

# **“A HORRIBLE FASCINATION”: SEGREGATION, OBSCENITY & THE CULTURAL CONTINGENCY OF RIGHTS**

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## ABSTRACT

*Building on current interest in the regulation of child pornography, this Article goes back to the 1950s, recovering a lost history of how southern segregationists used the battle against obscenity to counter the Supreme Court’s ruling in *Brown v. Board of Education*. Focused on the psychological development of children, *Brown* sparked a discursive backlash in the South focused on claims that the races possessed different cultures and that white children would be harmed. This backlash joined a larger, regional campaign, a constitutional guerilla war mounted by moderates and extremists alike that swept onto cultural, First Amendment terrain even as the frontal assault of massive resistance succumbed to federal might. A radical re-reading of prevailing understandings of southern resistance to *Brown*, this Article posits that civil rights proved much more culturally contingent than scholars have so far recognized and reframes the manner in which we understand *Brown*, its progeny, and current constitutional debates over the relationship between rights and race.*

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### INTRODUCTION

During the summer of 1959, Virginia newspaper editor James Jackson Kilpatrick adopted the alias “Billy Williams” and began purchasing large quantities of pornography through the mail.<sup>1</sup> While Kilpatrick was himself a married father of three,<sup>2</sup> Billy was “a twenty-three-year-old bakery salesman, a high-school graduate, interested in dirty pictures, dirty movies, [and] sexy correspondence.”<sup>3</sup> Within weeks, Billy’s inquiries led to a flood of obscene material, including an offer “to buy action films from Copenhagen.”<sup>4</sup> Inspired, Kilpatrick generated a second fictive persona, “Joseph Rocco,” “an effeminate, fruity sort of character, devoted to bondage pictures, male nudes . . . and the more delicate and bizarre forms of erotica.”<sup>5</sup>

Kilpatrick’s pornographic personae marked a dramatic departure from the man that most Virginians knew him to be—a loyal supporter of arch-conservative Senator Harry Flood Byrd and one of the South’s foremost advocates of massive resistance to *Brown v. Board of Education*.<sup>6</sup> Since 1955—a year after the Supreme Court’s landmark decision—Kilpatrick had used the editorial page of his newspaper, *The Richmond News Leader*, to criticize the ruling.<sup>7</sup> In editorial after editorial, he blasted *Brown* as a violation of states’ rights, celebrated Senator Byrd’s call for “massive resistance,” and even “revived” an eighteenth-century theory of constitutional defiance known as “interposition.”<sup>8</sup> The doctrine of interposition held that states could reject federal authority whenever they

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1. JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 3–4, 11 (1960).

2. Letter from James J. Kilpatrick to Pyke Johnson, Jr. (Jan. 20, 1958) (on file with Special Collections, University of Virginia).

3. KILPATRICK, *supra* note 1, at 11.

4. *Id.* at 4.

5. *Id.* at 11.

6. See JAMES JACKSON KILPATRICK, *THE SOUTHERN CASE FOR SCHOOL SEGREGATION* (1962); JAMES JACKSON KILPATRICK, *THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA* (1957) [hereinafter KILPATRICK, *SOVEREIGN STATES*]; Garrett Epps, *The Littlest Rebel: James J. Kilpatrick and the Second Civil War*, 10 CONST. COMMENT. 19 (1993).

7. NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950’S* 109, 129 (1969); INTERPOSITION: EDITORIALS AND EDITORIAL PAGE PRESENTATIONS, *THE RICHMOND NEWS LEADER, 1955–1956* (James Jackson Kilpatrick ed., 1956).

8. BARTLEY, *supra* note 7, at 129; DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* 168 (2004).

believed “that authority violated the Constitution,” a notion rooted in Madisonian opposition to the Alien and Sedition Acts of 1798.<sup>9</sup> By 1957, almost every southern state had adopted interposition as either official or symbolic policy, making Kilpatrick one of the single-most important architects of southern opposition to the Supreme Court.<sup>10</sup>

How, if at all, did Williams and Rocco fit into this picture? Were there ties between Kilpatrick’s views of *Brown* and his views of prominent 1950s Supreme Court obscenity cases, such as *Kingsley Books v. Brown* and *Roth v. United States*?<sup>11</sup> Or, was it mere coincidence that he began to develop fictive alter egos interested in pornography at the very same time that he led the South’s legal charge against civil rights? A letter Kilpatrick penned on January 7, 1960, provides a clue. “All this is now futile,” he began.<sup>12</sup> Though “the interposition movement of four years ago had great political value,” he continued, “[y]ou know what has happened since then as well as I. The full power and weight of the Federal judiciary have been thrown into enforcement of the doctrines laid down generally in *Brown v. Board of Education*, and the impact of that decision no longer can be avoided.”<sup>13</sup> Rather than continue massive resistance, argued Kilpatrick, the South needed to follow the tactics employed by the repeal forces to end Prohibition, namely “labor unceasingly to create a climate of opinion nationally in which the decision itself, if not actually reversed, will be effectively modified or controlled by acts of Congress.”<sup>14</sup> This called not for “foolish and useless laws,” concluded Kilpatrick, but “propaganda, publicity, and education.”<sup>15</sup>

Kilpatrick’s plea for propaganda marked a new turn, one that helped explain his sudden interest in obscenity—a topic that he declared held a “horrible fascination” for him.<sup>16</sup> As this Article will demonstrate, Kilpatrick wove threads of interposition into his 1960 book *The Smut Peddlers*, and used the battle against pornography to build a new coalition against the Supreme Court, this time under the rubric of upholding morality—itsself a front for undermining civil rights. Rather than a

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9. CHAPPELL, *supra* note 8, at 168.

