northern cities."<sup>33</sup> Enforcement of such laws was lax and businesses "discouraged [blacks] from patronizing places by letting them wait indefinitely for service, charging them higher prices, giving poor service, and publicly embarrassing them in various ways."<sup>34</sup> Although illegal, "whites only" signs could be found in some places in the North.<sup>35</sup> But, generally such signs were unnecessary, as some businesses simply refused to accommodate or serve blacks.

Throughout the North, *de facto* segregation was common in housing, which led to the *de facto* separation of the races in many public schools. In some parts of the North, especially southern Illinois and Indiana, schools were routinely segregated by local officials, despite laws that prohibited such practices. Northern public colleges and universities were integrated, but blacks were often second class students. United States Court of Appeals

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30. The exact amount is 68.0%. U.S. Census Bureau, Table A-9. Race for the United States, Regions, Divisions, and States: 1950.

31. *THESE RIGHTS*, *supra* note 13, at 18.

32. *Id.*

33. *Id.* at 78.

34. *Id.*

35. *Id.*

Judge A. Leon Higginbotham recalled that when he attended Purdue University in 1944 he was “one of twelve black civilian students.”<sup>36</sup> While allowed to attend classes on an equal basis, they were not provided with rooms in the dormitory and instead forced to live in an unheated attic.<sup>37</sup> When he asked for space in a dormitory, the president of the university informed him: “the law doesn’t require us to let colored students in the dorm, and you either accept things as they are or leave the University immediately.”<sup>38</sup> The future federal judge soon left for the thoroughly integrated Antioch College. From there he went on to Yale Law School.<sup>39</sup> Higginbotham’s experience illustrates the ambiguity and complexity of conditions in the North. Purdue, a state university in Indiana, had no space in its dorms for twelve black students; Antioch, a private college in Ohio, did.

At the federal level, conditions were worse than most northern states, even Indiana. The public schools in the District of Columbia were totally segregated<sup>40</sup> and the service academies were bastions of white supremacy. President Truman’s Committee on Civil Rights reported in 1947 that in the previous seventy-five years only thirty-seven blacks had been admitted to West Point, only six had been admitted to the Naval Academy, and no blacks had ever been admitted to the Coast Guard Academy.<sup>41</sup>

However bad conditions were for blacks in the North, it was the South where segregation was most virulent and oppressive, and of course that is where seven out of ten blacks lived. It has been nearly a half century since the courts and Congress began the process of desegregating America. It is easy to forget how thoroughly segregated America was at the time of the *Brown* decision, and especially before the passage of the 1964 Civil Rights Act. Some descriptions of this era are useful.

In his classic book, *The Strange Career of Jim Crow*, the great southern historian C. Vann Woodward surveyed the early development of segregation in the South. He quoted a South Carolina newspaper, which in 1898 attacked the growing segregation with an argument of *reductio ad absurdum*:

If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be Jim Crow cars,

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36. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR vii (1978).

37. *Id.*

38. *Id.* at viii.

39. *Id.* at ix.

40. Such segregation was banned in the companion case to *Brown*, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

41. THESE RIGHTS, *supra* note 13, at 43.



moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court—and a Jim Crow Bible for the colored witnesses to kiss. It would be advisable also to have a Jim Crow section in county auditors' and treasurers' offices for the accommodation of colored taxpayers. The two races are dreadfully mixed in these offices for weeks.<sup>42</sup>

Woodward then noted that within a few years, except for the “Jim Crow witness stand, all the improbable applications of the principle suggested by the editor in derision had been put into practice—down to and including the Jim Crow Bible.”<sup>43</sup>

On the eve of *Brown*, virtually every facet of life in the South was segregated. Southern blacks faced discrimination at every turn in their lives. If born in a hospital, southern blacks entered the world in a separate hospital;<sup>44</sup> they would be buried in segregated cemeteries.<sup>45</sup> As the President's Committee noted, in the South “it is generally illegal for Negroes to attend the same schools as whites; attend theaters patronized by whites; visit parks where whites relax; eat, sleep or meet in hotels, restaurants, or public halls frequented by whites.”<sup>46</sup> The Committee noted this was “only a partial enumeration” of what was a “highly refined” legally required pattern of discrimination that “cuts across the daily lives of southern citizens from cradle to the grave”<sup>47</sup> and that the system “brands the Negro with the mark of inferiority and asserts that he is not fit to associate with white people.”<sup>48</sup>

On the eve of *Brown*, virtually all public and private educational institutions in the South, from nursery school to college, were segregated. The only exceptions were a few small private historically black colleges that occasionally had a white student or two<sup>49</sup> and a few state graduate and

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42. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 68 (3d rev. ed. 1974).

