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I. INTRODUCTION

"The legal redress, the civil-rights redress, are far too slow for the demands of our time," proclaimed James Lawson at a meeting of student leaders of the lunch counter sit-in movement in the spring of 1960. "The sit-in is a break with the accepted tradition of change, of legislation and the courts."[1] Lawson contrasted the student-led movement to the National Association for the Advancement of Colored People (NAACP), which was "a fund-raising agency, a legal agency" that had "by and large neglected the major resource that we have—a disciplined, free people who would be able to work unanimously to implement the

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1. David Halberstam, *A Good City Gone Ugly*, REPORTER (Nashville), Mar. 31, 1960, *reprinted in* REPORTING CIVIL RIGHTS: AMERICAN JOURNALISM, 1941–1963, at 441 (2003).

ideals of justice and freedom."[2]

At the heart of this attempt to describe what was distinctive about the sit-in protests is a particular conception of law. From the perspective of Lawson and his fellow student activists, law can be readily defined. It is located in specific institutions (courts in particular). It is identified with a profession (lawyers). It even has a preferred speed of change (gradual). And for the purposes of the student protesters, law's most important characteristic is that at some point it runs out. The assumption behind Lawson's critique of the NAACP and the "civil-rights redress" is that there is a realm of law—and there is something else. It is this assumption that there is something else outside of law, a world of "not-law," if you will, that is the focus of this essay. For the sake of convenience, if not precision, I will refer to this realm of not-law as "society."[3] From the students' point of view, then, the activities at the center of their civil rights project—college dorm room bull sessions, lunch counter protests, community mobilization, picketing, marching, negotiations with restaurant owners and city leaders—were largely separable from the work of the law. Law and its perceived absence thus became a vital source of collective identity for the students. Their understanding of law's boundaries, of the law-society division, helped to create a sense of community and common purpose. Making a claim about the concept of law can be a way to critique or embrace a particular organization or tactic, to rally public support for a particular cause, or to urge a specified course of action. The students' conception of law, through their collective act of definition and boundary construction, played a central role in this crucial stage of the civil rights movement.

The students' claim to be standing outside the realm of the law offers a resonant example of a theme of the civil rights movement that I believe deserves more attention from sociolegal scholars. The sit-in movement was only one of many instances in which participants in the civil rights movement made a conscious effort to establish a boundary between the work of the law and the work of social interactions outside the sphere of formal legal institutions and legal actors. Diverse and sometimes competing claims about the relationship between law and social action pervaded the black freedom struggle.

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2. *A Passive Insister: Ezell Blair Jr.*, N.Y. TIMES, Mar. 26, 1960, at 10; Claude Sitton, *Negro Criticizes N.A.A.C.P. Tactics*, N.Y. TIMES, Apr. 17, 1960, at 32.

3. My use of this term is not meant to make a conclusion about the presence or absence of law, in some form, in this sphere of "society." By "society" I simply mean to give a label for a sphere of life that, in the minds of the historical actors whose ideas I examine, is distinct from their conception of "law." By using this term I am trying to recreate the distinction between law and "not-law" as others have understood it, and to adopt a label that allows for comparisons between diverse efforts to define the boundaries of the law. At different times in this Article "society" will refer to customs, traditions, and attitudes; to protest actions and political contestation; even to certain kinds of laws. The only common denominator among this disparate collection of activities is that at some point in time, for some group of actors, they were distinguished from a sphere of activity understood as "law."

The persistent value of the law-society distinction as a historical artifact is all the more striking when contrasted with the recent efforts of sociolegal scholars to question its utility as an analytical framework. Law, these scholars insist, can never be fully separated from the processes of social change. The separation of the world into "law" and "society" fails to reflect lived experience. It is a post hoc construction of scholars looking for neat categories in which to cabin phenomena that always resists such categorization efforts. This critique of the law-society divide has served a valuable role in expanding our understanding of the way law functions. Yet, as I seek to demonstrate in this Article, the subjects of our historical inquiry can often be quite insistent in defending the barricades of the law as something discrete and distinct from society. Various individuals and groups with quite distinct and often opposed agendas regularly expended considerable thought and energy in creating conceptual boundaries around the law. They put considerable faith in distinguishing law (as they understood it) from the rest of the world. I argue that even as legal scholars have rightly questioned the usefulness of a dichotomous law-versus-society framework for understanding the dynamics of law in all its rich complexity, it remains an essential object of study for legal historians.

This Article unfolds in three main Parts. In Part II, I begin my examination of the way law was conceptualized during the civil rights movement with a consideration of three efforts to sharpen the boundaries of the law. First, I look at the vision of law put forth by defenders of Jim Crow as they mobilized against federal civil rights intervention—a vision based on the assumption that law should reflect norms and customs that had evolved outside the law. I then consider the ways in which civil rights advocates in the lead-up to *Brown v. Board of Education* challenged the segregationist conception of the law by pressing the case for the capacity of law to undermine discriminatory behavior and attitudes. Third, I examine the efforts of the sit-in protesters to define themselves in opposition to lawyers and legal reform tactics. As these episodes demonstrate, the various demands of the civil rights movement created incentives to clarify the boundary around the law. In each of these instances, the essential characteristic of law was its perceived separateness from something else.

In Part III, I then examine two individuals who articulated an alternative approach to categorizing law, an approach that sought to break down the separateness of law and society. The civil rights leader Martin Luther King Jr. and Yale law professor Alexander Bickel both argued for a definition of law that was more capacious than one based on the formal pronouncements of recognized governmental institutions. Each in his own way sought to reconceptualize law so as to recognize processes of cultural change, social disorder, and political agitation as integral to the legal process. Their effort to break down the law-society division, like the efforts of those who sought to emphasize this same division, came in response to the pressures and demands of the civil rights movement.

Finally, in Part IV, I consider the possible implications of this account of the law-society divide in the civil rights movement for legal historians. One of the challenges in moving scholarship of the civil rights movement beyond a dichotomous law-and-society framework, I suggest, will be to remain attentive to the conceptions of law drawn upon by the historical actors themselves, including the value they often placed upon the differentiation of law from society.

II. CONCEPTIONS OF THE LAW DURING THE CIVIL RIGHTS MOVEMENT

A. The Defense of Jim Crow—Protecting Folkways Against Stateways

Defenders of Jim Crow embraced their own conception of law and the law-society boundary. It was based on the idea that established cultural norms and traditions are the basis of a strong and stable society and that laws should reinforce and support these cultural foundations. To ask law to do more than to reflect and reinforce society—to use law to try to *change* entrenched norms—would be at best a waste of effort, at worst a recipe for social upheaval. "Stateways" are powerless to change "folkways," went the popular dictum, most commonly associated with Yale sociologist William Graham Sumner, the leading proponent of social Darwinism in the United States in the late nineteenth and early twentieth centuries.[4] Translated for the purposes of segregationists, "folkways" were the customs and practices of white supremacy, "stateways" were civil rights laws. For generations of southern proponents of Jim Crow, Sumner's dictum was, according to Gunnar Myrdal, "a general formula of mystical significance."[5]

The classic articulation of this principle can be found in *Plessy v. Ferguson*, where the Court expressed skepticism toward civil rights laws that conflicted with society's natural racial prejudices. "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences," the Court explained in upholding a Louisiana railroad segregation statute, "and the attempt to do so can only result in accentuating the difficulties of the present situation."[6] The belief "that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by enforced commingling of the two races" was deeply misguided.

> The object of the [Fourteenth Amendment] was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon

4. *See* WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS (1906).

5. GUNNAR MYRDAL, AN AMERICAN DILEMMA 1049 (1944); *see also* Christopher W. Schmidt, *"Freedom Comes Only From the Law": The Debate over Law's Capacity and the Making of* Brown v. Board of Education, 2008 UTAH L. REV. 1493, 1498–1510 (2008).

6. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

> color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.[7]

Social change, if it were to arrive, would do so through pressures other than legal compulsion. "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."[8] *Plessy* is pervaded with a general skepticism toward the power of the law to effect change in the "social" sphere.[9]

Over fifty years later, these same arguments—with much the same conception of law as separate from and subordinate to society—featured prominently in the segregationist argument in *Brown v. Board of Education*. Arguing before the Supreme Court, the Virginia Attorney General presented a bleak vision of what a desegregation ruling would create, drawing on language that echoed Sumnerian folkways principles. A legal mandate to desegregate schools, he warned, would be "contrary to the customs, the traditions and mores of what we might claim to be a great people, established through generations, who themselves are fiercely and irrevocably dedicated to the preservation of the white and colored races."[10]

On the Supreme Court, Justice Jackson was particularly receptive to these

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7. *Id.* at 544, 551.

8. *Id.* at 551.

9. *See, e.g.*, *id.* at 543 (referring to segregation law as creating "*merely* a legal distinction" (emphasis added)). The conception of law at the heart of the *Plessy* decision, based on a strict division between the social sphere (assumed to be a realm of free choice, unencumbered by legal constraints) and the civil and political spheres (where law had a role), was well established by the time of *Plessy*. *See, e.g.*, People *ex rel.* King v. Gallagher, 93 N.Y. 438, 448 (1883) (Social equality "can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. . . . In the nature of things there must be many social distinctions and privileges remaining unregulated by law and left within the control of the individual citizens, as being beyond the reach of the legislative functions of government to organize or control. The attempt to enforce social intimacy and intercourse between the races, by legal enactments, would probably tend only to embitter the prejudices, if any such there are, which exist between them, and produce an evil instead of a good result."); CONG. GLOBE, 39th Cong., 2d Sess. 252 (1867) (remarks by Rep. Thaddeus Stevens of Ohio) ("This [equal protection] doctrine does not mean that a Negro shall sit on the same seat or eat at the same table with a white man. That is a matter of taste which every man must decide for himself. The law has nothing to do with it.").

10. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952–1955, at 98 (Leon Friedman ed., 1969). *See also id.* at 61 (remarks of John W. Davis, attorney for South Carolina) ("Is it not of all the activities of government the one which most nearly approaches the hearts and minds of people, the question of education of their young? Is it not the height of wisdom that the manner in which that shall be conducted should be left to those most immediately affected by it, and that the wishes of the parents, both white and colored, should be ascertained before their children are forced into what may be an unwelcome contact?"); *cf.* Hannah Arendt, *Reflections on Little Rock*, 6 DISSENT 45, 46–56 (1959) (distinguishing between political, social, and private realms, classifying child education as social, and arguing that the legal mandate of nondiscrimination should only apply to the political realm).

arguments for the incapacity of law to reshape established social practices. In his unpublished concurring opinion in *Brown*, Jackson wrote that courts "cannot eradicate" the "fears, prides and prejudices" that support segregation.[11] Jackson continued:

> This Court, in common with courts everywhere, has recognized the force of long custom and has been reluctant to use judicial power to try to recast social usages established among the people. . . . Today's decision is to uproot a custom deeply embedded not only in state statutes but in the habit and usage of people in their local communities.[12]

From this he concluded, "In embarking upon a widespread reform of social customs and habits of countless communities, we must face the limitations on the nature and effectiveness of the judicial process."[13]

Following the *Brown* decision, segregationists in the South renewed their critique of "stateways" that conflicted with established Jim Crow customs. In 1956, 101 members of the United States Congress, all representing the South, signed what became known as the Southern Manifesto. The document defended the Court's "separate-but-equal" interpretation of the Fourteenth Amendment in *Plessy*. "[R]estated time and again, [it] became a part of the life of the people of many of the States and confirmed their habits, traditions, and way of life."[14] Law's proper role, according to this reasoning, was to respect commitments that had taken shape outside the realm of the law.