10. BARTLEY, *supra* note 7, at 131; *see also* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 390–91 (2004).

11. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Roth v. United States*, 354 U.S. 476 (1957).

12. Letter from James J. Kilpatrick to Edward E. Lane (Jan. 7, 1960) (on file with Special Collections, University of Virginia).

13. *Id.*

14. *Id.*

15. *Id.*

16. KILPATRICK, *supra* note 1, at 289.

quixotic, one-man quest, Kilpatrick's turn to prudence joined a larger, regional campaign, a constitutional guerilla war mounted by moderates and extremists alike that swept onto cultural, First Amendment terrain even as the frontal assault of massive resistance succumbed to federal might. Dubious moral regulations emerged across the region, southern officials declared the need to reinvigorate decency, and land bridges between the South and the nation began to surface, particularly as civil rights protest devolved into urban riots in 1965.

Animating this shift was a pervading sense that the Civil Rights Movement had to be engaged on its own terms, not with violence or vitriol but moral rhetoric and aspirational politics. Just as movement leaders such as Martin Luther King, Jr., extolled black heroism and disciplined non-violence, so too did segregationists like Kilpatrick feel compelled to celebrate the best of the white South: its civility, its manners, and its paternalist concern for African Americans whom, of course, segregationists then painted as illegitimate, immoral, and inept. If successful, Kilpatrick hoped to undermine the persuasive power of black leaders like King while winning national support for the struggle against *Brown* at the same time. However, accomplishing such a task involved delicate cultural politics. On the one hand, white officials aimed to delegitimize civil rights by increasing moral regulations of extramarital sex, common law marriage, and illegitimacy, essentially reframing black culture as pathological. On the other hand, they recast white southerners as morally principled arbiters of decency, a move reinforced by a sudden interest in the seemingly non-race related subject of pornography.

To illustrate, this Article will proceed in five parts. Part I recovers the first signs of a cultural backlash to *Brown* in the South, showing how segregationists feared the ruling's effect on the indoctrination of racial prejudice in white youth, even as they seized on the opinion's social science evidence to forge a statistically constructed moralist response. Part II shows how said response bled onto legal terrain, sparking a web of regulations on marriage, adoption, and illegitimacy, all aimed at preserving segregation through coded, legislative means. Part III shows how segregationists applied these means to the national framework, looking to bridge southern interests with voters in both the North and West. The segregationists went so far as to posit amendments to the United States Constitution under the rubric of controlling pornography. Part IV reveals the manner in which such discursive moves intersected with the direct action phase of the Civil Rights Movement, prompting a series of exchanges between black activists and white segregationists on the explicitly cultural terrains of language, dress, and literature. Finally,

Part V recovers the constitutional implications of these intersections, first through victories against illegitimacy, and then a surprising right-hand turn on the Supreme Court.

What lessons do we learn from such an inquiry? First, though legal historians have tended to portray southern resistance to *Brown* in terms of massive resistance,<sup>17</sup> such readings only scratch the surface of segregationist strategy in the 1950s and 60s. Second, while southern historians like David Chappell argue that the white South failed to develop a Christian response to the prophetic religion of the Civil Rights Movement,<sup>18</sup> a close look at segregationist turns to moral regulations indicates that segregationists did in fact assemble such a response, though not one articulated in prophetic terms. Rather than invoke prophetic religion, segregationists turned to a discourse of personal morality, one that proved particularly insidious precisely because it merged Puritanical notions of sexual sin with longstanding presumptions that the law should in fact be used to control such sin, even if no harm was involved.<sup>19</sup> Even scholars who take segregationist religion seriously have missed this point with their argument that southern whites became preoccupied with “proclaiming the impending end of time and the irrelevance of life in the flesh.”<sup>20</sup>

Rather than consider life in the flesh irrelevant, segregationists worked hard to link Evangelical notions of personal purity with conservative fears of delinquency, pornography, and the corruption of minors more generally,<sup>21</sup> laying the foundations for a discourse that would come to win popular support through the end of the twentieth century.<sup>22</sup> Indeed, the significance of segregationist turns to personal morality lay precisely in

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17. See, e.g., KLARMAN, *supra* note 10, at 385–442.

18. See CHAPPELL, *supra* note 8, at 5.

19. Lord Devlin, *Law, Democracy, and Morality*, 110 U. PA. L. REV. 635, 636 (1962) (calling for the use of law to regulate morality).

20. Jane Dailey, *Sex, Segregation, and the Sacred after Brown*, 91 J. AM. HIST. 119, 121 (2004).

21. See, e.g., Whitney Strub, *Black and White and Banned All Over: Race, Censorship and Obscenity in Postwar Memphis*, 40 J. SOC. HIST. 685, 703 (2007) [hereinafter Strub, *Black and White*] (showing how segregationists in Memphis turned to “moralistic fervor” in the struggle against civil rights); Whitney Strub, *Perversion for Profit: Citizens for Decent Literature and the Arousal of an Antiporn Public in the 1960s*, 15 J. HIST. SEXUALITY 258, 260, 291 (2006) [hereinafter Strub, *Perversion*] (noting that “[p]ornography remained central to the New Right’s moral outrage” into the 1980s).