43. *Id.*

44. Pauli Murray found that only two states, Mississippi and South Carolina, mandated segregation in public hospitals. PAULI MURRAY, *STATES LAWS ON RACE AND COLOR* 17 (Studies in the Legal History of the South ed., The Univ. of Ga. Press 1997) (1951). This illustrates the gap that sometimes existed between statutes and practice. Everywhere in the South, private and public hospitals were segregated. This was accomplished by statute, local ordinance, administrative practice and interpretation of statutes, and custom. Furthermore, since no federal laws, or southern state laws, prohibited private discrimination, non-public hospitals segregated patients, or refused to treat blacks, without any need for legislation.

45. In many places, cemeteries were segregated by local ordinance, custom, or the decision of the cemetery owner. North Carolina had a statute requiring this kind of segregation. *Id.* at 329.

46. *THESE RIGHTS*, *supra* note 13, at 79.

47. *Id.*

48. *Id.*

49. Despite laws banning integration in private colleges, some historical black colleges, such as Fisk University in Nashville, Tennessee, often had a few white students, usually the children of white faculty

professional schools that were integrated in the late 1940s and early 1950s as a result of lawsuits based on the failure of southern states to provide similar educational opportunities for blacks.<sup>50</sup> At the beginning of the century, Kentucky's Berea College was integrated. In 1904, to stop this breach of southern racial etiquette, Kentucky passed legislation banning private integration, and Berea sued, attempting to remain integrated in the face of laws mandating segregation.<sup>51</sup> The United States Supreme Court upheld Kentucky's law mandating that private colleges be segregated, giving a green light to legally mandated segregation everywhere in the South, even where parties wanted to be integrated.<sup>52</sup> In the years just before *Brown*, the Supreme Court forced a few graduate and professional schools to desegregate, but these decisions were based on the failure of the defendant states to provide separate graduate and professional education that was equal.<sup>53</sup> In 1949, in response to the emerging graduate and professional school cases, thirteen segregating states entered into a "regional compact" to provide segregated graduate and professional education for southern blacks.<sup>54</sup> The regional compact was never

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members. Interview with John Hope Franklin, Fisk graduate and former President of the Fisk Board of Trustees. Local and state officials usually turned a blind eye to such behavior, perhaps because it did not actually challenge the existing racial regime. *Id.*

50. The University of Maryland Law School was integrated in 1935 as a result of litigation brought in state court by the N.A.A.C.P. *Pearson v. Murray*, 182 A. 590, 594 (1936). Maryland's highest court upheld the ruling in 1936, after Donald Gaines Murray had already enrolled in the University of Maryland Law School. *See id.* This was the only civil rights victory of this kind won in a southern state court. *See* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 187-94 (First Vintage Books ed. 1997) (1975) (presenting an excellent discussion of this litigation); *see also* *McLaurin v. Okla. State Regents for Higher Ed.*, 339 U.S. 637 (1950) (integrating the University of Oklahoma Graduate School of Education); *Sweatt v. Painter*, 339 U.S. 629 (1950) (integrating the University of Texas School of Law); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948) (integrating the University of Oklahoma Law School). Two of the previously cited cases centered on the failure of Oklahoma to provide a law school or graduate training for blacks. *See McLaurin*, 339 U.S. at 642; *Sipuel*, 332 U.S. at 632. *Sweatt v. Painter* involved Texas' failure to provide a law school for blacks and, subsequently, the Court's unanimous determination that the instantly created law school for blacks overwhelmingly failed the equal prong of the separate but equal test. *Sweatt*, 339 U.S. at 636. The black law school continued to operate as Texas Southern Law School until its name was changed to the Thurgood Marshall School of Law. Ironically, Marshall had argued the *Sweatt* case, denouncing the quality of the law school that now bears his name. In none of these cases did the N.A.A.C.P. challenge segregation *per se*.

51. *Berea College v. Kentucky*, 211 U.S. 45 (1908).

52. *Id.*

53. *See, e.g., McLaurin*, 339 U.S. at 637; *Sweatt*, 339 U.S. at 629; *Sipuel*, 332 U.S. at 631. These cases were won by civil rights attorneys, in part, because the states either did not have a similar program for blacks, or the separate institution was so grotesquely unequal that the Court would not accept the fiction of separate but equal.