President Eisenhower, who personally opposed *Brown*, echoed this view in less confrontational terms. He said privately that he believed the decision had set back racial progress by decades,[15] and in public he conspicuously refused to say that the decision was right, limiting himself to bland statements about respecting the Court and carrying out his duty to enforce the law.[16] In the aftermath of *Brown*, he repeatedly dismissed the idea that law could affect prejudice. "[I]t is difficult through law and through force to change a man's heart," he explained at a 1956

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11. Robert H. Jackson, Memorandum by Mr. Justice Jackson 2 (Mar. 15, 1954) (unpublished manuscript) (on file with the Library of Congress).

12. *Id.* at 10.

13. *Id.* at 12.

14. 102 CONG. REC. 4460 (1956).

15. EMMET JOHN HUGHES, THE ORDEAL OF POWER: A POLITICAL MEMOIR OF THE EISENHOWER YEARS 201 (1963) ("I am convinced that the Supreme Court decision *set back* progress in the South *at least fifteen years*. . . . It's all very well to talk about school integration—if you remember you may also be talking about social *dis*integration. Feelings are deep on this, especially where children are involved. . . . We can't demand *perfection* in these moral things. All we can do is keep working toward a goal and keep it high. And the fellow who tries to tell me that you can do these things by *force* is just plain *nuts*.").

16. On Eisenhower's position on *Brown* and civil rights generally, see, e.g., J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 46–55 (1961); Michael Mayer, *With Much Deliberation and Some Speed: Eisenhower and the* Brown *Decision*, 52 J. S. HIST. 43, 44–45 (1986).

news conference.[17] Eisenhower admonished that

> we must all . . . help to bring about a change in spirit so that extremists on both sides do not defeat what we know is a reasonable, logical conclusion to this whole affair, which is recognition of equality of men.… This is a question of leadership and training and teaching people, and it takes some time, unfortunately.[18]

The President used this skepticism to justify his tepid public support for federal involvement in desegregating schools. Writing in 1961, two civil rights scholars lamented:

> In the six years immediately following *Brown v. Topeka*, President Eisenhower, by his statements and by the things he left unsaid, reflected the views and sentiments of large sections of the American people who were inclined to question the efficacy of law as an instrument of social control and advancement in the field of race relations.[19]

The inconsistencies and ironies that pervaded the segregationist commitment to a conception of law as independent of and subordinate to social norms are readily apparent. Most obviously, segregationist claims tended to ignore the inconvenient fact that a crucial component of the construction of the "tradition" of Jim Crow was, in fact, law. Despite all the talk about the limits of law, *Plessy* upheld a Louisiana statute—a statute that defenders and critics alike assumed would have an impact on behavior. As C. Vann Woodward famously argued in *The Strange Career of Jim Crow*, laws were essential to the development of segregation.[20] Before the imposition of Jim Crow laws in the late nineteenth century, Woodward wrote, "the Negro could and did do many things in the South that in the latter part of the period, under different conditions, he was prevented from doing."[21] "[S]egregation statutes, or 'Jim Crow' laws . . . constituted the most elaborate and formal expression of sovereign white opinion upon the subject."[22] They gave an "illusion of permanency."[23] While recognizing "evidence that segregation and discrimination became generally practiced before they became law," Woodward emphasized "that segregation and ostracism were not nearly so

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17. *Text of President Eisenhower's News Conference on Foreign and Domestic Affairs*, N.Y. TIMES, Sept. 6, 1956, at 10.

18. *Id.* Despite his call for leadership, Eisenhower saw little role for the nation's chief executive in leading on school desegregation. "I think it makes no difference whether or not I endorse [*Brown*]. What I say is the—Constitution is as the Supreme Court interprets it; and I must conform to that and do my very best to see that it is carried out in this country." *Id.*

19. MILTON R. KONVITZ & THEODORE LESKES, A CENTURY OF CIVIL RIGHTS 255 (1961). In the words of Roy Wilkins: "If [President Eisenhower] had fought World War II the way he fought for civil rights, we would all be speaking German today." ROY WILKINS WITH TOM MATHEWS, STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS 222 (1982).

20. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955).

21. *Id.* at 91.

22. *Id.* at 7.

23. *Id.* at 8.

harsh and rigid in the early years as they became later"—that is, after the legalization of Jim Crow.[24] Even if scholars have challenged some of Woodward's stronger claims regarding the fluidity of race relations and the significance of Jim Crow laws in the late nineteenth century,[25] his basic point, that laws played a central role in the solidification of what segregationists would come to defend as custom, is irrefutable. Segregationist portrayals of law as subordinate to society sought to efface the role that law had played in the maintenance of Jim Crow.

A further irony in all this segregationist talk about the limited efficacy of "stateways" was that a centerpiece of massive resistance, the southern effort to resist implementation of *Brown*, was, in fact, law: namely, state laws designed to circumvent federally imposed desegregation.[26] (As one segregationists aptly—if incorrectly—put it, "As long as we can legislate, we can segregate."[27]) Defenders of Jim Crow used state laws to shift decision-making power over school assignments so as to minimize desegregation. Sometimes this meant using state-level authority to reign in local school boards that might be moved to comply with *Brown*, as was the case in Virginia, which created a state-wide pupil placement board. Sometimes it meant granting increased powers of discretion to local decision-makers. A particularly effective example of this segregationist legal maneuver was the pupil placement law, under which states granted local school boards power to make school assignments. The end result: token integration of selected schools, with the vast majority of students still attending single-race schools.[28] Another segregationist tactic was to protect against federal interference by increasing state-level control over localities, in an attempt to diffuse overtly defiant actions that risked attracting federal intervention.[29]

Segregationists thus shifted back and forth between proclaiming law as subordinate to practices and attitudes and turning to law to protect these same practices and attitudes when threatened by the civil rights movement. This vacillation highlights a fundamental inconsistency in the segregationist definition

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24. *Id.* at 23. *See also* Howard N. Rabinowitz, *More Than the Woodward Thesis: Assessing the Strange Career of Jim Crow*, 75 J. AM. HIST. 842, 844 (1988) ("[D]espite [Woodward's] partial disclaimers, the existence of law enforcing segregation has always been the key variable in evaluating the nature of race relations.").

25. *See, e.g.*, Rabinowitz, *supra* note 24.

26. *See* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1969); Patrick E. McCauley, *Be It Enacted*, *in* WITH ALL DELIBERATE SPEED: SEGREGATION-DESEGREGATION IN SOUTHERN SCHOOLS (Don Shoemaker ed., 1957); Tom Flake, *475 Legislative Actions Pertain to Race, Schools*, 10 SOUTHERN SCHOOL NEWS, May 1964, at 1b.

27. PELTASON, *supra* note 16, at 93.

28. *See, e.g.*, JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 61–78 (1959); PELTASON, *supra* note 16, at 78–92; Daniel J. Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA. L. REV. 517 (1959).

29. *See* ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS (2009).

of law. In claiming that, as a prescriptive matter, law should never stray too far from local commitments and practices, segregationists wavered between two polar opposite assumptions about law's efficacy. On the one hand, they often characterized law as powerless in the face of entrenched social norms: stateways *cannot* change folkways. Custom is primary, law epiphenomenal. Effective laws are those that reflect and reinforce established customs. But at other times defenders of segregation traded their Sumnerian conservatism for something more in line with the conservatism of Edmund Burke. In this view, law had revolutionary potential: law was distinctly powerful and dangerous and potentially disruptive of social norms. It is not that stateways cannot change folkways; it is that stateways should not attempt to change folkways. Law's capacity here is significant: law is a potentially dangerous weapon; law must therefore be respected and used circumspectly. Thus, for the segregationists, the construction of the law-society boundary was an effort to both demote law's capacity for social change and elevate this same capacity so as to warn against reckless attempts to use the law for social transformations.

B. The Racial Liberal Argument for the Capacity of Law

In their challenge to Jim Crow, civil rights proponents commonly embraced a conception of law they framed as a direct response to segregationist skepticism toward legal reform.[30] This approach largely accepted the premise of the segregationists' conception of law as functioning on a distinct plane from society (consisting of attitudes, customs, practices—Sumner's "folkways"), but they sought to challenge the segregationists' society-over-law hierarchy. Law could shape social behavior, argued liberal scholars and activists. After all, as Woodward explained in *The Strange Career of Jim Crow*, the edifice of Jim Crow was largely the product of law.[31] In the 1940s and 1950s, racial liberals increasingly attributed the major sins of racial oppression less to underlying attitudes and more to legal constraints on behavior. "[T]he chief device of social segregation in the South is the law," concluded one scholar in 1947,[32] a point that Thurgood Marshall would echo in his arguments before the Supreme Court in *Brown*, where he emphasized that the fundamental problem of racial segregation was "the state-imposed part of it."[33] This focus on the particular potency of law has clear implications for the racial liberal reform agenda. If law could indeed dictate social behavior in a relatively direct and predicable manner, then the removal of segregation laws and the passage of antidiscrimination laws could lead the way toward integration.

The creation of a compelling, persuasive ideology of civil rights reform had

30. I examine the racial liberal vision of law in the period leading up to and immediately following *Brown* at more length in Schmidt, *supra* note 5.

31. *See supra* notes 20–25 and accompanying text.

32. Ira de A. Reid, *Southern Ways*, SURVEY GRAPHIC, Jan. 1947, at 39.

33. ARGUMENT, *supra* note 10, at 49.

two key components, each aimed at challenging assumptions of the folkways school of thought that segregationists embraced. First was the destabilization of the belief that racial hierarchies were natural and inflexible and that racial prejudice was a necessary component of the human condition.[34] Second was pressing the argument that legal commands can be particularly effective in transforming social relations. In the early postwar period, these two projects were necessarily connected. The more malleable the attitudes and customs of Jim Crow, the more readily external pressures (such as a federal antidiscrimination law) could reform community attitudes and customs. And the more powerful the law, the deeper into Jim Crow race relations it could penetrate. Thus, the case for the capacity of the law made these two interlocking arguments: iniquitous racial customs and prejudices were not nearly as entrenched as was generally assumed (and certainly not the solid rock of Sumnerian folkways), and wide-scale legal reform was the most effective way to lead the nation away from its damaging tradition of racial inequality. Attitudes, liberals argued, followed actions. So even if the law was limited in changing hearts and minds, it could regulate discriminatory behavior. And eventually a lessening of discrimination in social relations would lead to a lessening of prejudicial attitudes.[35] The cycle of legally enforced separation exacerbating racial distrust and stereotypes on which Jim Crow was built might therefore be reversed, with a new cycle initiated in which legally enforced integration might lead to better race relations.