22. See MARSHALL FRADY, *BILLY GRAHAM: A PARABLE OF AMERICAN RIGHTEOUSNESS* (Simon & Schuster 2006) (1979); CHRIS HEDGES, *AMERICAN FASCISTS: THE CHRISTIAN RIGHT AND THE WAR ON AMERICA* (2006); *THE CHRISTIAN RIGHT IN AMERICAN POLITICS: MARCHING TO THE MILLENNIUM* (John C. Green et al. eds., 2003); *TOWARD AN EVANGELICAL PUBLIC POLICY: POLITICAL STRATEGIES FOR THE HEALTH OF THE NATION* (Ronald J. Sider & Diane Knippers eds., 2005).

their ability to appeal across regional lines, transforming the struggle against *Brown* into a decidedly cultural crusade for the preservation of personal, moral values and Christian virtue.

That obscenity became entangled in this project is worth noting. Even today, attitudes toward obscenity differ significantly based on whether the targets are children or adults. This phenomenon is exemplified in the current disconnect between prosecutions of minors for “sexting” and the constitutional protection of adult-makers of “crush” videos involving the torture of animals.<sup>23</sup> Now, as then, prosecutions for pornography seem to be animated more by an interest in monitoring children than ending exploitation or cruelty, a concern that assumed a bizarrely sinister guise during the struggle for civil rights.

Further, documenting segregationist moves to pornography broadens our understanding not simply of southern resistance to civil rights, but what scholars Paul Brest, Sanford Levinson, Jack Balkin, Akhil Reed Amar, and Reva Siegel call the “processes of constitutional decision-making.”<sup>24</sup> Interested in the role that “other political institutions” besides the Court play in constitutional interpretation, Brest et al. limit their discussion of segregationist reactions to *Brown* to “The Southern Manifesto,” a document pledging that the South will use “all lawful means” to combat the ruling.<sup>25</sup> Missing, however, is any discussion of what those legal means were, how the segregationists aimed to curry popular opinion against the Court, and how they carried the constitutional struggle against racial equality onto explicitly cultural terrain—terrain that raises questions about the cultural contingency of rights generally in the United States.

Put simply, the terrain of culture became a lost front in the struggle for racial equality at midcentury.<sup>26</sup> The end of segregation, this Article will demonstrate, created fears across the South not simply of racial integration, but also fears of social, moral, and sexual disorder, particularly among youth. Public officials responded to such fears by pushing for increased legal regulation of both the public and private

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23. Robert Barnes, *Justices Overturn Anti-Animal-Cruelty Law in Free Speech Case*, WASH. POST, Apr. 21, 2010, at A3; Tamar Lewin, *Rethinking Sex Offender Laws for Youths Showing Off Online*, N.Y. TIMES, Mar. 21, 2010, at A1; Kathleen Parker, *Crush Animal Cruelty; The Next Step Is Up to Congress*, WASH. POST, Apr. 25, 2010, at A21.

24. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (5th ed. 2006).

25. *Id.* at 902–04.

26. The idea that the realm of culture can be implicated in political struggle is nothing new. For an early exposition of the relationship between culture and political conflict, see ANTONIO GRAMSCI, PRISON NOTEBOOKS (Joseph A. Buttigieg ed., 1992).

spheres, including marriage, adoption, and illegitimacy. For segregationists like Kilpatrick, such regulations of culture promised a salve for social insecurities generated by *Brown*, even as they posed a potential threat to the cultural claims inherent in white supremacy. If the region pushed too far in the area of cultural control, feared Kilpatrick, it would risk appearing backward and philistine, undermining racist arguments that southern whites were culturally superior to blacks. Critical to the South's chances at preserving segregation, in other words, was carving out a constitutional and cultural defense of Jim Crow that voters across the country could endorse. Consequently, Kilpatrick became deeply involved not simply in the legal struggle over civil rights, but also a larger, literary struggle over the cultural implications of recognizing those rights.

#### I. THE 'UNPREJUDICED' MIND

Long before James Jackson Kilpatrick shifted his attention from interposition to pornography, segregationist voices called for a moral crusade against civil rights. Among the first to do so was Mississippi Judge Thomas Pickens Brady.<sup>27</sup> In a speech later distributed by segregationists across the South, Brady posited that desegregation would quickly lead to interracial sex.<sup>28</sup> "Constantly," argued Brady, "the [N]egro will be endeavoring to usurp every right and privilege which will lead to intermarriage."<sup>29</sup> Such arguments, as historians have shown, were not only common in the post-*Brown* South but coincided with prohibitions against interracial marriage dating back at least two hundred years.<sup>30</sup>

Yet, woven through Brady's intermarriage claim were strange threads, hints not simply that integration might encourage illicit sex, a common fear, but that integration might actually prevent children from developing

27. BARTLEY, *supra* note 7, at 85.

28. For the influence of Brady's speech on massive resistance, see *id.*

29. TOM P. BRADY, BLACK MONDAY 65 (1955).

30. See PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 19, 225–26 (2009) (discussing the history of miscegenation law and arguments that integration would lead to miscegenation in Mississippi); see also MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH (1997); KEVIN J. MUMFORD, INTERZONES: BLACK/WHITE SEX DISTRICTS IN CHICAGO AND NEW YORK IN THE EARLY TWENTIETH CENTURY (1997); JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES (1980); Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock's Central High*, 62 ARK. HIST. Q. 42 (2003); Martha Hodes, *The Sexualization of Reconstruction Politics: White Women and Black Men in the South after the Civil War*, 3 J. HIST. SEXUALITY 402 (1993); Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890–1934*, 20 L. & HIST. REV. 225 (2002).

