The Hypocrisy of "Equal but Separate" in the Courtroom: A Lens for the Civil Rights Era

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

JAIMIE K. MCFARLIN*

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

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

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

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

The pews are sparsely filled, and you nod towards the other Black spectators mouthing a “Good Morning” and slide in next to them, hoping not to get caught on a splinter on the unkempt “Black pews.” Looking up towards the judge’s bench, you see the Confederate flag in the front of the room. You also take a glimpse at the defendant, a shackled, fourteen-year-old Black boy, and his White defense attorney. Shaking your head in anguish, you

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1 This article focuses on state courts because “[e]ven before Brown, federal courtrooms were not segregated.” Hon. Constance Baker Motley, Reflections on Justice Before and After Brown, 32 FORDHAM URB. L.J. 101, 104 (2004).
6 See Coleman v. Miller, 117 F.3d 527, 528 (11th Cir. 1997) (quoting Governor Marvin Griffin’s 1956 state address that expressed his state’s activist opposition to civil rights while denying an action to enjoin the flying of the Georgia state flag over Georgia’s state office buildings).
7 See Benno C. Schmidt, Jr., Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1407 (1983) (“From the end of Reconstruction to the New Deal, virtually every embodiment of the legal process in
realize taking this morning off from work was pointless. The White prosecutor stands behind his table and waves at the defense counsel, who smiles and winks back in earnest. The White bailiff carries a Bible in each hand, and sits them on the counter with his paperwork. He passes by the door near your seat and you glimpse at the names on the witness list. Not surprisingly, the “Dr.” from in front of your name is missing.

The jury enters, and you recognize a few of the all-White faces. You rise to your feet as the Judge enters, and the day’s proceedings begin, immersed in the contradiction that Plessy bestowed upon the courts.
This article serves as both a descriptive and somewhat persuasive discussion of the southern courthouse during the Jim Crow era and the early stages of the Civil Rights Movement, as judges were challenged by the dual function of minstrel M.Plessy’s call for “equality under the law” and orchestrating overt segregation. This hypocrisy plagued the courts until the reversal of Plessy v. Ferguson in the 1954 ruling of Brown v. Board of Education.\textsuperscript{14} Put simply, the courthouses from Plessy to Brown exemplified Gunner Myrdal’s conflict paradigm: “a conflict between liberty, equality, and the American idea of fair play on the one side, and prejudice, self-interest, and habit on the other.”\textsuperscript{15} Using the conflict paradigm to articulate the hypocrisy, the article examines wide-ranging practices of southern state courts during the Jim Crow era and the early Civil Rights movement. My analysis concludes with explaining the southern state courthouse as playing a tripartite role in American apartheid as a symptom, signal, and symbol of societal norms. An understanding of the court’s role as such incorporates facets of overt discrimination and the battleground of the Civil Rights movement that, at times, was not captured within written case law.

B. THE CONFLICT PARADIGM

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

\textsuperscript{14} 347 U.S. 483 (1954).
\textsuperscript{16} Dred Scott v. Sandford, 60 U.S. 393 (1856).
\textsuperscript{17} Id. at 450. (1856) (declaring the Missouri Compromise void because it deprived slaveowners of property in the free territories).
became tools of segregationists to combat these progressive reforms before and immediately following the Civil War and passage of the Thirteenth Amendment. Reconstruction was destroyed in the aftermath of 1877 and with the election of Rutherford B. Hayes, which led to the federal government pullback of its federal forces, allowing White supremacy to blossom in the South. Perhaps not surprisingly, anti-segregationists, up until the NAACP’s work in 1910, saw the ballot box and not litigation as a much more efficient weapon in the struggle for African-American freedoms.

The legal hallmark of this post-Reconstruction system of racial segregation was *Plessy v. Ferguson*, enumerating the mantra of “equal but separate.” *Plessy* was decided “on the edge of one of the most terrorist seasons in American history, the Post-Reconstruction era.” *Plessy* survived as the backdrop to explain the sentiments of the judiciary who used *Plessy’s* holding of “separate but equal before the law” to construct a fictional neutrality of racial segregation’s effects. *Plessy* deferred to the

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


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

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


25 *Plessy*, 163 U.S. at 544 (citing Roberts v. City of Boston, 59 Mass. 198, 206 (1849)).
state to “established usages, customs, and traditions of the people.” With deference to social jurisprudence as its choice of judgment, courtrooms were confines for both covert and overt anti-Black sentiments throughout the post-Reconstruction era, creating a convoluted battleground for the Civil Rights Movement.