New findings in the social sciences offered advocates of legally enforced integration scientific support for their position. In making their case for the value of law in breaking down patterns of segregation, racial liberals drew particularly on the "contact" hypothesis. This sociological theory, premised on the idea that increased interaction among various groups (in relatively equal status settings) would lead to improved relations between these groups, had largely displaced the assumption, prominent earlier in the century, that excessive interactions between different groups risked destabilizing society. The basis of contact theory was that ignorance produced prejudice, and the best remedy for ignorance was exposure and education. As one scholar put it, "[S]ome kind of legal force is necessary to bring members of the two groups into a close enough relationship for the discriminators to learn from experience how inadequate their stereotypes have really been."[36] Social psychologists quickly built an entire scholarly literature around contact theory. Experiments in interracial housing came to the conclusion that, under the proper circumstances, living in close contact made different groups more tolerant and less prejudiced; military and workplace integration studies offered much the same conclusion.[37] In 1949, sociologist Arnold M. Rose (who

34. This was a central contribution of GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944).
35. *See, e.g.*, GORDON W. ALLPORT, THE NATURE OF PREJUDICE 261–82 (1954).
36. Gene Weltfish, *Implications for Action, and More Facts Needed*, 1 J. SOC. ISSUES 47, 52 (1945).
37. Prominent works in this vast area of postwar scholarship include ALLPORT, *supra* note 35;

had worked closely with Gunnar Myrdal in the preparation of *An American Dilemma*) published an article in *Common Ground*—titled "'You Can't Legislate Against Prejudice'—Or Can You?"—in which he summarized what appeared to be an emerging scholarly consensus: "A significant amount of evidence has become available to indicate that the attitude of prejudice, or at least the practice of discrimination, can be substantially reduced by authoritative order."[38]

By the time of *Brown*, the skepticism toward the idea of civil rights law that had dominated the late nineteenth and early twentieth centuries, while far from dead, had been pushed to the margins of mainstream reformist discourse. The efforts of a generation of scholars, activists, and lawyers had seriously weakened the claims of legal skeptics. "It is now generally accepted," observed the author of a 1951 law review article on segregation and the Fourteenth Amendment, "that legal action, within limits, can influence ways of living."[39]

The case for the capacity of the law in the context of school desegregation was built upon at least a decade of civil rights accomplishments. These included, most notably, the Supreme Court decisions in the white primary case of 1944,[40] the desegregation of the military by executive order in 1948,[41] and the 1950 Supreme Court decisions holding that the separate-but-equal principle established in *Plessy* no longer satisfied the requirements of the Fourteenth Amendment when applied to university education.[42] In each case a new legal mandate was placed in opposition to established practices. And in each case, the new law led to significant change. Although segregationists predicted blood in the streets, the reactions to each of these civil rights breakthroughs were, while not overwhelming, more promising than catastrophic.[43]

The experience of the white primaries and the desegregation of the military and higher education featured prominently in the case for *Brown*, in and out of the courts. The NAACP journal *Crisis* dismissed predictions of violence in reaction to Court-ordered desegregation, citing as evidence the success of the higher

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MORTON DEUTSCH & MARY EVANS COLLINS, INTERRACIAL HOUSING: A PSYCHOLOGICAL EVALUATION OF A SOCIAL EXPERIMENT (1951); SAMUEL STOUFFER, AMERICAN SOLDIER (1949); WALTER WHITE, HOW FAR THE PROMISED LAND? 87–103 (1955).

38. Arnold M. Rose, *"You Can't Legislate Against Prejudice"—Or Can You?*, 9 COMMON GROUND 61, 61 (1949).

39. J.D. Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 572 (1951).

40. Smith v. Allwright, 321 U.S. 649 (1944).

41. Executive Order 9981, 13 Fed. Reg. 4313 (July 26, 1948).

42. Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637 (1950).

43. *See, e.g.*, Channing Tobias, *Implications of the Public School Segregation Cases*, 60 CRISIS 612–13 (1953); Note, *Grade School Segregation: The Latest Attack on Racial Discrimination*, 61 YALE L.J. 730, 739 n.38 (1952); Comment, *Racial Violence and Civil Rights Law Enforcement*, 18 U. CHI. L. REV. 769, 781 (1951); Bernard Crick, *Eve of Decision: The South and Segregation*, NATION, Oct. 31, 1953, at 350; William H. Hastie, *Appraisal of* Smith v. Allwright, 5 LAW. GUILD REV. 65 (1945); *Race Prejudice is Dying*, LIFE, June 19, 1950, at 34.

education cases and the "high respect" of the American people for the Supreme Court.[44] "Segregation has been legally disintegrating under one court decision after another," observed a 1953 *New York Times* editorial.[45] In light of the impressive strides that had been made to break down segregation in higher education, the turn to public schools was "a logical sequence of events." There were "risks" involved when a change in law is placed in opposition to "mores and social practices . . . [y]et change in race relations in the South . . . has been swift in recent years."[46] In making their arguments in *Brown*, NAACP lawyers framed each of these legal interventions as demonstrating a relatively straightforward causal relationship: law commanded a new social norm; and society responded.[47]

The racial liberal approach to civil rights reform, like that of the segregationist adherents to Sumnerian principles, was premised on a conception of law as an independent force acting upon society. Both groups accepted the folkways-versus-stateways framework. That is, both recognized a division between the force of law and the force of culture. But whereas segregationists elevated folkways above stateways, liberals sought to put them on more equal footing. In their more confident moments, they even elevated stateways above folkways: stateways could change folkways, law could lead society. To the segregationists, stateways were a threat; to civil rights proponents, they were an opportunity. The premise for the legalist reformers was that law could move society. And for law to move society, it must be have some causal force, independent of society. To lead society, law must stand apart from society. As it gained strength in the 1940s and 1950s, the racial liberal campaign for civil rights reform was thus premised on a faith in the idea of a clear divide between law and society.

C. The Sit-Ins: An Alternative to the Law?

The students who launched the sit-ins self-consciously identified their protest as a critique of civil rights lawyers and their reliance on the courts. They defined their efforts as an alternative to the court-focused approach to civil rights of the NAACP's Legal Defense and Educational Fund (LDF), which, by 1960, was struggling with the frustrating task of implementing its great victory in *Brown*. The students' anti-legalist posture led to considerable tension between the students and the NAACP lawyers, who urged them to stop protesting and allow the judicial process to take over. But these tensions also provided a valuable tool for the student protesters, as they energized and helped to unify the student movement. As Lawson's attack on the NAACP, quoted in the opening of this

44. *School Cases*, 60 CRISIS 356 (1953).

45. *The Paradox of Segregation*, N.Y. TIMES, June 14, 1953, at E10.

46. *Id.*

47. ARGUMENT, *supra* note 10, at 65 ("Every single time that this Court has ruled, they [i.e., white southerners] have obeyed it, and I for one believe that rank and file people in the South will support whatever decision in this case is handed down.").

Article, demonstrates, the leaders of the student movement sought to locate the significance of their protests as an alternative to "the civil rights redress," as an alternative to litigation and to dependence upon lawyers and judges—as, in their eyes, an alternative to the sphere of the law.[48] They understood law as something that could be delineated, differentiated, and thereby used as a defining characteristic for their own sense of identity as participants in the larger struggle.

As much as possible, the sit-in protesters pushed the law to the side, recognized (without necessarily accepting) the disjuncture between morality and legality, and worked to change minds more than laws. By resisting the reduction of their efforts into a formal legal claim and by putting their faith into protest and negotiation, they might lose the leverage of a claim based on formal law, but they gained something that was, to them, considerably more valuable: they were able to maintain control over the course of their challenge. They did not need to hand their protest over to the lawyers, as judicial appeals or other direct challenges to existing laws would necessitate. They were asserting their own understanding of their actions, which, while perhaps too moderate and lacking in long-term goals for some,[49] had the irreplaceable attribute of being all their own.

Rather than focusing on changing particular laws, the students spoke more of drawing attention to offensive practices that were designed to subjugate and humiliate African Americans and drive them from the public sphere.[50] The sit-in tactic would allow them not only to put forth a public plea for equal, dignified treatment, but, by sitting down at a "whites-only" lunch counter, to *enact* an alternative social practice in which the students had already assumed for themselves the place of dignity and respect to which they were entitled. This is what Thoreau memorably termed "the performance of right."[51] "The idea," one

48. In an influential article on the first weeks of the sit-in movement, Michael Walzer reported: "None of the leaders I spoke to were interested in test cases . . . . That the legal work of the NAACP was important, everyone agreed; but this, I was told over and over again, was more important." Michael Walzer, *A Cup of Coffee and a Seat*, 7 DISSENT 116, 116–17 (1960).

49. Some lawyers with the NAACP felt that while the sit-ins might win small-scale concessions from business owners and local officials, litigation victories and the passage of civil rights laws were the only sure ways to secure significant and lasting change. As an internal NAACP memorandum explained, "The only way we will be able to successfully break down the practices of segregation and discrimination and undermine the legal support of these practices through the law is by the process of having such laws and ordinances declared unconstitutional." NAACP Position on Jail, No Bail, n.d., NAACP Papers, Library of Congress, Manuscripts Division, Part 21, Reel 21. Thurgood Marshall was making much the same point when he lectured the Greensboro student protesters not to settle for "token integration." WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM 93 (1980).

50. *See, e.g.*, Walzer, *supra* note 48, 116–17 ("None of the leaders I spoke to were interested in test cases; nor was there any general agreement to stop the sitdowns or the picketing once the question of integration at the lunch counters was taken up by the courts. That the legal work of the NAACP was important, everyone agreed; but this, I was told over and over again, was more important. Everyone seemed to feel a deep need finally to act in the name of all the theories of equality.").

51. Henry David Thoreau, *Resistance to Civil Government*, *in* THOREAU: POLITICAL WRITINGS 8

participant explained (in a letter written from a Florida jail), "was to demonstrate the reality of eating together without coercion, contamination or cohabitation."[52] Student leader Diane Nash spoke of the need to create "a climate in which all men are respected as men, in which there is appreciation of the dignity of man and in which each individual is free to grow and produce to his fullest capacity."[53] For the students, a courtroom battle, even if victorious, would never allow for this kind of statement.

The students' actions and their efforts to distinguish these actions from the work of civil rights lawyers resonated with diverse groups. The Southern Regional Council, a leading voice of southern liberalism (an embattled position at this time that was premised on an effort to critique Jim Crow while also opposing federal intervention), praised the students for seeking an alternative to legal reform and urged them to stay out of the courtroom. By "appeal[ing] to conscience and self-interest instead of law," a Southern Regional Council report explained, the students brought a much-needed new approach to the problem of racial discrimination. "They have argued on the basis of moral right and supported that argument with economic pressure. By their action they have given the South an excellent opportunity to settle one facet of a broad problem by negotiation and good will instead of court order."[54] The sit-ins, noted Howard Zinn, then a professor at Spelman College, "cracked the wall of legalism in the structure of the desegregation strategy."[55] African American journalist Louis Lomax praised the students for displacing the "Negro leadership class"—most notably the NAACP—as "the prime mover of the Negro's social revolt."[56] He wrote of the students' accomplishments:

> The demonstrators have shifted the desegregation battle from the courtroom to the market place, and have shifted the main issue to one of individual dignity, rather than civil rights. Not that civil rights are unimportant—but, as these students believe, once the dignity of the Negro individual is admitted, the debate over his right to vote, attend public schools, or hold a job for which he is qualified becomes academic.[57]

(Nancy L. Rosenblum ed., 1996).

52. Patricia Stephens, *Tallahassee: Through Jail to Freedom*, *in* SIT-INS: THE STUDENTS REPORT 1, 1 (Jim Peck ed., 1960).

53. Diane Nash, *Inside the Sit-Ins and Freedom Rides: Testimony of a Southern Student*, *in* THE NEW NEGRO 44 (Mathew H. Ahmann ed., 1961).