race prejudice.<sup>31</sup> Brady asserted, “You cannot place little white and [N]egro children in classrooms and not have integration. They will grow up together and the sensitivity of the white children will be dulled.”<sup>32</sup> Brady’s mention of sensitivity indicated that racism was something that had to be inculcated in youth, a refinement of sorts that children did not naturally possess. Others agreed. Writing for the *Atlantic* in 1956, South Carolina journalist Herbert Ravenel Sass declared that “the elementary public school” had to remain segregated “at all costs” because white youth possessed “unprejudiced” minds.<sup>33</sup> “[R]ace preference is not active in the very young,” warned Sass, but was rather “one of those instincts which develop gradually as the mind develops and which, if taken in hand early enough, can be prevented from developing at all.”<sup>34</sup>

Not all segregationists framed their fear of integration in terms of eroding prejudice. Some spoke of harm. “I submit that white children also have rights,” proclaimed Mississippi Senator James Eastland only weeks after *Brown* was handed down.<sup>35</sup> “[T]ensions and frictions generally found in an interracial school,” continued Senator Eastland, “certainly will have a bad effect on a white child, and in my judgment will interfere with the white child’s ability to learn.”<sup>36</sup> South Carolina journalist William D. Workman echoed Senator Eastland’s concerns in a book defending Jim Crow:

[T]he integrationists, who cry for racial admixture in the cause of bolstering the personality development of a Negro minority, do not hesitate to compel the mingling of a white minority with a black majority without any consideration of the inevitable psychological

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31. Scholars of children in the South have not recognized the extent to which even staunch segregationists like Brady realized race prejudice was artificially inculcated in youth. *See, e.g.*, REBECCA DE SCHWEINITZ, *IF WE COULD CHANGE THE WORLD: YOUNG PEOPLE AND AMERICA’S LONG STRUGGLE FOR RACIAL EQUALITY* (2009). Notions that white children had to be educated on the ideology of race were nothing new. Colonial elites in places as distant as British South Africa and the Dutch East Indies struggled incessantly with the challenge of European children abandoning European ways. This concern led to entire discourses on the proper training, or education, of white youth, discourses that prefigured white concerns in the American South during the 1950s. *See* ANN LAURA STOLER, *RACE AND THE EDUCATION OF DESIRE: FOUCAULT’S HISTORY OF SEXUALITY AND THE COLONIAL ORDER OF THINGS* 105 (1995); Ann Laura Stoler, *Sexual Affronts and Racial Frontiers: European Identities and the Cultural Politics of Exclusion in Colonial Southeast Asia*, in *TENSIONS OF EMPIRE: COLONIAL CULTURES IN A BOURGEOIS WORLD* 198, 215 (Frederick Cooper & Ann Laura Stoler eds., 1997).

32. BRADY, *supra* note 29, at 65.

33. Herbert Ravenel Sass, *Mixed Schools and Mixed Blood*, *ATLANTIC*, Nov. 1956, at 48.

34. *Id.*

35. 100 CONG. REC. 11,523 (1954) (statement of Sen. James Eastland).

36. *Id.*



impact upon the personalities of the white children. Indeed, there has been a monumental indifference on the part of the race-mixers concerning the likelihood of adverse psychological effects upon white children.<sup>37</sup>

Exacerbating southern interest in “psychological effects” was *Brown*’s citation of social science data to establish that segregated schools violated the equal protection clause of the Fourteenth Amendment, not simply because schools were unequal, but because racial separation per se inflicted psychological harm on black youth.<sup>38</sup> Georgia Attorney General Eugene Cook lamented the fact that, in his view, “the justices based their decision not upon any premise or tenet of law but solely upon sociological and psychological theories.”<sup>39</sup> South Carolina Senator Olin D. Johnston agreed, noting that when he “became a United States Senator [he] took an oath to support and defend the Constitution of the United States” but that this oath did not include supporting “sociological pronouncements of a Supreme Court” that replaced law with arbitrary “judicial dictatorship.”<sup>40</sup>

Outrage at the Court’s reliance on social science data convinced some segregationists, including James Jackson Kilpatrick, that outright defiance or “massive resistance” to the Court was the South’s best hope. Such a belief prompted Kilpatrick to launch a legal campaign of “interposition” from his desk in Richmond.<sup>41</sup> First devised by Thomas Jefferson and James Madison in response to the oppressive Alien and Sedition Acts of 1798, the doctrine of interposition held that it was “the unquestionable right” of individual states to resist unconstitutional federal action.<sup>42</sup> Though not quite as dramatic as armed revolt, the theory nevertheless held that states could interpose their will against the Supreme Court, a proposition that flirted with outright rejection of the federal government.

37. WILLIAM D. WORKMAN, JR., *THE CASE FOR THE SOUTH* 241 (1960) (emphasis omitted).

38. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954). Even northern sources commented on the Court’s reliance on social psychology. See James Reston, *A Sociological Decision: Court Founded Its Segregation Ruling On Hearts and Minds Rather Than Laws*, N.Y. TIMES, May 18, 1954, at 14-L (“Relying more on the social scientists than on legal precedents—a procedure often in controversy in the past—the court insisted on equality of the mind and heart rather than on equal school facilities. . . . The court’s opinion read more like an expert paper on sociology than a Supreme Court opinion. It sustained the argument of experts in education, sociology, psychology, psychiatry and anthropology . . .”). See generally DARYL MICHAEL SCOTT, *CONTEMPT & PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880–1996* (1997).

39. Eugene Cook, Att’y Gen. of Ga., *The Southern View of Segregation*, An Address Before the Conservative Society of the Yale Law School (Dec. 8, 1955) (on file with author).