54. *See MURRAY*, *supra* note 44, app. 6, at 666 (Note on Regional Compact—Education).

implemented in any serious way, and even if it had been, it would probably have done little for black education in the South. In reality, most southern states ignored the education of their black citizens as much as they could. Louisiana, for example, created some twenty “trade schools” between 1934 and 1949 for whites, but did not provide any trade schools for blacks.<sup>55</sup>

At the primary and secondary levels the disparity in public expenditures guaranteed that blacks would have inferior educational facilities. Almost without exception, white principals, supervisors, and teachers were paid more than blacks. Classes for blacks had more children than classes for whites, schools for blacks were open fewer days, and the facilities were vastly inferior.<sup>56</sup> A situation in Clarendon County, South Carolina, illustrates the reality of segregated education. In 1949, the County spent \$179 per pupil for white children and \$43 per pupil for black children.<sup>57</sup> The county had sixty-one school buildings for its 6,531 black students, which were worth \$194,575. The 2,375 white students went to twelve different schools, worth \$673,850.<sup>58</sup> The schools for blacks were dilapidated at best, some were “plain falling-down shanties.”<sup>59</sup> They lacked modern heating or indoor plumbing. In this very rural county the school system refused to provide a bus to black children, although it provided school buses for whites. Indeed, it was the refusal to provide a bus that led to the suit that eventually became part of the *Brown* litigation.<sup>60</sup>

Segregation profoundly affected criminal justice in the South. On the eve of the *Brown* decision, “some two-score southern cities” had at least a few black police officers.<sup>61</sup> But, most southern blacks still lived in rural areas and small towns, where policing was segregated and often oppressive. Police brutality towards blacks was the norm, and only the most egregious cases ever reached the federal courts where some relief might be found.

If arrested, blacks went to segregated jails and, when convicted, to segregated prisons.<sup>62</sup> In Florida it was illegal for any sheriff or other law enforcement officer to handcuff or chain blacks and whites together, while in

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55. *Id.* at 177-79.

56. *THESE RIGHTS*, *supra* note 13, at 63.

57. *KLUGER*, *supra* note 50, at 8.

58. *Id.*

59. *Id.* at 13.

60. *Id.* at 13-21; *see also* *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951) (denying injunction prohibiting segregation denied).

61. *THESE RIGHTS*, *supra* note 13, at 61.

62. *See, e.g.*, *MURRAY*, *supra* note 44, at 31-32 (Alabama); *id.* at 45 (Arkansas); *id.* at 84-85 (Florida); *id.* at 114 (Georgia); *id.* at 238, 247 (Mississippi); *id.* at 480 (Virginia).

Georgia black and white prisoners were to be kept separate “as far as practicable.”<sup>63</sup> Other southern states had similar laws and rules.<sup>64</sup> Segregated facilities meant that black prisoners would face worse conditions than their white counterparts. No matter how bad jail and prison conditions were for whites, they would always be worse for blacks. Furthermore, a convict leasing system gave county and state officials an incentive to vigorously prosecute all black lawbreakers, because convicts were laborers who could be rented out to various southern businesses.

In court, blacks were invariably represented by white attorneys, if they had representation at all. While some white attorneys represented their client with zeal and passion worthy of the fictional Atticus Finch,<sup>65</sup> others were dilatory or worse.<sup>66</sup> In the age before *Gideon v. Wainwright*,<sup>67</sup> poor defendants were not guaranteed a lawyer in non-capital cases; and thus, many blacks faced the court system without any formal legal advice or help. They faced white judges and all-white juries. In the deep-South, prison often meant laboring on a chain gang or in a rural work camp, where life was truly Hobbesian: brutal and short.

Virtually all other facilities were equally segregated. Southern states segregated homes for the aged,<sup>68</sup> orphanages<sup>69</sup> and homes or institutions for juvenile delinquents.<sup>70</sup> Industrial schools were segregated where they existed. Louisiana had three industrial schools: one each for young white males, white females, and black males.<sup>71</sup> Black female youthful offenders were not offered the option of learning a skill or trade in preparation for their rehabilitation.<sup>72</sup> In most southern states, African-Americans with a hearing problem, a mental

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63. *Id.* at 85, 114-15.

64. *See supra* note 62.

65. HARPER LEE, *TO KILL A MOCKINGBIRD* 10 (1960).

66. The failure of white Alabama lawyers to offer any sort of meaningful defense for their clients is detailed in *Powell v. Alabama*, 287 U.S. 45 (1932). *See also* DAVID J. BODENHEIMER, *FAIR TRIAL: THE RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* (1992); DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1979).

67. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

68. MURRAY, *supra* note 44, at 71 (Delaware). This appears to be the only statutory regulation of such institutions, probably because very few states had homes for aged blacks.