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

Before the Civil Rights Movement, the court faced the conflict paradigm through one of its major functions in segregation: racial identity case law. In the nineteenth century, southern state

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26 Id. at 550.
27 Smith, *supra* note 24, at 4 (finding that “Justice Brown’s framework for ‘exact justice,’ while flawed, established elements allowing courts to bend to an exclusionary social legal framework rather than an inclusive one under the Equal Protection Clause of the Fourteenth Amendment. In *Plessy*, the Court stamped its approval on social jurisprudence as the choice of judgment, thereby sealing race distinction in the fabric of American law as ‘exact justice.”’).
28 See Surell Brady, *A Failure of Judicial Review of Racial Discrimination Claims in Criminal Cases*, 52 SYRACUSE L. REV. 735, 766 (2002) (“*Brown* has not proven as useful in combating forms of discrimination that are far less public, such as may be practiced during enforcement of criminal laws. That distinct kind of discrimination needs new judicial sensitivities.”).
29 See *supra* notes 56 to 121 and accompanying text.
30 Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 445 (1982) (“Blacks in the South remained segregated and stigmatized by Jim Crow laws; disenfranchised by invidiously administered literacy tests, white primaries, and poll taxes; and victimized by a criminal process from whose juries and other positions of power they were routinely exclude”).
33 *Id.*
34 See generally, RANDALL KENNEDY *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003); Ariela J. GROSS, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth*
supreme courts showed that “race” was often determined as much by individuals' reputation and conduct as by appearance, “blood,” or other presumably scientific evidence. In each case, the “racial identity” of a person was disputed, and a determination of whether the person was White or Black was relevant to the outcome of the litigation. Then later, two critical cases in the height of the Jim Crow-era, Ozawa (1922) and Thind (1923), forced the Supreme Court to specify the judiciary’s criterion to determine race. The racial identity cases confirmed the courts role as the arbiter of segregation as Plessy allowed the courts to be the fact-finder as deciding who and what was separate under the law. The Supreme Court furthered that enforcement role in Gong Lum v. Rice, as it held that states possess the right to define a Chinese student as non-white for the purpose of segregating public schools.

A prolific example of the role of state courts as race referees was Green v. City of New Orleans. Green is the story of Jacqueline Henley, a mixed-race child whose racial classification foiled her

Century South, 108 YALE L.J. 109, 120, 181-85 (1998) (document the racial identity case law); Laura Miller, Are You White Enough? From Jim Crow Laws to Workplace Discrimination, the History of Race and the American Courtroom Is Incendiary, MONT. LAW., NOVEMBER 2008, at 22, 23 (explaining the role of the courts in the antebellum South and the characteristics that the court took into account when litigating race).

35 Gross, supra note 34 at 181-85.
36 Id.
39 Prior to 1922, two competing doctrines characterized the racial-prerequisite cases: the common-knowledge test and the scientific-evidence inquiry. The common-knowledge standard relied upon “popular, widely held conceptions of race and racial divisions” based entirely on perceptions that might or might not be grounded in physical appearance. This methodology contrasted sharply with the scientific-evidence test, previously in vogue, which had relied upon “supposedly objective, technical and specialized knowledge for racial determination.” Sharona Hoffman, Is There A Place for “Race” As A Legal Concept?, 36 ARIZ. ST. L.J. 1093, 1131 (2004). When viewed in isolation, the common law standard arose victorious. However, when applied, racial determination became a “system of white performance interpreted through the eyes of judges.” For a closer dissection of these two cases, see also John Tehranian, Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America, 109 YALE L.J. 817, 821-22 (2000).
40 Most remarkable was the role of the courts in interracial intimacy cases. See generally, KENNEDY, supra note 34; Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, Adoption, 17 HARV. BLACKLETTER L.J. 57-83 (2001).
41 Gong Lum v. Rice, 275 U.S. 78 (1927).
42 Id. at 83.
adoption due to a Louisiana law prohibited adoption across racial lines.\textsuperscript{44} In \textit{Green}, the court and authorities refused to change the child's race on her birth certificate,\textsuperscript{45} as reclassifying her race required proof beyond a reasonable doubt.\textsuperscript{46} In racial identity case law, “[f]ew cases illustrate more vividly the cruel lunacy of American pigmentocracy.”\textsuperscript{47} Not only was “equal but separate” the applicable standard, but it was the role of the courts to referee the minutiae of “separate.”