40. *Centralization Hit by SC Solons: Lawmakers Issue Warnings In Both Senate, House*, THE STATE (Columbia, S.C.), Mar. 2, 1956, at 1-D.

41. BARTLEY, *supra* note 7, at 126–49.

42. See *Kentucky-Virginia Resolutions*, RICHMOND NEWS LEADER, Nov. 21, 1955, at 10.

Yet, Kilpatrick viewed it—at the time—to be a genteel means of refuting *Brown*.<sup>43</sup> Indeed, to his mind, interposition represented a bridge issue, a non-objectionable concept that the South might use to relate to the rest of the country, perhaps even currying national favor. For example, in 1957, Kilpatrick argued that

the fate of the schools, or the fate of the resisting Southern states, is not the most vital issue here at bar. Far transcending any question of race or instruction, is the greater conflict over the stability of the Constitution. . . . If States outside the South are to comprehend the peril before them, they would do well to look beyond the frontal fight of *Brown v. Board of Education* to the flanking decisions in which State powers also are being steadily destroyed.<sup>44</sup>

Kilpatrick went on to discuss a series of “flanking” cases, all decided by the Supreme Court that increased the power of the federal government over the states. Among them were *United States v. California* and *United States v. Louisiana*, both declaring the federal government sole owner of “the land, minerals and other things of value” off the coasts of California and Louisiana.<sup>45</sup> Also indicative of federal creep were *Garner v. Teamsters Local Union No. 776*, which dismissed state remedies for labor disputes, and *Pennsylvania v. Nelson*, which overturned state convictions of suspected communists.<sup>46</sup> Such rulings, argued Kilpatrick, represented a frightening campaign by the federal government to rob the states of their sovereignty. Protecting that sovereignty, not preserving white supremacy, constituted the South’s ultimate reason for rejecting the Supreme Court.

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43. KILPATRICK, SOVEREIGN STATES, *supra* note 6, at 77, 86–98, 178–79, 186–99. In 1956, Kilpatrick wrote that “[t]he Supreme Court can be resisted in a dozen lawful ways. Its despotic usurpation of power can be fought judicially, politically, legislatively. Without compromising principle, without bowing to the court’s unwarranted mandates, the South can yet win.” *Fringes of the Storm*, RICHMOND NEWS LEADER, Sept. 5, 1956, at 10.

44. KILPATRICK, SOVEREIGN STATES, *supra* note 6, at 286–87.

45. *Id.* at 287–92 (discussing *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950)).

46. *Id.* at 292–96 (discussing *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485 (1953); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956)). That *Brown* might be successfully opposed was perhaps not as farfetched as it seemed. After all, in his seminal article *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, Robert Dahl argued that the Supreme Court operates as a policy-making institution within the larger American political system. However, because “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States,” the Court should not be expected to “long hold to norms of Right or Justice substantially at odds with the rest of the political elite.” Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285, 291 (1957).

Impressed, segregationists across the South adopted interposition as either official or symbolic policy, making it a pronounced component of the larger campaign of massive resistance to *Brown*.<sup>47</sup> Yet, interposition was not the only strategy pursued by southern states.<sup>48</sup> Across the South, moderates proclaimed that *Brown* could be circumvented through other, more subtle means.<sup>49</sup> In Florida, Governor LeRoy Collins warned that pursuing a course of “hot words” would only jeopardize the South’s position, and that “smart lawyers” could find “lawful and peaceful” means to circumvent the ruling.<sup>50</sup> Mississippi Governor J. P. Coleman agreed, warning that “[w]e can’t preserve segregation by defying the federal government,” but rather, the South needed to employ “legal means” to subvert the decision.<sup>51</sup>

What kind of means? Coleman developed a model for circumventing *Brown* that focused on removing all mention of race from southern state law while using coded signifiers to assign students to schools.<sup>52</sup> Coleman developed his plan, known as “pupil placement,” while listening to oral arguments in *Brown*.<sup>53</sup> The strategy hinged on using social science evidence, particularly illegitimacy rates, to assign students to schools based on sociological factors, such as moral character, intelligence, family background, and public health, rather than race.<sup>54</sup> As the next Part will show, moral regulations, of which pupil placement plans were one example, spread across the South, sparking a wave of related, moral regulations aimed at preserving Jim Crow.

## II. MORAL REGULATIONS

Coleman’s endorsement of pupil placement as a “legal means” of circumventing *Brown* marked a distinctly different form of resistance than constitutional defiance, or interposition, a strategy that quickly implicated other laws. For example, in 1956 Coleman signed a bill into law that

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47. BARTLEY, *supra* note 7, at 126–49.

48. For other strategies, including the centralization of law enforcement to undermine direct action protest, see ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* (2009).

49. *Id.* at 88–89.

50. *Id.*; Interview by Jack Bass and Walter De Vries with LeRoy Collins in Tallahassee, Fla. 12 (May 19, 1974) (on file with Southern Oral History Program Collection, University of North Carolina at Chapel Hill).

51. WALKER, *supra* note 48, at 12.

52. *Id.* at 39–43.

53. *Id.* at 39.