54. Margaret Price, Toward a Solution of the Sit-In Controversy (Southern Regional Council report), NAACP Papers, May 31, 1960, *microformed on* NAACP Relations with the Modern Civil Rights Movement, Part 21, Reel 21, Frame 783 (John H. Bracey & August Meier eds.) (Univ. Publ'ns of Am.).

55. Howard Zinn, *Finishing School for Pickets*, THE NATION, Aug. 6, 1960, at 71–73.

56. Louis E. Lomax, *The Negro Revolt Against "The Negro Leaders,"* 220 HARPERS 41, 41 (1960).

57. *Id.* at 42. S*ee also* Daniel H. Pollitt, *Dime Store Demonstrations: Events and Legal Problems of the First Sixty Days*, DUKE L.J. 315, 365 n.298 (1960) ("Constitutional amendments, congressional

The rejection of legalistic tactics not only won the students considerable support, but it also provided an invaluable way for the students to measure their accomplishments and create a sense of momentum for their movement. "We don't want brotherhood," one protester announced, "we just want a cup of coffee—sitting down."[58] Such tangible, small-scale goals had the tremendous advantage in that they held the possibility of immediate attainment—a far cry from the distant prospect of a victory in the courtroom, which invariably took months and even years of appeals.[59] Defining their goals in this way empowered the students. Restaurants were unwilling to give in to the students demands to desegregate, but many temporarily shut down in the face of the protests, an act that showed the students the power of their concerted actions.[60] When the Greensboro protests led to the first lunch counter closing of the movement, cheers erupted from the students and, in a premature burst of enthusiasm, they started shouting, "It's all over."[61] Before long, restaurants did begin to desegregate in the face of the protests. "Buried in the reams of copy about the southern sit-ins," noted a Congress of Racial Equality newsletter in April 1960, "is the fact that since the protest movement started, over 100 lunch counters and eating places in various parts of the south have started to serve everybody regardless of color."[62] Despite limited progress in the Deep South, elsewhere much desegregation took place in remarkably short order.[63] Marion Wright, then a young civil rights lawyer, observed, "in the majority of instances capitulation [to the students' demand for service] came peacefully, almost gracefully."[64]

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enactments, and Supreme Court decisions have failed to achieve their desired purpose. It was inevitable, therefore, that a more direct approach would be sought . . . ."); Nat Hentoff, *A Peaceful Army*, COMMONWEAL, June 10, 1960, at 275–78.

58. Walzer, *supra* note 48, at 112. Franklin McCain, one of the Greensboro Four, told reporters that they did not want an economic boycott: "We like to spend our money here, but we wish to spend our money at the lunch counter as well as the one next to it." *A&T Students Campaign to End Dime Store Bias*, CHI. DEFENDER, Feb. 13, 1960, at 11. Similarly, Joseph Charles Jones, a leader of the Charlotte sit-ins, explained: "I have no malice, no jealousy, no hatred, no envy. All I want is to come in and place my order and be served and leave a tip if I feel like it." *Negroes Extend Sitdown Protest*, N.Y. TIMES, Feb. 10, 1960, at 21.

59. For example, Robert Mack Bell, the plaintiff in the most significant of the sit-in cases to make its way to the Supreme Court, *Bell v. Maryland*, 378 U.S. 226 (1964), was not even aware when the NAACP argued his case before the Supreme Court—some three years after his initial arrest. "Nobody kept us posted on it or anything else," he would later recall. PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 146 (1988).

60. *See, e.g.*, *Lunch Counter Protest Spreads*, CHI. DEFENDER, Feb. 11, 1960, at A2; *N.C. Stores Close Down Counters*, GREENSBORO RECORD, Feb. 10, 1960, at 1, 3; *Sit-Down Strike Here Closes Lunch Counters*, RALEIGH TIMES, Feb. 10, 1960; *Student 'Sitdown' Protest Spreads to Virginia, Tenn.*, CHI. DEFENDER, Feb. 16, 1960, at 1.

61. *Negro Protest Lead to Store Closing*, N.Y. TIMES, Feb. 7, 1960, at 35; *Sitdown Leader Persists in Goal*, N.Y. TIMES, Mar. 26, 1960, at 10.

62. CORE-LATOR, April 1960, at 1.

63. *Id.*; Marion A. Wright, *The Sit-In Movement: Progress Report and Prognosis*, 9 WAYNE L. REV. 445, 448 (1963).

64. Wright, *supra* note 63, at 448.

Yet, despite the efforts of the students to keep the law out of their work, the law—in the form of police, judges, and lawyers—quickly asserted itself. The earliest waves of sit-in protesters recognized that they might be thrown in jail for their actions, perhaps they even expected it, but getting arrested was not their intention, at least not initially.[65] The most common response of restaurant operators was not to call the police, but to shut down their lunch counters.[66] Eventually, however, students were arrested, thrown in jail, and forced to defend themselves in court. This was when the lawyers arrived.

Here we can briefly return to the legalist posture toward civil rights reform discussed in the previous section, for the NAACP's dealings with the students in the opening months of the sit-ins sharply highlight their differences. Initially wary toward this dramatic departure from the carefully scripted litigation strategy they famously pioneered, LDF lawyers quickly came to see the sit-ins as offering the opportunity to revitalize their own work. NAACP lawyers were soon advising and representing arrested protesters,[67] and Thurgood Marshall and his team of lawyers in the national office began to prepare a constitutional challenge to discrimination in public accommodations.[68] Yet in their effort to justify their own involvement in the sit-ins, NAACP lawyers sought to redefine the goals of the protests. And they did so by emphasizing the limitations of working outside the legal process. NAACP strategy memos on the sit-ins repeatedly referenced the importance of "ultimate success" in the sit-in battle.[69] Activists must never forget the "main objective" of the protests, and they must always keep in mind the "long run" aims, none of which would be achieved without "a carefully planned and continuous attack."[70] Assumed was that the end goal of the protest should be the judicial recognition of the constitutional rights of the protesters.[71] Although the sit-ins "began as an issue of community relations," explained another NAACP memo, they "may well end as a question of legal rights and privileges," with the ultimate achievement being "a re-definition of the legal duties and rights of property owners in the conduct of their business."[72] Here we see the central legalist assumption in action, sharpened by its juxtaposition to the antilegalist position of the students: true reform of social practices requires legal change. Changes in practices without changes in the legal regulatory structure are ultimately limited—

65. *See, e.g.*, *Sitdown Leader Persists in Goal*, N.Y. TIMES, *supra* note 61, at 10.

66. *See supra* note 60.

67. JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 273–79 (1994).

68. *Id.* at 275–77; James Feron, *N.A.A.C.P. Plans Student Defense*, N.Y. TIMES, Mar. 18, 1960, at 23; *NAACP Sits Down With the 'Sit-Inners,'* N.Y. AMSTERDAM NEWS, Mar. 26, 1960, at 1, 24.

69. NAACP Position on Jail, No Bail, n.d., NAACP Papers, *supra*, note 54 at Frame 968.

70. *Id.*

71. *See supra* note 49 and accompanying text.

72. NAACP Report on the Student Protest Movement After Two Months, NAACP Papers, *supra*, note 54 at Frame 572.

they were nothing more than "appeal[s] of one segment of the citizenry to another."[73] Lasting change required the availability of authoritative, formal, external constraints on behavior. The logical, even "inevitable," path of change led from protest to law.[74] It was not until the sit-in movement accepted the necessity of legal reform that its success would be ensured.[75]

The divergent agendas of the students and the lawyers appeared with particular clarity over the question of how arrested students should deal with the legal system. The key question was whether they should appeal their convictions or whether they should accept the punishment and serve their jail sentences. The civil rights lawyers felt the students should plead not guilty to charges of disorderly conduct or trespass, pay bail, and appeal the conviction. They were being unjustly prosecuted, and there was a clear legal remedy for this. If convicted, they should pay the fines. At all costs, they should stay out of jail.[76] But the students had another option: to go to jail and thereby draw further attention to the injustice of the situation. Inspired by Martin Luther King's urging for them to adopt what came to be known as the "jail, no bail" strategy,[77] students envisioned filling up the jails and prisons with protesters and thereby elevating their moral challenge to the southern system of racial oppression.

Their "jail, no bail" tactic was a classic case of co-opting the tools of oppression in order to advance the cause of liberation. But unlike the civil rights lawyers, the students did not intend to beat the system by its own rules. They brought their own set of rules, the rules of nonviolence and civil disobedience. The goal here was to use the central institutions of the legal system, the

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73. *Id.* at Frame 571.

74. *Id.* at Frame 572.

75. Initially, the NAACP lawyers tried to convince the students to stop or scale back their protests. According to John Lewis, a leader of the Nashville student movement, "Thurgood Marshall, along with so many of his generation, just did not understand the essence of what we, the younger blacks of America, were doing." JOHN LEWIS WITH MICHAEL D'ORSO, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT 113–14 (1998). The NAACP's position was captured in an internal memorandum, which explained: "If the aim is to test the law, then the threshold question is what is gained by the large numbers of people being arrested and involved in appeals in the courts? . . . [O]ne does not need hundreds of cases and appeals to test the validity of a particular law. One or two is usually sufficient." Untitled, undated memorandum, NAACP Papers, *microformed on* Legal Department Administration Files, 1956–1965, Part 22, Reel 3, Frames 374–75 (John H. Bracey & August Meier eds.) (Univ. Publ'ns of Am.).

76. *See supra* note 54, at Frame 376 ("We realize that remaining in jail has moral and ethical implications not to be discounted, yet there is a grave danger that the individual, by his failure, neglect, or refusal to right a criminal charge levied against him and through accepting a jail sentence in lieu thereof, will *defeat* his main purpose and thus render ineffectual our overall legal attack on this spiteful, vicious system.").

77. Martin Luther King, Jr., A Creative Protest (Feb. 16, 1960), *in* THE PAPERS OF MARTIN LUTHER KING, JR.: VOLUME 5, at 367, 369 (1992) (speech to student protesters in Durham, North Carolina) ("Let us not fear going to jail. If the officials threaten to arrest us for standing up for our rights, we must answer by saying that we are willing and prepared to fill up the jails of the South. Maybe it will take this willingness to stay in jail to arouse the dozing conscience of our nation.").

courtrooms and the jails, as platforms from which to continue their appeals to the conscience of the defenders of Jim Crow—and to the nation at large. They would defy the counsel of their lawyers, reject the lawyers' advice to shift their focus from protest and consciousness-raising to litigation. They would attempt to maintain their own distinctive identity as standing outside the law, outside the "civil rights redress," even as police dragged them from lunch counters, as they stood before judges in court, and as they were locked up in jail cells.

For the students, the division of civil rights activism into the world of law and the world of "not-law" was fundamentally about empowerment. Defining their own identity as contributors to the freedom struggle in contrast to the "legal" approach was a way to unify their movement, to emphasize its uniqueness, and to elevate its tactics and goals. Their conception of the law was formal and institutional. The legal approach was, quite simply, the approach of the NAACP: legal challenges fought out in court. Of course, sociolegal scholars can easily see that a broader conception of law, one that recognizes the way in which legal norms and rights claims function as tools of contestation in society, would recognize that law pervaded the sit-in movement, regardless of students' claims to the contrary. The protests themselves constituted a powerful challenge to the meaning of the Constitution, well before the lawyers took the sit-in cases to court.[78] Nonetheless, the students' project of defining the scope of the law, so as to identify themselves as standing outside its boundaries, is also a central element of the legal history of the sit-in movement. In this way, the process of constructing the law-society divide was an essential organizational tool for this generation of pioneering civil rights protesters.