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

The African-American Civil Rights Movement\textsuperscript{50} encapsulates the major campaigns of civil resistance from the 1950’s to the early 1970’s to secure legal recognition and federal protection of the citizenship rights enumerated in the constitutional amendments adopted after the Civil War.\textsuperscript{51} In addition to boycotts,

\begin{itemize}
\item \textsuperscript{44} \textit{Id. See also} Kennedy, \textit{Interracial Intimacies}, supra note 40, at 57 (explaining back story and facts of the case).
\item \textsuperscript{46} \textit{See} \textit{Green}, 88 So. 2d at 77.
\item \textsuperscript{48} 182 A. 590 (Md. 1936) (notably argued by Thurgood Marshall and Charles Hamilton Houston).
\item \textsuperscript{50} I also refer to this period as the Civil Rights Era throughout this paper.
\item \textsuperscript{51} Juan F. Perea, \textit{An Essay on the Iconic Status of the Civil Rights Movement and Its Unintended Consequences}, 18 VA. J. SOC. POLY & L. 44, 44 (2010) (describing the era as
marches, and civil disobedience of the Movement, litigation attacked a wide spectrum of practices of the segregation regime.\textsuperscript{52} Civil Rights litigation, predominantly led by the National Association of Colored People (“NAACP”), had its first major victory in 1910.\textsuperscript{53} In 1954 the litigation reached its capstone in \textit{Brown v. Board of Education},\textsuperscript{54} the most famous Supreme Court decision of the twentieth century. Landmark impact litigation, as an engine in the Civil Rights Movement, is well-documented, debated, and interpreted by legal historiographies.\textsuperscript{55} Regardless of the chosen narrative surrounding that litigation, the debates still reiterate the broader impact of constitutional law through litigation and legislation in bringing drastic social change for Blacks across the country. However, the courthouse itself is an unheralded battleground and critical forum of the Civil Rights Movement, as the development of the Jim Crow courthouse and the courthouses’ place in the Civil Rights Movement provides a means for depicting various structures of segregation and its demise.

\section*{C. Examples of Racism in the Courtroom: Racial Segregation and Overt Discrimination}

The courtroom was one of the rare forums forced to directly face the conflicting values of segregation and equality. The courts were

\begin{itemize}
\item\textsuperscript{52} Randall Kennedy, \textit{Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott}, 98 YALE L.J. 999, 1012 (1989).
\item\textsuperscript{53} Guinn v. United States, 238 U.S. 347 (1915) (upholding the trial courts ruling by striking down an Ohio grandfather clause voting restriction and helping establish the NAACP’s importance as a legal advocate).
\end{itemize}
theoretically supposed to treat Black Americans explicitly as “equals” before the law. But at the same time, the courts created their own Jim Crow-era tactics of overt discrimination through all-White juries,\(^{56}\) segregated physical accessories of the courtroom (such as the Bible used for oath-taking),\(^ {57}\) and spatial segregation, including segregated bathrooms and pews.\(^ {58}\) Other forms of racism similarly mimicked anti-Black cultural sentiments through disrespectful verbal cues \(^ {59}\) and the belittlement of Black attorneys.\(^ {60}\)

1. All-White Juries

Arguably, one of the first segregated mechanisms in the courthouse to fall was the jury box.\(^ {61}\) In a series of cases from 1879 to 1942 starting with \textit{Strauder},\(^ {62}\) the Supreme Court “declared unequivocally that defendants in criminal cases are entitled to non-discriminatory selection of the grand jurors . . . and petit jurors . . . at trial.”\(^ {63}\) Blacks could no longer be totally excluded from jury lists by statute.\(^ {64}\) Instead, in the early 1900’s, states would use the processes of the jury selection itself to shield its process from \textit{Equal Protection}’s pre-\textit{Shelley v. Kramer} \(^ {65}\)

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\(^{56}\) See supra note 11.

\(^{57}\) See supra note 9.

\(^{58}\) See supra note 5.

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

\(^{60}\) See infra, notes 107-121 and accompanying text.

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


\(^{63}\) See Brady, supra note 61.


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

During the Jim Crow era, juries served as one of the simplest demise of criminal justice for Black Americans. Not only were Blacks facing criminal sanctions, but White plaintiffs were acquitted charges for crimes against Blacks. Judges around the South were able to place themselves a single iteration away from inequitable criminal remedies by relying on all-White juries

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


68 See Brady, supra note 61, at 765 (2002) (“State criminal justice systems became a primary tool for enforcing the subjugation of blacks.”)