69. *Id.* at 71 (Delaware); *id.* at 343 (North Carolina); *id.* at 369 (Oklahoma); *id.* at 439 (Tennessee); *id.* at 445 (Texas).

70. *Id.* at 23 (Alabama); *id.* at 40 (Arkansas); *id.* at 72 (Delaware); *id.* at 75 (District of Columbia); *id.* at 79 (Florida); *id.* at 90 (Georgia); *id.* at 176 (Louisiana); *id.* at 239 (Mississippi); *id.* at 338 (North Carolina); *id.* at 369 (Oklahoma); *id.* at 409 (South Carolina); *id.* at 430 (Tennessee); *id.* at 445 (Texas); *id.* at 464-65 (Virginia).

71. *Id.* at 176-77.

72. *Id.*

illness, or tuberculosis went to special institutions for blacks only.<sup>73</sup> Ironically, state schools for the blind were segregated in the South, even though, presumably, most of the students could not actually see each other.<sup>74</sup> Louisiana not only required separate buildings to house and educate black and white blind children, but also that they be “on separate ground.”<sup>75</sup> While all these institutions were in theory “separate but equal,” in practice they were never equal. No matter how bad conditions might be for whites, they were invariably worse for blacks.

As the South became increasingly industrialized, segregation helped keep blacks economically marginalized. South Carolina provided \$100 fines and up to thirty days imprisonment at hard labor for textile manufactures or their officials that failed to follow elaborate rules for racial separations.<sup>76</sup> The law set out in great detail that no company engaged in textile or cotton manufacturing—the most important industry in the state—could allow members of the

different races to labor and work together within the same room, or to use the same doors of entrance and exit at the same time, or to use and occupy the same pay ticket windows or doors for paying off its operatives and laborers at the same time, or to use the same stairway and windows at the same time, or to use at any time the same lavatories, toilets, drinking water buckets, pails, cups, dippers or glasses.<sup>77</sup>

Other states had similar rules. In Oklahoma, Tennessee, and Texas, mines were required to have both separate shower facilities and clothing lockers for workers when they emerged from the ground.<sup>78</sup> These laws did more than just humiliate blacks and remind them of their inferior legal status. The laws also prevented them from advancing in their jobs, or even getting jobs. Separate facilities for blacks meant that factory owners would have to invest more money in their mills, mines, and factories. Where possible, it made greater economic sense simply to hire only whites, leaving blacks outside the growing industrial job market.

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73. *Id.* at 42-43 (Arkansas); *id.* at 74 (Delaware); *id.* at 75 (District of Columbia); *id.* at 175, 188 (Louisiana); *id.* at 239 (Mississippi); *id.* at 338, 339 (North Carolina); *id.* at 369, 370-71 (Oklahoma); *id.* at 409 (South Carolina); *id.* at 430, 437 (Tennessee); *id.* at 445 (Texas); *id.* at 448, 463-64, 476 (Virginia).

74. *Id.* at 175 (Louisiana); *id.* at 239 (Mississippi); *id.* at 338 (North Carolina); *id.* at 369 (Oklahoma); *id.* at 445 (Texas); *id.* at 463-64 (Virginia).

75. *Id.* at 175.

76. *Id.* at 414; *see also* WOODWARD, *supra* note 42, at 98.

77. MURRAY, *supra* note 44, at 414.

78. *Id.* at 372 (Oklahoma); *id.* at 437 (Tennessee); *id.* at 452 (Texas).

Everywhere in the South, public accommodations were segregated by law<sup>79</sup>—separate, but almost never actually equal. The South required that there be separate drinking fountains, restrooms, motels, hotels, elevators, bars, restaurants, and lunch counters for blacks.<sup>80</sup> Trains had separate cars for blacks, and buses reserved the last few rows for blacks, always keeping them, symbolically, at the back of the bus. Taxis served whites or blacks, not both.<sup>81</sup> Waiting rooms at bus stations, train stations, and airports were separate as well. At theaters, blacks sat in separate sections at the back or in the balcony. Practice on these issues always varied. While many states mandated separate waiting rooms at train and bus stations, Florida found yet one more way to segregate, separate, and humiliate blacks, by requiring that railroads also provide separate ticket windows for black travelers.<sup>82</sup>

Beyond public accommodations, schools, and the workplace, everything else was segregated. Louisiana required separate ticket windows and entrances at circuses and tent shows.<sup>83</sup> The law required that these ticket offices be at least twenty-five feet apart.<sup>84</sup> Southern states banned interracial meetings of fraternal orders, while cities and states followed Birmingham's segregation of "any room, hall, theatre, picture house, auditorium, yard, court, ball park, public park, or other indoor or outdoor place."<sup>85</sup> Mobile had a 10:00 p.m. curfew for blacks. Florida stored textbooks from black and white schools in different buildings,<sup>86</sup> while New Orleans segregated its red light district.<sup>87</sup> Texas specifically prohibited interracial boxing,<sup>88</sup> while most cities and towns segregated seating at baseball fields. Local ordinances or customs made it illegal or unlikely that blacks and whites would compete against each other in sporting events, but some states made certain this would not happen.