III. LAW *AS* SOCIAL CHANGE: KING AND BICKEL'S CONCEPTIONS OF LAW

While approaching the issue from starkly different backgrounds and from distinct institutional settings, Martin Luther King Jr. and Alexander Bickel showed striking similarities in their efforts to expand the conception of "law." Each embraced a capacious definition of law, one broader than the traditional concept of law as the formal pronouncements of recognized governmental institutions. Whereas the experiences of the groups described above created incentives to define clear boundaries around their particular conceptions of the law, King and Bickel's experiences pointed in the opposite direction, toward an understanding of law as an unfolding social process. They sought to reconceptualize law so as to recognize processes of cultural change, social disorder, and political agitation as an

78. *See* Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 776–91 (2010); *see also* Kenneth Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 96 ("The demonstrators were . . . acting out a living narrative, claiming their equal citizenship with their bodies." (footnote omitted)); Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 994 (2006) ("People *perform* constitutional law as political law through (some of) their mobilizations in politics.").

integral part of giving meaning to the law.

A. Alexander M. Bickel

Much of Bickel's legal scholarship examined the limitations of formal legal pronouncements, particularly Supreme Court opinions. In his early work, published in the decade following *Brown*, Bickel's central project was to balance his commitment to a limited role for the judiciary in American life with his equally strong commitment to the rightness of *Brown*. In the face of massive resistance, "the judicial process had reached the limit of its capacity," Bickel warned in his 1962 classic *The Least Dangerous Branch*.[79]

> The Supreme Court's law, the southern leaders realized, could not in our system prevail—not merely in the very long run, but within the decade—if it ran counter to deeply felt popular needs or convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country.[80]

Eisenhower's decision to send federal troops into Little Rock, according to Bickel, was hardly a mark of the strength of the rule of law, "[f]or enforcement is a crisis of the system, not its norm. When the law summons force to its aid, it demonstrates not its strength and stability, but its weakness and impermanence."[81] In response to the challenge of massive resistance to school desegregation, Bickel formed his conception of law and its limitations. It was in this context that he would begin to integrate resistance to formal law as an integral part of the process of creating law.

While the Court and political leaders regularly asserted that compliance with *Brown* was simply about respect for the rule of law and for established legal institutions, and that defiance was therefore illegitimate,[82] Bickel recognized that the law rarely worked along such command-and-control premises. "[D]isagreement is legitimate and relevant and will, in our system, legitimately and inevitably cause delay in compliance with law laid down by the Supreme Court, and will indeed, if it persists and is widely enough shared, overturn such law."[83] Bickel's suggestion that resistance to the Supreme Court's ruling in *Brown* was in some way legitimate, that it was part of the process of law, was an effort to undermine the law-society boundary as defined by the liberal legalists. No longer was law standing apart and above society, setting rules by which society must

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79. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 256 (1962).

80. *Id.* at 258.

81. *Id.* at 266.

82. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958); Robert F. Kennedy, *Civil Rights: Conflict of Law and Local Customs*, *in* VITAL SPEECHES OF THE DAY 482, 484 (1961) ("Some of you may believe the decision was wrong. That does not matter. It is the law. And we both respect the law.").

83. Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 196 (1964).

abide (or change through formal mechanisms of revision). Some assume, Bickel explained,

> that when the Supreme Court lays down a rule of constitutional law, that rule is put into effect just about instantly. . . . But that has never been how things have worked on occasions when the Court judgments have been directed at points of serious stress in our society, and on such occasions that is not the way things should or conceivably could work.[84]

Law requires some level of consensus; coercion can only do so much.[85] The system requires opportunity to express disagreement with Court decisions, even to defy their validity as law. If the American constitutional structure did not offer "opportunity and means to reject and to alter the rule of law handed down from above," then, Bickel noted, "I for one would find it extremely difficult to defend the Supreme Court's function as ultimately consistent with democratic self-rule."[86]

By 1964 Bickel saw the *Brown* principle as having won out in the "pitched political struggle over the validity of the ultimate goal of desegregation."[87] Opposition and defiance had failed. The political branches of the federal government were now lined up behind school desegregation. Although Bickel thought such political struggles inevitable in attempting to make fundamental shifts in social practices, he also saw advantages to the extrajudicial debate over the meaning and validity of law. There were benefits in protecting the principle of democracy; and there were benefits in creating consensus in society behind new legal norms. "Law is a process," he explained. "It is the process of establishing norms that will not need to be frequently enforced."[88]

Bickel thus envisioned law as the product of a dialogic relationship—"a continuing colloquy"—between the Court, whose job is to translate fundamental principles into legal commands, and society (including the elected branches).[89]

> It is the political process that realizes in American life constitutional rules and principles enunciated by the Supreme Court. The Court's major pronouncements are subjected to the stresses of politics. Thus—and not by some mystic process of self-validation—do they become ways of ordering society, rather than mere literary compositions.[90]

Bickel's efforts to understand law as created through the process of social and political contestation led him toward an increasingly conservative view of the

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84. *Id.* at 198.

85. *Id.* at 198–99; *see also* BICKEL, *supra* note 79, at 258.

86. Bickel, *supra* note 83, at 200.

87. *Id.* at 202.

88. Alexander M. Bickel, *Civil Rights and Civil Disobedience*, *in* POLITICS AND THE WARREN COURT 87 (1965).

89. BICKEL, *supra* note 79, at 240; *see also* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 91 (1970) (describing Court decisions as the beginning of a conversation with society).

90. ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT, at ix (1965).

law, with his later work emphasizing tradition and custom as the basis for legal development. "Law is the principle institution through which a society can assert its values," Bickel explained in his final book,[91] a statement that seemed to assume that the values are developed largely apart from the processes of the law. The Warren Court became Bickel's primary foil. The Court was dominated by an approach that was "moral, principled, legalistic, ultimately authoritarian."[92] The idea that "laws alone, or even alone the men of laws who constitute the Supreme Court, can govern effectively" was nothing more than an "illusion."[93]

> Nothing of importance, I believe, works well or for long in this country unless widespread consent is gained for it by political means. And there is much that must be left to processes of political and even private ordering, without benefit of judicially enforced law. The Court must not overestimate the possibilities of law as a method of ordering society and containing social action. And society cannot safely forget the limits of effective legal action, and attempt to surrender to the Court the necessary work of politics.[94]

It was during this latter part of his career that Bickel turned to the writings of Edmund Burke. Bickel approvingly quoted Burke's observation that "[t]he foundation of government is . . . not in imaginary rights of men, but in political convenience, and in human nature . . . ."[95] "Government," Bickel concluded, "thus stops short 'of some hazardous or ambiguous excellence,' but is the better for it."[96] From this Burkean premise, Bickel identified the circumscribed role of the judiciary:

> The Court's first obligation is to move cautiously, straining for decisions in small compass, more hesitant to deny principles held by some segments of society than ready to affirm comprehensive ones for all, mindful of the dominant role the political institutions are allowed, and always anxious first to invent compromises and accommodations before declaring firm and unambiguous principles.[97]

In Burke, Bickel found confirmation for his more chastened understanding of the relationship between legal principle and custom.

Bickel's appreciation for the social context in which law received meaning, evident in all his academic writing, ultimately led him to question the legal liberalist assumption that law had the capacity to lead society. It brought him to a greater appreciation for the stability of customs and traditions, and the need for legal reformers, particularly the courts, to defer to social norms. Legal principles, Bickel

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91. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 5 (1975).
92. *Id.*
93. BICKEL, *supra* note 90, at x.
94. *Id.* at ix.
95. BICKEL, *supra* note 91, at 19.
96. *Id.*
97. *Id.* at 26.

argued, must derive from political consensus. He began to describe himself as a conservative, a conservatism that his friend Robert Bork described as "a habit of mind and a quality of spirit—thoughtfulness, prudence, respect for established values and institutions."[98] By the early 1970s, in the final years of his life, Bickel's critics would accuse him of elevating customs and social consensus to the point of seeming to accept an antilegalist pessimism reminiscent of the arguments used by Sumnerian defenders of segregation.[99]

B. Martin Luther King Jr.

Martin Luther King Jr. would adopt much the same vision as Bickel of the process of law as being fundamentally one of political and social struggle. For Bickel, whose primary interest was in the promulgation of law from formal legal institutions, this position led to a call for caution, an appreciation of the conservative defense of tradition. King's focus was on the other end of the process: not with the creation of new formal law, but with the work required to give life to basic legal principles. For King, the recognition of the process of law in society was a call to action.

From the time of his emergence onto the national scene as the young leader of the Montgomery Bus Boycott, King assumed the role of mediator between the legal achievements of the NAACP lawyers and the grassroots activism of an increasingly impatient African American community. By attempting to stand astride the law-society boundary (as both the student leaders of the sit-in protests and the NAACP lawyers generally defined it), he took on a role that was going to make him at times a target of criticism for the NAACP lawyers and at times a target of criticism for student activists. But this position, this shifting back and forth from protest marches and jail cells to White House signing ceremonies, put him in a particularly powerful position from which to assess the value and accomplishments of both legal and extralegal reform efforts. In attempting to explain the relationship of legal reform and social protest, he would abandon the conception of a law-society boundary that occupied both the students and the lawyers, instead adopting a view of law as a project of social and political construction.

From the start of his civil rights career, King positioned himself as building upon the work of the civil rights lawyers. In his December 1955 speech in

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98. Robert H. Bork, *A Remembrance of Alex Bickel*, NEW REPUBLIC, Oct. 18, 1975, at 21; *cf.* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1569 (1985) ("Bickel's 'Burkean ending' was entirely consistent with the basic intellectual outlook that dominated his work from its beginning and gave it its distinctive shape" (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 71 (1980)).

99. *See* ELY, *supra* note 98, at 70–72; LAURA KALMAN, YALE LAW SCHOOL AND THE SIXTIES 274–78 (2005); Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 552 (1976); J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 769 (1971).

Montgomery on the eve of the bus boycotts, he referenced the Constitution and the Supreme Court (which had recently issued its *Brown* decisions) as supporting the rightness of their cause.[100] It was particularly important for King to emphasize this point—that the "law" was on the side of the protesters—so as to differentiate their actions from those of the Ku Klux Klan and White Citizens Councils.[101] Furthermore, the resolution of the boycott was made possible by a Supreme Court decision.[102] When news of the Supreme Court's ruling striking down the segregated bus system arrived, the boycott was teetering on the brink of failure, faced with a potentially crippling legal challenge to the carpool system relied upon by the boycotters.[103] Yet King also sought to distance himself from the NAACP and its litigation-based tactics, an approach urged upon him by his influential advisor Bayard Rustin.[104] Blacks "must not get involved in legalism [and] needless fights in lower courts," King said, "Our job now is implementation . . . . We must move on to mass action."[105]

King was not alone in emphasizing the linkages between the activism of the boycotts and the transformation of civil rights laws. The mainstream press was eager to draw a direct connection between King's work and that of the NAACP lawyers. This interpretation had the effect of elevating the significance of his achievements while also emphasizing the nonradical nature of his demands and techniques. In 1957 *Time* ran a cover story on King, noting that "[i]n terms of concrete victories," he ranked "a poor second to the brigade of lawyers who won the big case before the Supreme Court in 1954."[106] Yet, his "leadership extends

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100. Martin Luther King Jr. (Dec. 5, 1955) (speech at MIA Mass Meeting at Holt Street Baptist Church, Montgomery, Ala.) ("And we are not wrong, we are not wrong in what we are doing. (Well) If we are wrong, the Supreme Court of this nation is wrong. (Yes sir) [Applause] If we are wrong, the Constitution of the United States is wrong. (Yes) [Applause] If we are wrong, God Almighty is wrong.").