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

In 1955, none of the black residents of Tallahatchie County were registered voters and thus, under the jury selection rules then in place, no black was eligible to serve as a juror. During the six hours of jury selection, the county’s sheriff-elect assisted the defense team, advising the lawyers as to which jurors were “doubtful” and which were “safe.” All of the twelve white men seated for the jury seemed safe. One of the defense attorneys said later, “After the jury was chosen, any first-year law student could have won the case.”
within the Plessy framework of “equality under the law.”\textsuperscript{70} As Blacks were kept out of jury service, the democratic safeguard of the jury system was turned into a means of minority subjugation.\textsuperscript{71}

The intersection of jury formation and responsibilities of the juries in creating unjust trial outcomes is only one prong of the effects of this racist practice. The formation of the all-White jury box also fit into the larger pattern of deficiency of legal protections for Blacks.\textsuperscript{72} This injustice in the jury selection process furthered the general feeling of uncertainty, arbitrariness and inequality.\textsuperscript{73} Jury duty, as a prong of civil service, was a sign of sound judgment and upright citizenry. The uniform exclusion of Blacks from jury service perpetuated the belief that “the black race . . . were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries.”\textsuperscript{74}

As more diverse jury lists were compiled, the jury selection process signified one of the first shifts in the courthouse towards even further coded discrimination. The fall of the all-White jury list propelled a move towards covert discrimination through tactics such as racially-based preemptory challenges.\textsuperscript{75} By

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

\textsuperscript{71} Id. at 1409.

\textsuperscript{72} Id.

\textsuperscript{73} GUNNER MYRDAL, AMERICAN DILEMMA 524 (1944) (emphasis added).

\textsuperscript{74} See Hill v. Texas, 316 U.S. 400, 405 (1942) (quoting Neal v. Delaware, 103 U.S. 370, 397 (1880)).

removing the all-White jury from the courthouse’s playbook, equality under the law faced another covert hurdle.

2. The “Colored” Bible

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

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

The separate Bibles for Black and White witnesses to swear their oaths captures the racial protocol of the Jim Crow South and demonstrates not only the banality of its evils but also the absurdity of its tactics. The segregated Bible reflects the depths at which discrimination was engrained in the courthouse -- as if the oath taken while swearing on different bibles created a Black

(arguing that all peremptories should have some rational basis to pass constitutional muster); Charles J. Ogletree, Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges, 31 AM. CRIM. L. REV. 1099, 1110 (1994) (recommending a number of reforms); Sheri Lynn Johnson, Black Innocence and the White Jury, 83 MICH. L. REV. 1611, 1698-99 (1985) (proposing that a minimum of three black jurors is necessary to guarantee a fair jury verdict when the accused is black).

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

77 Id.

78 Id.


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

77 Id.

78 Id.

truth and a White truth. As a purely figurative tactic of segregation this again encapsulates the hypocrisy of Plessy’s “equal but separate,” insisting that the judiciary ignore the power of symbolism.

3. Spatial Segregation of Facilities

Spatial desegregation was a major battlefront in the Civil Rights Era as physical “segregation emphasized such presumed differences by relegating Blacks to unmistakably inferior facilities. . . [S]igns were not the only physical reminders of separation . . . The physical inequality [became] a symbol of the essential racial status and [was] defended with great determination.” 80 Courthouses were no different than other public spaces plagued with Jim Crow apartheid as courthouse pews, bathrooms, and water fountains81 were segregated. In some courts, witnesses even testified from segregated witness boxes.82

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

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

From an architectural standpoint, courthouses and their layout of restrooms often represent the last physical vestiges of

83 HARPER LEE, TO KILL A MOCKINGBIRD 164 (1960).
segregation. In Hernandez v. Texas, the Supreme Court agreed the segregation of courthouse bathrooms was evidence as “Mexican” as a class of persons distinct from Whites, detailing “two men’s toilets, one unmarked, and the other marked ‘Colored Men’ and ‘Hombres Aquí’ (Men Here).” Notably in Green v. New Orleans, there was no bathroom in the courthouse (located in the all-White French Quarter of New Orleans) for the Black witness, Herbert Stanton, the alleged father of the mixed-race child. Because segregation was a functioning tool of discriminatory practices, “the marking of racially-separate restroom facilities was an official public statement that those in power thought [B]lack people were inferior.”