54. *Id.* at 40.

abolished common law marriage. Coleman hoped to boost black illegitimacy rates and “aid segregation by permitting the state to segregate on a basis of ‘unfavorable moral background’ instead of on a basis of race.”<sup>55</sup> The “theory of the bill,” reported the Baton Rouge *Morning Advocate*, “was to set up unfavorable moral background as a basis for segregation,” a background measured entirely by focusing on illegitimacy rates.<sup>56</sup> Of course, in citing such rates segregationists did not bother to mention whether the rates may have been artificially suppressed in white communities through either abortions or adoptions. Adoptions were facilitated by whites-only maternity homes,<sup>57</sup> and according to the Virginia League of Local Welfare Executives, abortions were handled “by the girls themselves or their families with no call on the taxpayers.”<sup>58</sup> The 10 percent of pregnancies that befell women on welfare, consequently, were “the ones that produce the cries of alarm,” and those pregnancies tended—due to Jim Crow’s devastating impact on education, economic opportunity, and political power—to be black.<sup>59</sup>

Yet, segregationists turned a blind eye to adoptions and abortions in white communities. Instead, they preferred to argue that “[s]outhern whites are the only people in America who can testify to . . . the low moral level of the Colored in marriage relationships.”<sup>60</sup> According to the *Virginia Methodist Advocate*, opposition to integration could be explained by the “different moral standards” between the races, standards reflected in “illegitimate births.”<sup>61</sup> A Mississippi newspaper agreed, reporting that “[n]ot more than 20 per cent of the Negroes are married.”<sup>62</sup> The newspaper further noted that “[i]f you will pick out ten Negro families and check the records, you will find that not over two of them are actually legitimately married.”<sup>63</sup>

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55. *Common Law Marriage Ban Sent to Coleman*, MORNING ADVOC. (Baton Rouge), Apr. 1, 1956, at 1.

56. *Legislators in Mississippi End Session*, MORNING ADVOC. (Baton Rouge), Apr. 1, 1956, at 10-D.

57. WALKER, *supra* note 48, at 80–81.

58. Celestine Sibley, *Sex Hoopla, Not Funds, Is Illegitimacy Cause*, ATLANTA CONST., Feb. 15, 1960, at 16. Furthermore, about twelve percent of all pregnancies in the South ended in abortion, but were never discovered. *Id.*

59. *Id.*

60. LOUIS E. DAILEY, *THE SIN OR EVILS OF INTEGRATION* 39 (1962).

61. 85 CONG. REC. A6455 (appendix July 18, 1958) (extension of remarks of Rep. Watkins M. Abbitt).

62. J.A. Thigpen, *Thigpen Report Shows Less Than A Fifth Negro Parents Are Wed*, DELTA DEMOCRAT-TIMES (Greenville, Miss.), Nov. 17, 1955, at 13.

63. *Id.*

The emphasis on marriage rates as a justification for segregation, together with the use of marriage or extra-marital motherhood as a means of perpetuating it, helps to explain a wave of laws enacted across the South in the 1950s that made marriage licenses increasingly difficult to obtain. To take just a few examples, Mississippi enacted several bills in 1956 “designed to throw up a bulwark around the state’s segregation laws.”<sup>64</sup> One such bill banned common law marriage.<sup>65</sup> Further, another bill required that all marriage licenses provide information on the applicants, including their race, number of past marriages, and manner of termination of past marriages, and that all data collected from the applicants be sent to the Bureau of Vital Statistics of the State Board of Health for tabulation.<sup>66</sup> That same year, Georgia declared that marriage licenses could only be granted by the registrar, or his clerk, at the county courthouse, between the hours of 8:00 A.M. and 12:00 P.M.<sup>67</sup> As an accommodation to working people, the act declared that the clerk could also grant licenses at his personal residence,<sup>68</sup> no doubt a provision that catered to whites, who were undoubtedly more comfortable approaching white homes after hours than African Americans. One year later, Georgia further complicated the process of obtaining a marriage license by removing the presumption that previous marriages had been dissolved when an individual applied for a marriage license.<sup>69</sup> Instead, the applicant carried the burden of proving that any prior marriages had been legitimately dissolved via divorce.<sup>70</sup> For those in a common law marriage, such a measure made the prospect of remarrying significantly harder, if not impossible.

In 1957, North Carolina required that all newborns be registered within five days of birth with the Office of Vital Statistics and that a birth certificate be obtained for each child.<sup>71</sup> Further, information regarding the marital status of parents was to be included on each birth certificate, and each certificate was then to be sent to the Office of Vital Statistics, presumably for tabulation purposes.<sup>72</sup> The significance of birth certificates

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64. *Legislators in Mississippi End Session*, MORNING ADVOC. (Baton Rouge), Apr. 1, 1956, at 10-D.

65. Act of Apr. 5, 1956, ch. 239, 1956 Miss. Laws 289.

66. Act of Mar. 22, 1956, ch. 302, 1956 Miss. Laws 399.

67. Act of Feb. 14, 1956, No. 37, 1956 Ga. Laws 43.

68. *Id.*

69. Act of Feb. 22, 1957, No. 85, 1957 Ga. Laws 83.

70. *Id.*

71. Act of June 12, 1957, ch. 1357, 1957 N.C. Sess. Laws 1478.

72. *Id.*

assumed an even more pronounced role in Arkansas, where “no child” was “admitted to the first grade of any public school of the state until the parent, guardian, or some other responsible person has presented to the proper school authorities such child’s birth certificate.”<sup>73</sup> Louisiana passed a similar rule, holding that “all children, upon entering the first grade of any school in the State of Louisiana shall be required to present a copy of their official birth record to the school principal.”<sup>74</sup> Louisiana later passed a law that required individuals applying for a marriage license to present certified copies of their original birth certificates.<sup>75</sup>