101. The differentiation of civil disobedience from segregationist lawlessness was a central theme of King's famous Letter from Birmingham Jail. Martin Luther King Jr., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. (James M. Washington ed., 1986).

102. Gayle v. Browder, 352 U.S. 903 (1956).

103. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1065 (1989) ("[T]he judicial victory [in *Gayle v. Browder*] alone would not have been nearly as significant without the mass boycott from which it arose, for the boycott facilitated active participation on a scale impossible for any lawsuit. At the same time, it is important to appreciate that without the suit and the eventual support of the Supreme Court, the boycott may well have ended without attaining any of its expressed goals, a result that would have been cruelly discouraging."); *see also* Christopher Coleman, Laurence D. Nee & Leonard S. Rubinowitz, *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY 663 (2005); Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957*, 9 LAW & HIST. REV. 59 (1991).

104. DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 86 (1986).

105. *Id.* at 91.

106. *The South: Attack on the Conscience*, TIME, Feb. 18, 1957.

beyond any single battle. . . . King reached beyond law books and writs, beyond violence and threats, to win his people—and challenge all people—with a spiritual force that aspired even to ending prejudice in man's mind."[107] In targeting "the South's Christian conscience," King "outflanked the Southern legislators who planted statutory hedgerows against integration for as far as the eye could see."[108]

King captured and gave voice to the deep challenge to legal liberalism posed by the two major developments of the post-*Brown* decade—the rise of massive resistance and the emergence of direct action protest as a viable reform tactic. Direct action protest was both an extension of, and an alternative to, the NAACP's project of school desegregation litigation, which by the late 1950s had largely stalled in the face of obstructionist legal maneuverings. A new wave of civil rights protest, sparked by the student lunch counter protests of 1960, emerged, motivated in large part by frustration with the slowness of legal reform.[109] To understand what drove African Americans to take to the streets to demand their rights, King explained, "[o]ne must understand the pendulum swing between the elation that arose when the [school desegregation] edict was handed down and the despair that followed the failure to bring it to life."[110] He critiqued what he saw as an overly idealistic vision of the law that the NAACP lawyers relied upon in making their case for *Brown*,[111] adopting instead an explanation for the relationship between law and prejudicial attitudes, between civil rights reform and the achievement of racial equality, that balanced an appreciation of the value of legal change with an insistence that formal legal change was never enough. For King, the law by itself was limited in its ability to affect hearts and minds.

Injustice might find expression in unjust laws, but, King emphasized, the roots of injustice are deeper. To truly uproot entrenched patterns of inequality, one must acknowledge the limits of legal reform. African Americans "must not get involved in legalism [and] needless fights in lower courts," King warned, for that was "exactly what the white man wants the Negro to do. Then he can draw out the fight."[112] This was the harsh lesson of *Brown* and massive resistance. "Our job now is implementation. . . . We must move on to mass action . . . in every community in the South, keeping in mind that civil disobedience to local laws is

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107. *Id.*

108. *Id.*

109. *See, e.g.*, CHAFE, *supra* note 49, at 101 (describing the sit-ins as "creat[ing] a new method for carrying on the struggle" for racial equality); RAYMOND ARSENAULT, FREEDOM RIDES: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE (2006).

110. MARTIN LUTHER KING JR., WHY WE CAN'T WAIT 5 (1964).

111. King suggested that he too might have bought into the lure of racial liberalism when the decision first was announced. Martin Luther King Jr., *'The Time for Freedom Has Come,'* N.Y. TIMES MAG., Sept. 10, 1961, at 118 ("When the United States Supreme Court handed down its historic desegregation decision in 1954, many of us, perhaps naively, thought that great and sweeping school integration would ensue.").

112. GARROW, *supra* note 104, at 91.

civil obedience to national laws."[113] King also emphasized the limits of the law (and the failures of overly simplistic and optimistic versions of contact theory) in discussing the distinction between desegregation and integration. "Desegregation is eliminative and negative, for it simply removes . . . legal and social prohibitions."[114] It is a "first step," a "short-range goal," and by itself it is "empty and shallow."[115] In contrast, integration requires the "positive acceptance of desegregation and the welcomed participation of Negroes into the total range of human activities."[116] It is "the ultimate goal of our national community."[117] To achieve desegregation without integration has "pernicious effects."[118] "It leads to 'physical proximity without spiritual affinity.' It gives us a society where men are physically desegregated and spiritually segregated, where elbows are together and hearts are apart."[119]

One of King's invaluable contributions to the struggle for racial equality stemmed from his skepticism toward the efficacy of legal change when it was unaccompanied by organized social action. "On the subject of human nature," King was, in the assessment of historian David L. Chappell, "close to the modern conservatism of Edmund Burke . . . . [He] leaned toward a prophetic pessimism about man."[120] Violence, King explained, "is inevitable in social change whenever deep-seated prejudices are challenged"—and for this reason, nonviolent resistance was the best policy because it had the ability to "absorb" violent resistance to change.[121] King's demanding vision, a potent mixture of prophetic radicalism and realism, resonated in the post-*Brown* years. The limited accomplishments of school desegregation litigation undermined the central claim of those most committed to more formal, legal-centric approaches to social reform, helping to open space in the national debate for King and those young activists who placed direct-action protest rather than legal reform at the center of their reform project.

C. When Law Is Not Law

For all their vast differences of background, professions, and ideological commitments, King and Bickel converged on a basic insight into the functioning of law in creating social change: law is part of a process of struggle; it never stands

113. *Id.* at 91–92.

114. Martin Luther King Jr., *The Ethical Demands for Integration* (Dec. 27, 1962), *in* A TESTAMENT OF HOPE, *supra* note 101, at 117, 118.

115. *Id.* at 118.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW 46 (2004).

121. MARTIN LUTHER KING JR., *Our Struggle*, *in* A TESTAMENT OF HOPE, *supra* note 101, at 75, 80.

apart from that struggle. Each adopted the same trope to illustrate this unbounded conceptualization of law's role in society: *law is not always law*.

Looking back on the struggle over *Brown*, Bickel emphasized the necessary consensual foundation of law. "Whenever a minority is sufficiently large or determined or, as in the case of *Brown*, strategically placed, we do not quite have law."[122] The project of law then becomes to "generate a greater measure of consent, or reconsider our stance on the minority's position."[123] Coercion is a tool, but not the only one, and more often than not a less than effective one. Ultimately more effective are "methods of persuasion and inducement, appeal to reason and shared values, appeal to interest, and not only material but political interest."[124] "We act on the realization that the law needs to be established before it can be effectively enforced, that it is, in a quite real sense, still provisional."[125]

Along similar lines, King wrote in 1961, "The law tends to declare rights—it does not deliver them. A catalyst is needed to breathe life experience into a judicial decision by the persistent exercise of the rights until they become usual and ordinary in human conduct."[126] In King's eyes, the students sitting at lunch counters, like the participants in the bus boycotts he led in Montgomery, were "seeking to dignify the law and to affirm the real and positive meaning of the law of the land."[127] King's vision of social justice demanded not only legal reform through recognized institutional channels such as litigation and lobbying, but also social protest and interracial negotiation on the local level.[128] While protesters

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122. BICKEL, *supra* note 91, at 110. Archibald Cox also sought to capture this point when, in 1966, he noted that "the principle of *Brown v. Board of Education* became more firmly law after its incorporation into title VI of the Civil Rights Act of 1964." Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1966).

123. BICKEL, *supra* note 91, at 110–11.

124. *Id.*

125. *Id.*

126. King, *supra* note 111, at 119. *See also* KING, *supra* note 114, at 124. ("A vigorous enforcement of civil rights laws will bring an end to segregated public facilities which are barriers to a truly desegregated society, but it cannot bring an end to fears, prejudice, pride, and irrationality, which was the barriers to a truly integrated society."); *but see* MARTIN LUTHER KING JR., *The American Dream* (1961), *in* A TESTAMENT OF HOPE, *supra* note 101, at 208, 213 ("Both legislation and education are required. . . . We need legislation and federal action to control behavior. It may be true that the law can't make a man love me, but it can keep him from lynching me, and I think that's pretty important also.").

127. *Interview on "Meet the Press"* (Apr. 17, 1960), *in* THE PAPERS OF MARTIN LUTHER KING, JR.: VOLUME 5, *supra* note 77, at 428, 430.

128. On this point, King's vision of the nature of the law and social change was closer to Bickel's than to some prominent civil rights lawyers, such as Thurgood Marshall. When, for example, the Kennedy Administration proposed a sweeping civil rights law, explicitly intended to get protesters off the streets, Bickel supported the effort, but warned "that if one is passed, neither the Administration nor the public should view the problem as solved, or should regard further agitation and mass marches as unjustified." Alexander M. Bickel, *Civil Rights Boil-Up*, NEW REPUBLIC, June 8, 1963, at 13. *See also* Alexander M. Bickel, *Much More Than Law Is Needed*, N.Y. TIMES MAG., Aug. 9, 1964, at 7 ("It is an all-too-common delusion with us that the way to solve a problem is to pass a law

"should not minimize work through the courts . . . legislation and court orders can only declare rights. They can never thoroughly deliver them. Only when the people themselves begin to act are rights on paper given life blood."[129] King embraced the rhetoric of rights, but he demanded an expanded understanding of what constitutes a right, differentiating a formal proclamation of a legal right from the substantive protection—the "life blood"—of a fully realized right.

Although the experience of the 1960s moved them in opposite directions—Bickel toward Burkean conservatism, King toward a more radical social democratic posture—they shared a central insight about the law: in certain circumstances a particular law (i.e., the product of the formalized mechanism of law making) might fail to achieve the status of law (i.e., a constraint external to and superior to the normal workings of social interactions). Law must be constructed, and this is a process in which there are no clear boundaries between a legal and social sphere. It is all law, and it is all society. For both Bickel and King, the law-society boundary ultimately has little relevance to the construction of law. Laws become law not through formal mechanisms of legal production alone, but through a process of enforcement, education, and struggle.

Bickel and King thus offer an approach to conceptualizing the law-society boundary that is ultimately quite different from those described in Part I of this Article. While the diverse groups described there—segregationists, racial liberals, and student sit-in protesters—saw their causes as best promoted by emphasizing the boundaries of law, Bickel and King saw their own distinct agendas best served by breaking down these very same boundaries.

IV. DEFINING LAW'S BOUNDARIES IN HISTORIES OF THE CIVIL RIGHTS MOVEMENT

If we shift our perspective from the history of the civil rights movement to historical accounts of the movement, we see that historians of the civil rights movement have also drawn on distinctive conceptions of the law-society divide. A useful way to understand the historiographical development of the civil rights movement is to focus on the various approaches historians and legal scholars over the past four decades have taken in conceptualizing law and its role in the civil rights movement. In fact, on the question of law and the limits of law, historiography has generally mirrored history. The four basic approaches to the

about it and then forget it, and we are naturally prone to seize on facts that seem to confirm what we wish to believe."). Marshall, on the other hand, remained skeptical toward King's tactics (referring once to King as a "first-rate rabble-rouser," MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW, 1936–1961, at 305 (1994)), and he never lost his faith in social change through litigation. *See, e.g.*, Thurgood Marshall, *Law and the Quest for Equality*, 1967 WASH. U. L.Q. 1, 8 (1967) ("[T]he social reform inherent in the [civil rights] decisions was achieved by the efforts of men, largely lawyers, who believe that through the rule of law change could indeed be wrought. The Negro who was once enslaved by law became emancipated by it, and is achieving equality through it.").