In 1948, the Mississippi Supreme Court addressed segregated seating in the death penalty appeal of Murray v. State. The court considered whether to reverse the murder conviction of a Black man tried in a courtroom that segregated Black spectators, allowing them to sit only in the balcony. The court’s language reveals the long tradition of courthouse segregation: “It is asserted that the seating arrangement, suggested pursuant to a custom whose immemorial usage and sanction has made routine, resulted in a concentration in the balcony of those of the same race as the defendant.”

In affirming the conviction, the court implicitly approved of that “routine” tradition, and its decision permitted its continuance: “Assuming that this seating arrangement was insisted upon and

85 Hernandez v. State of Tex., 347 U.S. 475 (1954) (“Substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from ‘whites’. . . by showing the attitude of the community.”) (Footnote omitted). See also, Juan Francisco Perea, Mi Profundo Azul: Why Latinos Have a Right to Sing the Blues, in COLORED MEN AND HOMBRES AQUÍ: HERNANDEZ V. TEXAS AND THE EMERGENCE OF MEXICAN AMERICAN LAWYERING 100, (Michael A. Olivas ed., 2006).
87 88 So. 2d at 76.
88 Kennedy, Interracial Intimacies, supra note 42, at 61 (2001) (“Unable to find toilets other than those reserved for whites, [Stanton and Green] were forced to leave the courthouse and wander through the surrounding French Quarter in search of relief.”)
89 Higginbotham, supra note 7, at 526.
90 Murray v. State, 202 Miss. 849, 33 So. 2d 291 (1948) (en banc).
91 Id. at 857, 33 So. 2d at 292.
deemed prejudicial to such as were piqued thereby-as to which there is no showing-such reactions may not be magnified into a fancied denial of constitutional rights and thereupon made assignable to the defendant.”

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

4. Overt Discrimination in the Courtroom

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

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92 Id.
93 373 U.S. 61, 62 (1963)
95 See State v. Cox, 244 La. 1087, 1108 (1963) (The Louisiana Supreme Court, in considering appellants’ claim that racial segregation in the courtroom had denied him a fair trial in violation of his due process and equal protection rights, acknowledged that the courtroom in question had been segregated for many years but affirmed the conviction). Later, the United States Supreme Court reversed Cox’s conviction on first amendment grounds but did not discuss the question of the segregation of the courtroom. State v. Cox, 379 U.S. 536 (1965).
Black defendants and witnesses were routinely addressed by their first names, called “boy” or “nigger,” or other terms of condescension, and derided as untrustworthy and simple-minded. One example of the repeated use of 'nigger' to refer to the defendant is the trial record in *Franklin v. South Carolina*.

Similarly, in a major 1904 peonage prosecution, *United States v. McClellan*, the Attorney General-elect of Georgia represented the defendants. The federal district Judge Emory Speer made a rare admonishment of counsel: “Don’t you think the future Attorney-General of the state of Georgia can spare us this ‘nigger, nigger, nigger’? It sounds so unworthy of a great court of justice, and so unworthy of your own position at the bar to be alluding to these poor unfortunate creatures constantly in the lowest terms of degradation.”

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

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

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100 *A Recent Georgia Peonage Case: Throwing a Sidelight on Legal and Social Conditions in the South*, 23 The Green Bag 525, 528 (1911).
101 King, supra note 7, at 543 (‘Appellate courts have upheld convictions despite prosecutors’ references to black defendants and witnesses in such racist terms as ‘black rascal,’ ‘burr-headed nigger,’ ‘mean negro,’ ‘big nigger,’ ‘pickaninny,’ ‘mean nigger,’ ‘three nigger men,’ ‘niggers,’ and ‘nothing but just a common Negro, a black whore.’)
102 See *Ex parte Hamilton*, 275 Ala. 574, 574 (1963), rev’d, 376 U.S. 650 (1964). For an acknowledgement that the use of first names for black persons was part of the Southern caste system, see also King, supra note 10.
103 Id.
The Supreme Court reversed with no oral argument, citing *Brown* and *Johnson v. State of Virginia*. Miss Mary Hamilton’s request was simple: treatment with the same dignity accorded to White witnesses in the court.