Though such regulations coincided with a larger effort to document differences in “moral background” between the races, questions emerged about how, precisely, whites were to escape such statistical nets. This became apparent in North Carolina in 1959, when two state legislators proposed a bill granting district attorneys the power to prosecute unwed mothers for child abandonment. According to the proposal, district attorneys would be provided with lists of illegitimate births and would be required to investigate the parents responsible for such births.<sup>76</sup> District attorneys would also receive lists of public welfare grant recipients and be required to investigate them for similar violations.<sup>77</sup> If the prosecutors happened to find that unwed parents were misusing funds, they could charge them with a misdemeanor.<sup>78</sup>

Immediately, cries emerged from North Carolina’s white community, particularly the portion of the community that dealt with white adoptions.<sup>79</sup> On May 12, 1959, for example, Galt Braxton, a member of the Board of Trustees of the Children’s Home Society of North Carolina of Greensboro, wrote to the chair of the House Health Committee complaining that the bill made for bad policy.<sup>80</sup> In particular, he complained of the requirement that prosecutors be supplied with the names and addresses of illegitimate children and their unwed mothers.

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73. Act of Mar. 3, 1959, No. 139, 1959 Ark. Acts 382.

74. Act of July 8, 1954, No. 573, 1954 La. Acts 1061.

75. Act of July 1, 1958, No. 160, 1958 La. Acts 609. The statute also required applicants to present medical documents dated within ten days of the license application asserting that they did not carry a venereal disease. *Id.* Evidence that these requirements made it significantly harder to acquire a marriage license emerged in an attorney general’s opinion in 1958. *See* 1958 Op. La. Att’y Gen. 25, 26 (describing alternative routes that could be taken for those who did not have birth certificates).

76. *Davis-Jolly Morals Bill Is Discarded*, NEWS & OBSERVER (Raleigh), Apr. 22, 1959, at 1.

77. *Id.*

78. *Sterilized Illegitimacy Bill Okayed*, NEWS & OBSERVER (Raleigh), May 30, 1959, at 3.

79. *Davis-Jolly Substitute Is Opposed*, NEWS & OBSERVER (Raleigh), May 7, 1959, at 10.

80. Letter from H. Galt Braxton to Carl Venters (May 12, 1959) (on file with North Carolina State Archives); *see* WALKER, *supra* note 48, at 80.

“Such a law,” argued Braxton in an editorial for the *Kinston Daily Free Press*, would “brand” every “innocent child born in North Carolina out of wedlock as illegitimate.”<sup>81</sup> Rather than reduce illegitimacy rates, this “would defeat efforts that have been in progress for more than half a century to save such innocent youngsters by placing them in reputable and proper homes.”<sup>82</sup> Not only that, the bill “would brand every young woman in the State who unfortunately becomes an unwed mother and would put up the bars permanently for such a girl or young woman to be redeemed to society and thereafter live a life worthwhile.”<sup>83</sup>

Given that North Carolina boasted few maternity homes for blacks, Braxton’s message clearly aimed to alert the legislature to possible harm the bill might cause whites.<sup>84</sup> Further, Braxton’s concern that whites be “redeemed” from their premarital affairs underscores the extent to which southern invocations of morality proved only a partial substitute for color as a basis for discrimination. Yet, this did not stop states from continuing the project of using moral signifiers as vehicles for furthering repression. To take just a few of the most outrageous examples, in 1958 Georgia passed a voter registration act that enabled voters to register in two different ways.<sup>85</sup> Either they could read and write intelligibly a section of the state or national constitution, or they could exhibit good character and an understanding of the duties of citizenship by responding to a set of questions.<sup>86</sup> Due to persistent illiteracy caused by Jim Crow, most black applicants chose to answer the questions despite the fact that the majority of them were ultimately disqualified for not answering the questions correctly.<sup>87</sup> Florida writer Stetson Kennedy commented on these disqualifications, noting that arbitrary determinations of moral character were often involved:

The purge procedure as evolved by Georgia is simplicity itself. You receive a legal summons to appear before the county board of registrars at a specified time . . . to “show cause” why your name should not be dropped because of “bad character” . . . . If you fail to

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81. H. Galt Braxton, *Such Legislation Would Be a Black Mark*, KINSTON DAILY FREE PRESS, May 11, 1959, at 1.

82. *Id.*

83. *Id.*

84. KENNETH J. NEUBECK & NOEL A. CAZENAVE, WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA’S POOR 71 (2001).

85. Voters’ Registration Act, No. 321, 1958 Ga. Laws 269.

86. *Id.* at 278.

87. *Georgians Stick with State Law on Negro Voting*, MORNING ADVOC. (Baton Rouge), Mar. 1, 1960, at 4-A.

appear, your name is automatically stricken; if you do appear, it is usually stricken just the same.<sup>88</sup>

Mississippi followed a similar pattern, also looking to moral character as grounds for rejecting applications to vote. This became apparent in 1960, when Mississippi state representative Thompson McClellan introduced a resolution requiring that voters be “of good moral character” in order to register.<sup>89</sup> The Senate adopted the measure on April 28, 1960, and the House followed a few days later.<sup>90</sup>

Meanwhile, the Louisiana legislature submitted two constitutional amendments to a statewide referendum limiting voting rights to those who could establish good moral character.<sup>91</sup> According to the statute, those who had “lived with another in ‘common law’ marriage within five years from the date of making application to become an elector,” and those who had “given birth to an illegitimate child within the five years immediately prior to the date of making application for registration as an elector” did not possess good character.<sup>92</sup> The amendments, which were passed on November 8, 1960, empowered county registrars to determine whether individuals were either in common law marriages or had illegitimate children.<sup>93</sup>

Not satisfied, Louisiana then punished unwed mothers by denying them welfare benefits. In 1960, the state passed a bill denying welfare benefits to an illegitimate child “if the mother of the illegitimate child in question is the mother of two or more older illegitimate children.”<sup>94</sup> Then, the legislature enacted another statute denying public assistance “to any person who is living with his or her mother if the mother has had an illegitimate child after a check has been received from the welfare department.”<sup>95</sup> Almost immediately, the new measures “removed over a quarter of Louisiana’s . . . recipients from the state’s welfare rolls by

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88. STETSON KENNEDY, *JIM CROW GUIDE TO THE U.S.A.: THE LAWS, CUSTOMS AND ETIQUETTE GOVERNING THE CONDUCT OF NONWHITES AND OTHER MINORITIES AS SECOND-CLASS CITIZENS* 157 (Univ. of Ala. Press 2011) (1959).