129. TAYLOR BRANCH, PARTING THE WATERS, 1954–1963, at 598 (1988).

law-society divide that I described above—the "folkways" skepticism toward the capacity of law; the legalist claims of the NAACP lawyers and their allies; the grassroots antilegalist tactics of the sit-in movement activists; and the effort to break down the law-society boundary embraced by King and Bickel—each capture different assumptions about law that can also be found within civil rights movement historiography.

The role of competing conceptions of law in legal historical scholarship can be seen with particular clarity by examining an issue that has become a central point of debate for civil rights movement scholarship: the connection between the Supreme Court and the direct action protests of the 1950s and 1960s. The long-held assumption, embraced by popular accounts and by most scholarship, is that *Brown* served as a catalyst for subsequent social activism. In declaring segregated schools unconstitutional, the Supreme Court redefined the terms of the game, placed the law of the land behind the cause of racial equality, and provided the spark that ignited the civil rights movement.

The first generation of histories of the civil rights movement that adopted this interpretation of *Brown* grew directly out of the work of midcentury racial liberalism.[130] Extending the theme C. Vann Woodward used to explain the rise of Jim Crow, scholars placed law and lawyers at the heart of changes that were taking place. While the civil rights movement was obviously defined by dramatic episodes of social protest, its achievements were best measured by the changes in the law that had resulted. This was a narrative that the mainstream media tended to embrace as the civil rights movement unfolded. In a retrospective on the ten-year anniversary of *Brown*, for instance, *New York Times* reporter Claude Sitton wrote, "Negroes frequently observe that, while the Emancipation Proclamation freed them physically, the Supreme Court decision freed them mentally. . . . [O]bservers generally agree that the forces unloosed by the Supreme Court are shaping an America that will differ sharply from the one that existed on May 17, 1954."[131] In the following decades, civil rights lawyers and law professors regularly promoted this same narrative. The desegregation ruling, according to NAACP lawyer Jack Greenberg, "profoundly affected national thinking and has served as the principal ideological engine of today's civil rights movement";[132] *Brown* "sired" the

130. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976); LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO (1966); CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959).

131. Claude Sitton, *Since the School Decree: Decade of Racial Ferment*, N.Y. TIMES, May 18, 1964, at 1. *New York Times* Supreme Court Reporter Anthony Lewis also regularly emphasized the inspirational impact of *Brown* in his writings. *See, e.g.*, ANTHONY LEWIS, PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION 303 (1964) ("However discouraged one may be at the continuing reality of discrimination, he should remember that this country is at least on the right course—and that the law put it there.").

132. Jack Greenberg, *The Supreme Court, Civil Rights, and Civil Dissonance*, 77 YALE L.J. 1520,

movement, wrote J. Harvie Wilkinson.[133] *Brown*'s achievement could be most easily measured by the scope of the social change that resulted. Social protest was tightly linked to legal institutions: the Supreme Court's *Brown* decision served as a catalyst for subsequent direct action protest, which, in turn, pressured the federal government to enact landmark civil rights legislation in the mid-1960s.[134] The Supreme Court provided a spark that set in motion events that resulted in a constructive dialogue between social protest and further legal change.

Although this narrative, with the Supreme Court as the fulcrum of the civil rights movement, has retained a prominent place in popular culture and in the legal academy, there has always existed a counternarrative, one more skeptical about the role of the Court. In the years leading up to and immediately following *Brown*, the NAACP and its allies worked to marginalize those who supported the cause of the black freedom struggle but questioned the ultimate value of civil rights victories in the courts.[135] Skepticism toward the capacity of the Court never disappeared, however. The social and legal upheavals of the 1960s—with inflated hopes for transforming society through civil rights laws followed, inevitably, by disappointment with the realities of entrenched inequalities—led to a resurgence of Court skeptics. A moderate form can be seen in King and Bickel's efforts to reconceptualize law. A more sustained challenge to the idea that the work of lawyers and judges—the law in its formalistic sense—created the conditions necessary for the civil rights movement was the black nationalist scholarship that emerged in the late 1960s and 1970s.

The black nationalist critique of civil rights reform was part of a broader enterprise of challenging the white-dominated legal structure—a challenge that saw traditional legal reform, litigation and lobbying, as too limited, too dependent on whites, and too unresponsive to the needs of the masses of black Americans. Harold Cruse, in his classic critique of the African American reform tradition, *The Crisis of the Negro Intellectual* (1967), portrayed the NAACP as a mouthpiece for the "Black Establishment" and school desegregation as little more than "a cause dear to the hearts of most middle-class Negro constituents."[136] *Brown* did not lead society, wrote NAACP lawyer Lewis Steel, in a controversial attack on the Supreme Court (which would lose him his job).[137] All *Brown* did was "bring the

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1522 (1968); *see also* Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 246–47 (1968) (*Brown* "fathered a social upheaval . . . . [T]he psychological dimensions of America's race problem were completely recast. . . . As a result, the Negro was propelled into a stance of insistent militancy.").

133. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION 3 (1979); *see also* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 15 (1998); Glennon, *supra* note 103.

134. For a list of sources that adopt this kind of approach, see Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 8–9 n.2, 75 n.328 (1994).

135. *See generally* Schmidt*, supra* note 5.

136. HAROLD CRUSE, THE CRISIS OF THE NEGRO INTELLECTUAL 240 (1967).

137. JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF

Court up to date" with changes already taking place.[138] "[T]o give nine white Supreme Court judges the credit for exposing to Black people the nature of racial discrimination is to ignore an entire people's history," one radical legal activist argued.[139] Those writing in this radical or nationalist vein generally believed that law could be effective in shaping social practices, they simply thought it invariably served majority interests. Therefore even those legal breakthroughs that seem most significant, such as *Brown* and the Civil Rights Act of 1964, ultimately had limited racially egalitarian effects in challenging entrenched patterns of racial inequality.[140] The strong version of this position resuscitated William Graham Sumner's pessimism toward legal reform: white supremacy was engrained in the folkways of American life and civil rights laws were largely ineffectual in changing this fact.[141] "*Brown* has made it clear that, even if the Court wanted to, it could not free Blacks from their oppression," wrote Howard Moore Jr. "Blacks now know that only through self-reliance and solidarity in the continuing struggle can they attain freedom, justice and equality."[142] Whatever accomplishments came out of the civil rights movement, nationalists argued, should be attributed to grassroots activism and organization, not to court decisions and legislation.[143]

This focus on organizing and local politics was at the heart of the social histories of the civil rights movement, which came to dominate the historiography of the movement in the 1980s. Social historians did not necessarily seek to directly refute the law-centric account in the way black nationalist scholars did. Rather, their accounts pushed federal legal reform to the margins of the story. Basically

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LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 481 (1994); Lewis M. Steel, *A Critic's View of the Warren Court—Nine Men in Black Who Think White*, N.Y. TIMES MAG., Oct. 13, 1968, at 56.

138. Steel, *supra* note 137.

139. Kenneth Cloke, *The Economic Basis of Law and State*, *in* LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER, AND THE COURTS 56, 77 (Robert Lefcourt ed., 1971).

140. *See, e.g.*, Haywood Burns, *Racism and American Law*, *in* LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER, AND THE COURTS, *supra* note 139, at 38, 48 ("There are serious questions about the amount of true change the series of modern civil rights victories and legislation since *Brown* and the Civil Rights Act of 1957 have been able to effect in the real-life situations of nonwhite people in America.").

141. *See, e.g.*, *id.* at 39 ("[Law] has been the way in which the generalized racism in the society is made specific and converted into particular policies and standards of social control which mirror the racism of the dominant society."); *id.* at 54 ("The law will change when men who make the law change—or when we make new men."). By 1968, Robert Carter combined (somewhat inconsistently perhaps) a view of *Brown* as inspiring black militancy with a skepticism toward legal reform. *See* Carter, *supra* note 132, at 248 ("For, whatever the Court does, our society is composed of a series of insulated institutions and interests antithetical to the Negro's best interests. Effective regulation and control of these institutions and interests must come not from the Supreme Court but from the bodies politic.").

142. Howard Moore, Jr., 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, *supra* note 139, at 55, 60.

143. The belief that law was dependent on other, more fundamental social processes was a commonplace assertion in the emerging law and society movement. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 10 (1973) (describing law "as a mirror of society" and "as relative and molded by economy and society.").

adopting the perspective of the sit-in leaders and other movement activists, this scholarship assumed the world of law (defined in its formal sense, as lawyers, court decisions, and legislation) was readily separable from the lives and achievements of the participants. Law plays only a background role (if that) in classic accounts of the movement by Clayborne Carson, John Dittmer, Doug McAdams, Aldon Morris, Charles Payne, and others.[144] In these local histories, as Kenneth Mack has recently explained, the methodological assumption was "that law was epiphenomenal, not that important to local movement actors, and sometimes even corrosive of local community organizing."[145]

Thus, into the 1990s, the histories of the civil rights movement were generally told on several different, largely distinct tracks, each premised on a different conception of the relationship between the distinct spheres of law and society. One was the traditional account, popular in law schools and in text books, in which legal institutions, particularly the Supreme Court, were critical in energizing and sustaining the movement. A more skeptical account, pioneered by the black nationalist scholars of the late 1960s and 1970s and then picked up in various forms by critical legal and critical race scholars in the 1970s and 1980s, assumed that legal elites lacked either the power or the inclination to use the law as a force of significant reform.[146] Much of this work treated law as a secondary phenomenon, ultimately dependent on social and economic forces. And then there were the grassroots society histories, in which law played only a minor background role in the development of social movement organization and activism.

Beginning in the 1990s, a new generation of legal scholars revisited the question of how formal legal changes, particularly *Brown v. Board of Education*,

144. CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S (2d. ed. 1995); JOHN DITTMER, LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI (1994); DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970 (2nd ed. 1999); ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE (1984); CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE (1995); *see also* AUGUST MEIER & ELLIOT RUDWICK, CORE: A STUDY OF THE CIVIL RIGHTS MOVEMENT, 1942–1968 (1973).

145. Kenneth W. Mack, *Bringing the Law Back into the History of the Civil Rights Movement*, 27 L. & HIST. REV. 657, 658 (2009); *see also* Kennedy, *supra* note 103 at 1004–05 (writing in the late 1980s and noting the lack of legal analysis in scholarship on the civil rights movement). Some of these studies did acknowledge the value of *Brown* and other federal legal reforms on the grassroots movement. *See, e.g.*, DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970, at 108 (2d ed. 1982) (noting the "symbolic importance of the shift" of federal government policy on civil rights in the 1940s and 1950s, which "was responsible for nothing less than a cognitive revolution within the black population regarding the prospects for change in this country's racial status quo"); MORRIS, *supra* note 144, at 39 ("[T]he two approaches—legal action and mass protest—entered a turbulent but workable marriage.").