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

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

Not only was the Black defendant pleading for understanding from White judges, White prosecutors, White police officials, and White juries, but the defendant was also unable to secure Black counsel as they largely did not exist in the Jim Crow South. Not until *Gideon v. Wainwright* in 1963 did the Supreme Court begin

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104 Id.
105 Id.
106 Higginbotham, supra note 7, at 527.
107 MYRDAL, supra note 73, at 326.
108 The exception to the rule of White supremacy in the judicial administration during the Jim Crow-era and early Civil Rights Movement is Miami’s “Negro Municipal Court,” established in 1950 as the United States’ first, and perhaps only, court ever set up on purely racial lines. See Ernesto Longa, *Lawson Edward Thomas and Miami’s Negro Municipal Court*, 18 ST. THOMAS L. REV. 125 (2005) (detailing the history and arguing for the significance of this court).
109 Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth and Fourteenth Amendments require the states to provide counsel to all indigent defendants). The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI.
requiring the states to provide counsel for indigent defendants in criminal cases. 110 Right to court-appointed counsel in state courts was dependent on a laundry list of manipulable factors. 111 Black defendants were left to fend for themselves.

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

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

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

111 To limit the right of appointment, the Court manipulated two factors: the complexity of the trial situation, and the defendant’s stake in the proceedings (in right to counsel cases between Betts v. Brady, 316 U.S. 455 (1942), and Gideon v. Wainwright, 372 U.S. 335 (1963)). “Against the complexity of each case it set off the defendant’s abilities to master it—his intelligence, youth, experience, etc.” Stein, supra note 110, at 549. For exhaustive review of these cases, see Beaney, The Right to Counsel in American Courts 160-91 (1955).


115 Id.

116 Id.

117 Id.
In the epic study in 1944, *The American Dilemma by Gunnar Myrdal*, Myrdal contemplates the plight of Black lawyers. Myrdal simply states, “the Negro attorney often has little chance before a Southern court.” Not even “respectable” Black attorneys could procure the justice of the court, but instead, Myrdal comments that it would take a “respectable” White attorney to garner the respect of the court on behalf of a Black client.\(^\text{118}\) The limited availability of Black lawyers further undermined due process for the majority of Black criminal defendants.\(^\text{119}\)

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

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

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

From the previous exploration of the segregation and racism in the courts, segregation in the courtroom augmented, confirmed, and approved those dominant social norms of White supremacy outside the courtroom walls. In similar tertiary analysis, the racism in the courtroom preceding the Civil Rights era stood as a symbol, signal, and symptom of racism in broad society.\(^\text{122}\)

\(^{118}\) *Myrdal*, *supra* note 73, at 326.


\(^{120}\) Id.

\(^{121}\) Kennedy, *supra* note 52 at 1034.

\(^{122}\) Higginbotham, *supra* note 7, at 545-551.
in the courts can be symptomatic of societal racism: reflecting the ideologies, attitudes, myths, and assumptions of anti-Black social norms. 123 Segregation can also signal to the courtroom participants to partake in racism, triggering and mobilizing racist attitudes and stereotypes in the judgment and actions of the judge, jury, and attorneys. 124 Lastly, discrimination and segregation in the courts are “powerful symbols, acting to reinforce, legitimate, and perpetuate racism in the broader society.”125

1. Courthouse Racism as a Symptom

Courthouse racism was a symptom of societal norms as the judiciary participated in racism in a manner plagued with the distinguishing features of Jim Crow social conditions. The characteristics of the 1950’s era courtroom mirrored the micronorms of segregated America as “the law articulate[d] and the institutional structures embod[ied] the formal racial dogmas.” 126 As Randall Kennedy termed the “etiquette of segregation,” the Jim Crow micropolitics of day-to-day living highlighted the infiltration of segregation into all aspects of life.127 Segregation was not just in the classrooms, buses, and dining rooms, but imposing an abundance of taboos and etiquettes in personal contacts.128 Segregation was a national phenomenon, albeit in less virulent forms in Northern states.129 Myrdal noted that the rules of segregation were often enforced beyond statutory

123 Id. at 545-46.
124 Id. at 546.
125 Id.
126 E. B. Reuter, Address, Why the Presence of the Negro Constitutes a Problem in the American Social Order, 8 J. NEGRO EDUC. 291, 297 (1939).
127 Kennedy, supra note 52 at 1010. See also Robert J. Cottrol & Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 GEO. L.J. 309, 349-50 (1991) (“Jim Crow was established both by the operation of law, including the black codes and other legislation, and by an elaborate etiquette of racially restrictive social practices.”)
128 Samad, supra note 15, at 11-12.
obligations, pointing out that courts were active in enforcing not just law, but also customs far outside those set down in legal statutes.\textsuperscript{130} The segregation and discrimination of the courthouse rose beyond mere symbolic participation in Jim Crow-era tactics; but rather, the underlying racist ideology (with symptoms previously examined in this article) was a disease engulfing the judiciary.