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79. THESE RIGHTS, *supra* note 13, at 76.

80. *Id.*

81. MURRAY, *supra* note 44, at 32-34. (Alabama); *id.* at 117 (Georgia); *id.* at 191 (Louisiana); *id.* at 375 (Oklahoma); *id.* at 619 (Mobile ordinance); *id.* at 628 (Atlanta ordinance). The Georgia statute allowed taxis to carry people of both races "under such conditions of separation of the races as the [Georgia Public Service] Commission may prescribe." *Id.* at 117. It is impossible to imagine how that might have operated. Other states segregated all commercial vehicles, which would have included taxis.

82. *Id.* at 87.

83. *Id.* at 171.

84. *Id.*

85. *Id.* at 615.

86. *Id.* at 82.

87. ALEXIA P. LONG, THE GREAT SOUTHERN BABYLON: SEX, RACE AND RESPECTABILITY IN NEW ORLEANS, 1865-1920, at 192-99 (2004) (discussion of a 1917 ordinance requiring non-white prostitutes to move out of Storeyville to another district).

88. *Id.* at 443.

Georgia specifically segregated billiard rooms and poolrooms.<sup>89</sup> South Carolina and Oklahoma segregated public parks and playgrounds.<sup>90</sup> In Louisiana, it was illegal for blacks and whites to reside in the same dwelling, and the existence of “separate entrances or partitions” would not be a defense to a charge under this law.<sup>91</sup> Oklahoma provided for “segregation of the white and colored races as to the exercises of rights of fishing, boating, and bathing”<sup>92</sup> as well as “to the exercise of recreational rights” at parks, playgrounds, and pools.<sup>93</sup> The state authorized the public service commission “to require telephone companies . . . to maintain separate booths for white and colored patrons.”<sup>94</sup> Even the sacred was not protected from the need of southern whites to separate themselves from blacks: Tennessee required that houses of worship be segregated.<sup>95</sup> Texas and North Carolina segregated their public libraries by statute,<sup>96</sup> while other states did not, presumably because they did not imagine blacks using public libraries. Nevertheless, when blacks tried to use them, they were either refused access or forced into segregated facilities.<sup>97</sup> Georgia never seemed to tire of finding things to segregate, and, thus, in its 1937-38 legislative session, provided that the names of white and black taxpayers be made out separately on the tax digest.<sup>98</sup> As Judge William H. Hastie of the Third Circuit concluded, “[t]he catalog of whimsies was long.”<sup>99</sup> These “whimsies,” codified by law, reminded blacks, over and over again, that in the American South, and much of the North, they could not expect equal treatment anywhere in society, even in houses of worship!

Beyond the statutes, the “whimsies” manifested themselves as customs and extralegal forms of segregation. Woodward was unable to find a statute requiring separate Bibles in courtrooms, but everywhere that was the practice.<sup>100</sup> As Woodward noted, writing in 1956:

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89. *Id.* at 89.

90. *Id.* at 417 (South Carolina); *id.* at 372 (Oklahoma).

91. *Id.* at 188.

92. *Id.* at 370.

93. *Id.* at 372.

94. *Id.*

95. William H. Hastie, *Toward an Equalitarian Legal Order, 1930-1950*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 20 (1973).

96. MURRAY, *supra* note 44, at 342 (North Carolina); *id.* at 450 (Texas).

97. See JOHN HOPE FRANKLIN, *RACE AND HISTORY* 289 (1989).

98. MURRAY, *supra* note 44, at 115.

99. Hastie, *supra* note 95, at 20.

100. WOODWARD, *supra* note 42, at 102.

it is well to admit, and even to emphasize, that *laws are not an adequate index of the extent and prevalence of segregation and discriminatory practices in the South*. The practices often anticipated and sometimes exceeded the law. It may be confidentially assumed—and it could be verified by present observation—that there is more Jim Crowism practiced in the South than there are Jim Crow laws on the books.<sup>101</sup>

What the historian Woodward described for the turn-of-the-century and beyond, the economist Gunnar Myrdal observed in the 1940s. His classic study of American race relations, *An American Dilemma*, detailed the existence of an elaborate system of segregation throughout the American South, as well as less pervasive and systematic, but equally pernicious, forms of discrimination in the North.<sup>102</sup> Myrdal noted that:

Every Southern state and most Border states have structures of state laws and municipal regulations which prohibit Negroes from using the same schools, libraries, parks, playgrounds, railroad cars, railroad stations, sections of streetcars and buses, hotels, restaurants and other facilities as do the whites. In the South there are, in addition, a number of sanctions other than the law for enforcing institutional segregation as well as etiquette. Officials frequently take it upon themselves to force Negroes into certain action when they have no authority to do so.<sup>103</sup>

Significantly, Myrdal followed this description of the South by noting that the Supreme Court prevented (at that time) any federal intervention to stop this discrimination. Myrdal wrote, “[a]s long as the Supreme Court upholds the principle established in its decision in 1883 [*The Civil Rights Cases*] to declare the federal civil rights legislation void, the Jim Crow laws are to be considered constitutional.”<sup>104</sup>

Before the 1960s, much of the Northern private organizations and businesses were also free to discriminate, merely by refusing to serve blacks.<sup>105</sup> In the South, of course, private discrimination was not only legal everywhere, but often required by law. In the South, blacks could usually shop at the same department stores as whites, but they had to take separate elevators (usually the freight elevators) to the different floors. They might buy the same clothing as whites, but were usually not allowed to try on the clothing before purchasing it.<sup>106</sup> Financial service institutions in the South,

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101. *Id.* (italics in original).

102. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1994).

103. *Id.* at 628.

104. *Id.* at 628-29.

105. *Id.* at 630.

106. STETSON KENNEDY, *JIM CROW GUIDE: THE WAY IT WAS* 225 (1959). Kennedy notes that non-whites attempting to purchase clothing or other goods in a Southern department store might:



such as banks, simply refused to let blacks open accounts or use their services. Banks often refused to extend credit to blacks, even to military veterans seeking housing loans under the GI Bill of Rights.<sup>107</sup>

Even in those states where civil rights statutes existed, residential segregation, custom, and lax enforcement created an atmosphere that was hostile to blacks, at best. Businesses could, and did, avoid breaking the law by

the indirect devices of discouraging the Negro from seeking services in these establishments; by letting him wait indefinitely for service, by telling him that there is no food left in the restaurant or rooms left in the hotel, by giving him dirty or inedible food, by charging him unconscionable prices, by insulting him verbally, and by dozens of other ways of keeping facilities from him without violating the letter of the law.<sup>108</sup>

On the eve of *Brown*, the situation for blacks in the United States, north or south, was ugly and grim. Starting with a series of court decisions around 1950,<sup>109</sup> the Court began to chip away at segregation, but it was not until the passage of the 1964 Civil Rights Act that private acts of discrimination came under attack. Before then, segregation was painful and pervasive. In 1963, just a year before the Civil Rights Act was passed, the Rev. Martin Luther King, Jr., in his famous “Letter from a Birmingham Jail,” described the nature of segregation, as he tried to explain why blacks could no longer wait for equality:

[W]hen you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can’t go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children. . . . when you have to concoct an answer for a five-year-old son who is asking, “Daddy, why do white people treat colored people so mean?”; when you take a cross-country drive and find it necessary to sleep

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1. Be ejected.
  2. Be insulted.
  3. Be served only after all the whites have been served.
  4. Be intercepted by a shopwalker whose job it is to direct all nonwhites to basement counters.
  5. Be denied the privilege of trying on clothes.
  6. Be required to try on clothing in the privacy of your own home.
  7. Be required to put on a cloth skullcap before trying on millinery.

107. *THESE RIGHTS*, *supra* note 13, at 68.

108. *Id.* at 110.

109. See *Henderson v. United States*, 339 U.S. 816 (1950) (striking down segregation in interstate trains); *McLaurin v. Okla. State Regents for Higher Ed.*, 339 U.S. 637 (1950) (ordering the admission of an African-American to the graduate school at the University of Oklahoma); *Sweatt v. Painter*, 339 U.S. 629 (1950) (ordering the admission of an African-American to the University of Texas School of Law); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that courts could not enforce restrictive covenants).

night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading “white” and “colored”; when your first name becomes “nigger,” your middle name becomes “boy” (however old you are) and your last name becomes “John,” and your wife and mother are never given the respected title “Mrs.”; when you are harried by day and haunted by night by the fact that you are Negro, living constantly on tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of “nobodiness”—then you will understand why we find it difficult to wait.<sup>110</sup>

*Looking at One State: Louisiana*

One way of understanding the pre-*Brown* world is to look at how segregation would have impacted the life of a black child born and raised in the South on the eve of World War II. Louisiana offers a useful example, in part because of intensive research done by scholars on that state, and in part because of how Justice William O. Douglas detailed the nature of segregation in his concurring opinion in *Garner v. Louisiana*.<sup>111</sup>

Consider a junior high student living in Louisiana on the eve of the *Brown* decision. A birth, in 1939 or 1940, would have taken place in a segregated hospital. Throughout her early life, probably until her late twenties (well after *Brown*), any black she knew who went to a hospital would have gone to a segregated one.