146. *See, e.g.*, Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). *See generally* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY (2001).

related to the emergence and development of civil rights era social activism. It was during this decade that Gerald Rosenberg and Michael Klarman began publishing a series of books and articles that directly challenged the traditional legalist interpretation of *Brown* as a significant causal factor in the emergence of civil rights protests. Rosenberg, in his 1991 book *The Hollow Hope*, argued that *Brown* accomplished little—it did not desegregate the schools (the Civil Rights Act of 1964 should be credited with this); and it had minimal effects on the rise of the direct-action phase of civil rights movement.[147] Klarman took up the same question but came to a somewhat different conclusion. In several articles and in a 2004 book, he argued that the decision's most significant effects were indirect: the decision mobilized the white South to resist segregation at all costs; the threat of integration radicalized southern politics. This led to the bloody and highly publicized confrontations in Birmingham, Selma, and elsewhere, which in turn led to increased support in the North for civil rights and transformative legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[148] Klarman has labeled this the "backlash thesis."[149]

Rosenberg and Klarman's approaches, like all studies of the social impact of judicial decisions, depend upon a basic assumption about the nature of law: law can be identified as a force independent of society and law's effects on society can be meaningfully measured.[150] This was much the same assumption that was at the heart of the legalist vision of the NAACP lawyers who made the case for *Brown*. Yet in assessing the capacity of law to create social reform, Rosenberg and Klarman make a further distinction that was generally not found in the arguments of the NAACP lawyers in the 1950s. They differentiate law from politics. For their purposes, law is the product of the courts; politics is the product of democratic institutions and social activism. Both Rosenberg and Klarman isolate judicially produced law from the law produced from representative institutions. And then

147. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–169 (1991); *see also* Gerald N. Rosenberg, Brown *is Dead! Long Live* Brown*!: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161 (1994).

148. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 344–442 (2004); *see* Michael J. Klarman, Brown v. Board of Education*: Facts and Political Correctness*, 80 VA. L. REV. 185 (1994); *see also* Klarman, *supra* note 134. In his 2004 book, Klarman acknowledges a more significant role for *Brown* in influencing black activism than he allowed in his earlier essays. *See, e.g.*, KLARMAN, *supra*, at 369 ("*Brown* prompted southern blacks to challenge Jim Crow more aggressively than they might otherwise have done in the mid-1950s."); *id.* at 467 ("*Brown* raised the hopes and expectations of black Americans."). But he maintains his basic point that *Brown*'s relationship to the movement was indirect. *Id.* at 374 ("The nearly six-year gap between *Brown* and the Greensboro sit-ins suggests that any such connection must be indirect and convoluted. . . . The outbreak of direct-action protest can be explained independently of *Brown*.").

149. Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

150. For a classic assessment of the assumptions underlying legal compliance and impact studies, see Malcolm M. Feeley, *The Concept of Laws in Social Science: A Critique and Notes on an Expanded View*, 10 L. & SOC. REV. 497 (1976).

they consider the relationship between law (i.e., the federal judiciary) and various nonlaw categories: school desegregation statistics; public opinion polls; newspaper coverage; the words and actions of (nonlegal) activists and political leaders. To fit this into the terminology I have been using, their law-society boundary is essentially a circle around the judiciary.

Partly in reaction to these revisionist accounts of *Brown*'s impact, partly in an effort among sociolegal scholars to bring more attention to the role of law in social movements, recently scholars have sought to redefine the law-society divide that, in its various forms, has dominated civil rights movement scholarship thus far. Legal histories of the civil rights movement have found more law on the grassroots level than social historians had recognized, even as they tend to challenge the revisionist impact studies as overly focused on the Supreme Court and insufficiently attentive to the way nonelite actors draw upon legal norms. The past decade or so has seen the flowering of legal historical scholarship on the civil rights movement that simply asks different questions and focuses on different areas of civil rights law and activism. This scholarship has sought to undermine the assumption of a clear distinction between law and the rest of society. The latest scholarship on the NAACP has emphasized the diversity of its efforts, drawing attention to the work of its lawyers in settings outside the courts. Of particular interest has been the NAACP's efforts on behalf of labor rights[151] and legal activism within its local branches.[152] In some ways this is traditional legal history, focusing on the efforts of civil rights lawyers to change the laws. But in reconstructing the lives and worldviews of these civil rights era lawyers, the lines between activism and legal reform, between politics and law are blurred to the point where they no longer seem to matter.

Recent scholarship in political science and sociology has also offered powerful analytical tools for studying the role of law in social movements—and in the process challenging the utility of the law-society division. This sociolegal scholarship has tended to be much more self-conscious about conceptualizing "law" as a category of analysis than work in the field of legal history.[153] Much of this work has sought to capture the creation and development of legal

151. *See, e.g.*, RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE (2006); Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948–1964*, 26 LAW & HIST. REV. 327 (2008); Kenneth W. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931–1941*, 93 J. AM. HIST. 37 (2006); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 265 (2005); *see also* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987).

152. *See, e.g.*, TOMIKO BROWN-NAGIN, COURAGE TO DISSENT (2011); GOLUBOFF, *supra* note 151.

153. *See, e.g.*, Michael McCann, *Law and Social Movements*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 506, 507 (Austin Sarat ed., 2004) ("Much of the debate regarding how law matters for social movements derives from quite divergent ways of understanding and studying law itself. Most generally, when we refer to 'the law,' we imply different types of phenomena.").

consciousness in informal settings.[154] In his classic study of the "politics of rights," for example, Stuart Scheingold critiqued the "myth of rights," which was "premised on a direct linking of litigation, rights, and remedies with social change."[155] Judicially protected rights were instead better understood as "political resources of unknown value in the hands of those who want to alter the course of public policy."[156] Law, in this sense, is a social phenomenon. It is a resource of social movement mobilization; it acts within society rather than upon society. The central concern of sociolegal scholars doing this kind of work is less with whether law produces social change and more with the way in which law functions within different institutions and in different social settings—these are legal "rights at work," in Michael McCann's phrasing.[157] From this perspective, talk about the boundaries of the law make little sense. Applied to the civil rights movement, this genre of scholarship has located a legal consciousness within the ranks of civil rights movement activists—including those who insisted that their tactics offered an alternative to legal reform.[158]

While much recent work on the history of civil rights and the role of law in social movements has critiqued *Brown* revisionist scholarship by challenging its underlying assumptions about the boundaries of the law and the role of law in shaping social action, some legal scholars have sought to challenge the revisionist interpretation on its own ground. This critique accepts the identification of causal links between judicial rulings and extrajudicial action as a question worth considering, but they challenge the revisionist conclusion that *Brown* had such a minimal impact on the civil rights movement. Some of this work has attempted to

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154. *See, e.g.*, SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (1990); SUSAN S. SILBEY & PATRICIA EWICK, THE COMMON PLACE OF LAW (1998); Laura Beth Nielson, *Situating Legal Consciousness: Experience and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 LAW & SOC'Y REV. 1055 (2000); Austin Sarat, *". . .The Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 342 (1990).

155. STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 5 (1974).

156. *Id.* at 6–7.

157. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATIONS (1994); *see also, e.g.*, Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 733 (1992) (describing a "bottom-up, dispute-centered approach" to studying law that "emphasizes that judicially articulated legal norms take a life of their own as they are deployed in practical social action"); *id.* at 734 ("The key insight provided by this view is to emphasize the dynamic, variable interaction between formal and informal, adjudicatory and nonadjudicatory, and state-centered and indigenous legal processes in evolving social struggles."); Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 907 (1996) ("Law and society scholarship depicts the law as a culturally and structurally embedded social institution. By focusing on law-in-action rather than law-on-the-books, Law and Society research highlights the ways in which extralegal social processes continuously construct and reconstitute the meaning and impact of legal norms.").

158. *See, e.g.*, Coleman et al., *supra* note 103; Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966*, 34 LAW & SOC'Y REV. 367 (2000).

identify instances in which *Brown* did in fact have a direct influence on social movement activism, emboldening individuals to demand rights in ways they might otherwise have been unable to do.[159] Another approach is to focus on the negative response to *Brown*—to the white "backlash" the decision produced. Rather than treating this as a cost of pressing the law too far ahead of society, Robert Post and Reva Siegel have advocated a model of "democratic constitutionalism," in which cultural debate and constitutional conflict are recognized as a central site of rights formation.[160] Backlash to legal pronouncements is not necessarily something to be feared or avoided, they argue. Struggle over fundamental constitutional conflicts may have a beneficial role in the constitutional system. Backlash may have "potentially constructive effects";[161] it "may be a necessary consequence of vindicating constitutional rights."[162]

Activists, lawyers, social scientists, and politicians who were part of the civil rights movement in the middle decades of the twentieth century debated the meaning of law—its efficacy in shaping social relations, its relation to custom, the role of litigation in social reform movements, the possibility of activism outside the sphere of law. And ever since, scholars of the civil rights movement have debated these very same questions.

V. CONCLUSION

All struggles for social change create incentives for putting forth a vision of what the law is—and what it is not. The civil rights movement offers a particularly clear illustration of this. The concept of law had a particular value to the historical actors involved in the movement. Law was important not simply for its ability to regulate behavior or to legitimate certain norms (although it could have these attributes), but for the way it helped to organize the complex landscape of social reform politics. The act of conceptualizing the law was often a way to define and to justify one's role in the movement. Each of the groups I have examined defined the boundaries of the law in a way that was overly simplistic, even misleading. Segregationists tried to ignore the role of law in creating and maintaining their folkways; racial liberals exaggerated the distinctive nature of the law so as to make their case for law's efficacy in shaping race relations; and the sit-in leaders relied upon a caricature of civil rights lawyering in the process of defining their own role in the struggle. Yet by committing themselves to these conceptions of law,

159. *See, e.g.*, David J. Garrow, *"Happy" Birthday,* Brown v. Board of Education*?* Brown*'s Fiftieth Anniversary and the New Critics of Supreme Court Muscularity*, 90 VA. L. REV. 693, 712–20 (2004); David J. Garrow, *Hopelessly Hollow History: Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151 (1994); McCann, *supra* note 157, at 735–36; Mark Tushnet, *The Significance of* Brown v. Board of Education*,* 80 VA. L. REV. 173 (1994).

160. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash,* 42 HARV. C.R.-C.L. L. REV. 373 (2007).

161. *Id.* at 375.

162. *Id.* at 395

however simplistic or misleading, each group illustrates the value of the law-society divide for social movement participants.

As a methodological premise for legal history moving forward, challenging the conception of the law as a bounded, exogenous locus of power and influence seems a useful starting point. Approaching law as functioning in a constitutive manner within society, rather than in a causal manner upon society, effectively captures a critical part of historical reality.[163] This approach, demonstrated in different ways in the writings of Martin Luther King Jr. and Alexander Bickel, would seem to render the law-society divide as basically irrelevant. This is the direction in which the best of recent legal historical scholarship on the civil rights movement has been heading.

Yet even as scholars question the analytical value of a conception of law as separate from other spheres of life, we should also recognize that a perception of separateness has often resonated in powerful ways with the subjects we are trying to understand. A central part of the history of the civil rights movement was not only the work of rights and the exposure of the artificiality of the separateness of law and society, but also the value that various groups placed upon a conception of law as separate from society. The drawing of the law-society boundary was a central part of the way in which historical actors understood their world and the role of law in that world. For this reason, regardless of its methodological or theoretical shortcomings, the law-society dichotomy remains an essential object of legal historical inquiry.

163. *See* Christopher Tomlins, *How Autonomous Is Law?*, 3 ANN. REV. L. SOC. SCI. 45 (2007) (exploring the assumptions underlying the relational law-and-society framework and considering possible alternatives).