2. Courthouse Racism as a Signal

Courthouse racism acted as signals for those participants in the courtroom, triggering reactions from judges, juries, attorneys, and witnesses. The courtroom is filled with customs, traditions, time-honored practices, and rules of etiquette.\textsuperscript{131} As one judge explained, the courtroom is a “uniquely contrived atmosphere where the ultimate human drama unfolds.”\textsuperscript{132} Both judges and jurors are impacted by impressions of attorneys in their appearance and conduct.\textsuperscript{133} Furthermore, the appearance of justice intertwines with integrity of the courtroom that the Court has sought to preserve in its due process jurisprudence.\textsuperscript{134} Leon Higginbotham explained succinctly:

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

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\textsuperscript{130} Samad, \textit{supra} note 15, at 13.


\textsuperscript{132} Procaccini, \textit{supra} note 131, at 15.

\textsuperscript{133} Id.

\textsuperscript{134} See Cecelia Trenticosta & William C. Collins, \textit{Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana}, 27 Harv. J. Racial & Ethnic Just. 125, 152 (2011) citing Estes v. Texas, 381 U.S. 532, 561 (1965) ("[T]he courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to “the integrity of the trial” process.")
context by tripping other racist assumptions at other junctures in the proceeding.\textsuperscript{135}

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

3. Courthouse Racism as a Symbol

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

In the 1963 law review article, \textit{Racial Discrimination and the Federal Law: A Problem in Nullification}, Louis Lusky categorizes two separate mechanisms of oppression.\textsuperscript{140} Lusky deems discrimination linked to some particular relationship, such as student, voter, neighbor, passenger, customer, as narrow-spectrum devices.\textsuperscript{141} This discrimination is limited to when a

\textsuperscript{135} Higginbotham, \textit{supra} note 7, at 548-49.
\textsuperscript{136} \textit{Id.} at 549 (1990) (using similar analysis to separate counsel table in South Africa).
\textsuperscript{137} Due to sheer volume, I have not included the plethora of case law with mere references to the race of a defendant or witness. Another large group of cases includes racially derogatory prosecutorial appeals. \textit{See id.} at 529 (documenting racially derogatory prosecutorial statements).
\textsuperscript{138} \textit{Id.} at 572.
\textsuperscript{139} GRACE ELIZABETH HALE, MAKING WHITENESS 284 (1999).
\textsuperscript{141} \textit{Id.}
Black American would seek to utilize the relevant forum such as voting booth, school, or mode of transportation. The second mechanism is broad-spectrum devices of discrimination. Broad-spectrum discriminatory tactics remind and convince Blacks that they are an “intrinsically inferior order of being[s] who cannot justly claim equal treatment.” Systematic inequalities in the administration of the law squarely fall in that category through “exclusion of Negroes from jury panels and juries, courtroom segregation, unduly light punishment of Negroes convicted of crimes against other Negroes, and cruel and unusual punishment of Negroes convicted of crimes against [W]hites, and of convicted [W]hites who have aided Negro protests.”

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

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

Although the Friedman court was referring to attorney conduct, the pedestal that attorneys sit on as professionals is crucial in their role as community leaders. The void of Black attorneys in the list of great leaders of the Civil Rights Movement is a result

142 Id.
143 Id.
144 Id.
145 Id. (citations omitted).
146 Friedman v. District Court, 611 P.2d 77, 78 (Alaska 1980).
147 "Although black lawyers have served the black community as role models, providers of legal services, and protectors of property and civil rights, many of the best-known and most influential black leaders have not been lawyers. . . . [In fact,] there are very few lawyers who can be considered among the greatest leaders in African-American history." Paul Finkelman, Not Only the Judges' Robes Were Black: African-American Lawyers As Social Engineers, 47 STAN. L. REV. 161, 189-90 (1994). Notably, Malcolm X recalls a childhood story from grade school when he told his eight-grade English teacher, Mr. Ostrowski, that he wanted to become a lawyer when he grew up. ALEX HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 36 (1965). His teacher responded, "Malcolm, one of life's first needs is for us to be realistic. Don't
of anti-Black policies in both law schools and bar associations. But the rarity of the Black lawyer makes him even more symbolically important in the courthouse, drawing crowds with their courtroom appearances. Similar with respect to public accommodations and Title 2 of the 1964 Civil Rights Act, the ostracization of Blacks even in merely symbolic places of public accommodation had a concrete effect on the texture of Black lives. The courtrooms provided one of the first forums in American history in which a cadre of Blacks—the Civil Rights Movement’s Black lawyers—consistently and publically bested Whites in an intellectual-professional setting. Similarly, litigation victories forced segregationists to go outside the law to maintain their power. The Civil Rights Movement’s litigators “helped to erode the façade of inevitability that surrounded the segregation regime and to create the perception of a gap between right and reality, authority and force.”