While growing up, Louisiana would have offered few jobs for blacks. In 1943, she would have been too young to know that Shreveport, Louisiana, refused to accept “\$67,000 in federal funds for a health center” because the city would not agree to “a hiring quota of twelve blacks for every hundred workers.”<sup>112</sup> This is just one of countless examples of employment discrimination that was pervasive in Louisiana in the 1940s and 1950s. It was the way of the world at that time and in that place.

All of her schooling would have been segregated, whether she attended public or private schools. One of the best private high schools in New Orleans, St. Augustine, was opened in 1951 and created to educate young men from black Catholic families.<sup>113</sup> It was, of course, illegal for blacks and whites to attend the same schools in this city or anywhere else in the state. Simply

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110. Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), *reprinted in* 26 U.C. DAVIS L. REV. 835 (1993).

111. *Garner v. Louisiana*, 368 U.S. 157, 176 (1961) (Douglas, J., concurring).

112. FAIRCLOUGH, *supra* note 16, at 87.

113. St. Augustine High Sch., New Orleans, La., *available at* [www.purplenights.com](http://www.purplenights.com) (last visited June 3, 2004).

glancing at the physical structures of the white and black public schools would have alerted anyone to the sharp contrast and the incredibly unequal educational opportunities offered blacks by Louisiana's public schools.

In *Brown*, the Supreme Court declared segregated public schools to be unconstitutional, but public schools in New Orleans remained totally segregated until the early 1960s. In 1956, a federal district court ordered the integration of the New Orleans schools,<sup>114</sup> but it was not until 1960 that six-year-old Ruby Nell Bridges became the first black child to integrate a southern elementary school, when she entered William Franz Elementary School in New Orleans.<sup>115</sup> In 1960, Ruby Bridges's historic and courageous walk to that school, as she was protected from a hate filled crowd by federal marshals, made national headlines. The facts surrounding the marshals's escort of Bridges to the school later inspired Norman Rockwell's famous painting, *The Problem We All Live With*, which appeared in *Look Magazine*<sup>116</sup> and was seen by millions of Americans. For an entire year, Ruby Bridges was the only student in her classroom, as angry white parents pulled their children out of school rather than send them to a classroom with one black six-year-old child. That year, Ruby Bridges's father lost his job, because his daughter had integrated a school. Her grandparents, who were sharecroppers in Mississippi, were forced to leave the farm they had been on for twenty-five years, because the landowner knew that their granddaughter had integrated the schools in New Orleans.<sup>117</sup> Such was the racial climate in New Orleans and Mississippi, and throughout the deep South at the time of *Brown* and in the 1960's.

When Ruby Bridges entered a previously all-white elementary school in 1960, very few blacks voted in Louisiana. African-Americans in the heavily black seventh ward formed the Seventh Ward Civil League to increase black voter registration, but they had limited success.<sup>118</sup> In the 1940s there was some increased voting and voter registration among blacks, but there was also intense opposition to black voting in Louisiana, and most African-Americans in that state had no real opportunity to vote until after 1965.

Until 1958, when Judge Skelly Wright ordered the integration of the city's bus system, our hypothetical black resident of New Orleans would have

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114. *Bush v. Orleans Parish Sch. Bd.*, 138 F. Supp. 336, 337 (E.D. La. 1956).

115. FAIRCLOUGH, *supra* note 16, at 248-49.

116. Norman Rockwell, *The Problem We All Live With*, *LOOK*, Jan. 14, 1964, at 23-24.

117. *PBS Newshour: A Class of One*, Charlayne Hunter-Gault interview with Ruby Bridges Hall (Transcript of PBS television broadcast, Feb. 18, 1997), available at [http://www.pbs.org/newshour/bb/race\\_relations/Jan-June97/bridges\\_2-18.html](http://www.pbs.org/newshour/bb/race_relations/Jan-June97/bridges_2-18.html) (last visited Apr. 20, 2004).