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

[T]he psychological dimensions of America's race relations problem were completely recast. Blacks were no longer supplicants seeking, pleading, begging to be treated as full-

misunderstand me, now. We all here like you, you know that. But you've got to be realistic about being a nigger. A lawyer—that's no realistic goal for a nigger. You need to think about something you can be. You're good with your hands--making things. Everybody admires your carpentry shop work. Why don't you plan on carpentry? People like you as a person—you'd get all kind of work.” Id. After the career of Malcolm X as a civil rights leader, we should perhaps thank Mr. Ostrowski.

148 See Finkelman, supra note 147, at 167 (noting that thirty-four of the eighty-eight accredited law schools in 1939 had anti-Black admissions policies).
149 See Charles H. Houston, The Need for Negro Lawyers, 4 J. NEGRO EDUCATION 49, 51 (1935) (noting that southern Black lawyers are uniformly excluded from the benefits of membership in bar associations).
150 See Finkelman, supra note 147, at 187-190 (describing packed courtrooms witnessing Black attorneys at trial in both the antebellum North and Jim Crow-era South).
152 Kennedy, supra note 52 at 1064 (citing GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983); GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE (1984); Randall Kennedy, A Reply to Philip Elman, 100 Harv. L. Rev. 1938 (1987)).
153 Kennedy, supra note 52, at 1065.
fledged members of the human race. . . . They were entitled
to equal treatment as a right under the law; when such
treatment was denied, they were being deprived—in fact
robbed—of what was legally theirs. As a result, the Negro
was propelled into a stance of insistent militancy.154

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

E. CONCLUSION

As the discriminatory practices evolved, including those
previously explored in this paper, racial issues still influenced the
judiciary, but in more covert ways. Mimicking the rhetoric of
discrimination after the legislation and litigation of the Civil
Rights Movement, courthouse injustice shifted from overt to covert
bias. To understand the depths at which injustice pervades the
courthouse requires inspecting the overt discriminatory practices

154 DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 461 (1st ed. 1973). On the
importance of litigation in the shaping of consciousness more generally, see
Note, Judicial Right Declaration and Entrenched Discrimination, 94 YALE L.J. 1741
155 See, e.g., K. BUMILLER, THE CIVIL RIGHTS SOCIETY (1988); Moore, Brown v. Board of
Education: The Court’s Relationship to Black Liberation, in LAW AGAINST THE PEOPLE:
ESSAYS TO DEMYSTIFY LAW, ORDER, AND THE COURTS 62-64 (R. Lefcourt ed. 1971) (“The
needs of Blacks are fundamentally incompatible with the central role and function of
the judicial system. . . . When Blacks look closely at American jurisprudence on
questions of race, they find that little progress, if any, has been made after generations
of litigation.”); Steel, Nine Men in Black Who Think White, N.Y. TIMES MAG. (Oct.
1968).
156 I personally believe the legal apparatus during the Civil Rights Movement was more
. . are now sometimes referred to as ‘mere’ formalities were anything but ‘mere’ in the
context that King confronted.”)
157 Mary Ellen Maatman, Justice Formation from Generation to Generation: Atticus
Finch and the Stories Lawyers Tell Their Children, 14 LEGAL WRITING: J. LEGAL
WRITING INST. 207, 225 (2008) (“The ways in which physical spaces were divided and
maintained told a story: ‘For whites . . . African Americans were . . . most publicly
inferior because they sat in inferior waiting rooms, used inferior restrooms, sat in
inferior cars or seats, or just stood.’”) (citing GRACE ELIZABETH HALE, MAKING
WHITENESS 284 (1999)).
of recent American history in the Jim Crow and Civil Rights eras. Courthouse racism, including tactics not visible in case law, captures some of the origins of that overt bias as a symptom, signal, and symbol of Jim Crow-era societal norms.

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

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