118. FAIRCLOUGH, *supra* note 16, at 23-25.

had to ride at the back of a city bus in a “colored section,” and, if there was no more room in that section, the driver could refuse to allow blacks to board the bus. While growing up in New Orleans, every public park, recreation center, swimming pool, sports facility, restaurant, lunch counter—to name just the most common businesses and facilities—would have been either closed to her, or open only on a segregated basis. However, she could have used the public library, and even the same books as whites. This made New Orleans more progressive than some of the other southern cities. But, inside the library, the drinking fountains and restrooms were segregated, and the prominent signs would have reminded her of the pervasive segregation of her home state and city. She would also have had to use separate drinking fountains and public toilet facilities everywhere else. If she had attended a circus, she would have entered the tent through a separate entrance, and be forced to sit in a separate “colored” section. The blacks she knew would have patronized segregated barber shops and beauty salons, and used segregated elevators if they entered downtown stores.<sup>119</sup> A useful summary of the segregation laws of Louisiana is found in Justice William O. Douglas’s concurring opinion in *Garner v. State of Louisiana*.<sup>120</sup> Justice Douglas noted, “[t]here is a deep-seated pattern of segregation of the races in Louisiana, going back at least to *Plessy v. Ferguson*.”<sup>121</sup> In a footnote, he then quoted C. Vann Woodward’s *The Strange Career of Jim Crow*:

In bulk and detail as well as in effectiveness of enforcement the segregation codes were comparable with the black codes of the old regime, though the laxity that mitigated the harshness of the black codes was replaced by a rigidity that was more typical of the segregation code. That code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism eventually extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries.<sup>122</sup>

Justice Douglas next summarized the segregation laws of Louisiana in 1960, only six years after *Brown*, and only five years after *Brown II*:

Louisiana requires that all circuses, shows, and tent exhibitions to which the public is invited have one entrance for whites and one for Negroes. No dancing, social functions, entertainment, athletic training, games, sports, contests and “other such activities involving personal and social contacts” may be open to both races. Any public

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119. See *Garner v. Louisiana*, 368 U.S. 157, 180 (1961) (Douglas, J., concurring).

120. *Id.* at 179.

121. *Id.*

122. *Id.* at 179 n.1 (quoting WOODWARD, *supra* note 42, at 7-8).

entertainment or athletic contest must provide separate seating arrangements and separate sanitary drinking water and “any other facilities” for the two races. Marriage between members of the two races is banned. Segregation by race is required in prisons. The blind must be segregated. Teachers in public schools are barred from advocating desegregation of the races in the public school system. So are other state employees. Segregation on trains is required. Common carriers of passengers must provide separate waiting rooms and reception room facilities for the two races and separate toilets and separate facilities for drinking water as well. Employers must provide separate sanitary facilities for the two races. Employers must also provide separate eating places in separate rooms and separate eating and drinking utensils for members of the two races. Persons of one race may not establish their residence in a community of another race without approval of the majority of the other race. Court dockets must reveal the race of the parties in divorce actions. And all public parks, recreation centers, playgrounds, community centers and “other such facilities at which swimming, dancing, golfing, skating or other recreational activities are conducted” must be segregated.<sup>123</sup>

Douglas went on to note that,

[t]hough there may have been no state law or municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana’s custom. Segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law.<sup>124</sup>

## II. THE IMPLICATIONS OF *BROWN*

Such was the world of Louisiana and the South, on the eve of *Brown*, and in the years immediately following the decision. *Brown* did not lead to an immediate end to segregated schools. Chief Justice Warren carefully limited his opinion to public schools, in hopes, no doubt, of blunting southern opposition. Ironically, however, the first fruits of *Brown* appeared outside the schools. Within a few years the Court struck down segregation in urban transportation,<sup>125</sup> thus, in effect, overturning *Plessy v. Ferguson*.<sup>126</sup> This was in response to the Montgomery bus boycott. The Civil Rights movement soon took off, with Congress passing sweeping civil rights legislation, and, within a decade after *Brown*, segregation was illegal everywhere in America. It is hard to imagine a more profound change coming so quickly, and with relatively little violence. This was the *Brown* revolution. Ironically, schools remained stubbornly segregated, tied as they always have been, to

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123. *Id.* at 180-81 (citations omitted).

124. *Id.* at 181.

125. *Browder v. Gayle*, 142 F. Supp. 707 (D. Ala. 1956); *aff’d*, 352 U.S. 903 (1956).

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

communities, neighborhoods, and housing patterns. In the end, *Brown* was a powerful force in the revolution that ended formal, legalized segregation in America. This was a huge change and an enormous accomplishment. *Brown* was less successful, however, in creating an integrated society. That revolution still remains to be fought and won.