89. *Plan to Limit Negro Voters in Mississippi*, *MORNING ADVOC.* (Baton Rouge), Apr. 4, 1960, at 11-A.

90. *See* Act of May 5, 1960, Concurrent Resolution, 1960 Miss. Laws 886, 886. The requirement that voters be “of good moral character” was written into the state constitution two years later. *See* Act of May 23, 1962, 1962 Miss. Laws 1011, 1012.

91. No. 613, 1960 La. Acts 1166 (constitutional amendment).

92. *Id.* at 1167.

93. *Id.*

94. Act of July 7, 1960, No. 306, 1960 La. Acts 634.

95. Act of July 7, 1960, No. 251, 1960 La. Acts 525.



eliminating the eligibility of 6,000 families with 22,500 children—95 percent of whom were African American.”<sup>96</sup>

Florida engaged in a similar program. Citing “the pressing problem of illegitimacy,” Governor LeRoy Collins recommended that welfare be cut to children living in unsuitable homes.<sup>97</sup> A home’s suitability was determined by a set of vague criteria, each one capable of disqualifying the recipient.<sup>98</sup> For example, if children were left alone while their parents engaged in “social activities or undesirable pursuits,” then the parents could lose welfare benefits.<sup>99</sup> Also, if parents engaged in promiscuous conduct “either in or outside the home” or had an illegitimate child after receiving an assistance payment, they could lose support.<sup>100</sup> Of the 14,664 reports on unsuitable homes that were filed because of the 1959 restrictions, 91 percent of these reports were filed against black families, with the end result that 7,000 families and nearly 30,000 children lost welfare funding.<sup>101</sup>

Though draconian, welfare cuts in Florida and Louisiana epitomized a larger shift in southern law away from express references to color and towards more subtle, manufactured notions of racial character, even culture. North Carolina Governor Luther Hodges admitted as much during a televised address on August 8, 1955, when he asserted that African Americans possessed a “new and rapidly developing culture,” while whites retained an “older culture” that was at risk of destruction under integrated conditions.<sup>102</sup> “[U]nless we can, through good will and pride in the integrity of our respective racial cultures,” argued Hodges, “separate schools voluntarily,” then much of the progress made by both cultures would be “undone.”<sup>103</sup> Though Hodges did not define what, precisely, he meant by culture, his words reverberated with claims made by other, more extreme segregationists. To take just a few examples, James Jackson Kilpatrick agreed that integration would lead to “the decline of the only culture we know,”<sup>104</sup> while Judge Thomas Pickens Brady warned that

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96. NEUBECK & CAZENAVE, *supra* note 84, at 71.

97. WALKER, *supra* note 48, at 111–12.

98. Act of May 29, 1959, chap. 59-202, 1959 Fla. Laws 376.

99. *Id.* at 377.

100. *Id.*

101. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 139–40 (2d ed. 1993).

102. Luther H. Hodges, Address By Governor Luther H. Hodges of North Carolina on State-Wide Radio-Television Network (Aug. 8, 1955) (on file with North Carolina State Archives).

103. *Id.*

104. Letter from James J. Kilpatrick to William H. Heath (July 26, 1957) (on file with Special Collections, University of Virginia).

wherever integration was attempted, “the white man, his intellect and his culture have died.”<sup>105</sup> Such recurring allusions to culture help explain the region-wide emphasis on illegitimacy rates, statistical indicators of sexual behavior that segregationists used—even manipulated—to prove that race was not simply a matter of cosmetic difference.<sup>106</sup> Rather, race could be measured, they argued, by looking at collective sexual behavior. What they wanted to assert was in fact customary behavior, or culture, thereby generating a color-neutral, moralist discourse that animated—and was animated by—state law. As the next Part will illustrate, segregationists carried this discourse to the national stage, hoping to build bridges between the South and the rest of the nation.

### III. SOCIOLOGICAL WARFARE

Even as southern states enacted increasingly racially coded moral regulations to preserve Jim Crow, so too did segregationists cobble together a moralist campaign aimed at stirring resentment to integration nationally.<sup>107</sup> Animating this campaign was a conviction that the South’s fate hinged on pitching reasonable arguments to the “unprejudiced” minds of enough voters in the North and West that *Brown* might be “effectively modified or controlled by acts of Congress.”<sup>108</sup> As one of the attorneys for South Carolina who argued against the NAACP in *Brown* put it, “[o]ur only hope at present lies not in the carrying on of the battle in the courts,” but rather, in taking “the battle to the people and using the same psychological and sociological warfare that has been so successfully carried on against us.”<sup>109</sup>

One place where segregationists hoped to take the battle to the people, or at least their representatives, was Congress. There, prominent Senators

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105. BRADY, *supra* note 29, at 7.

106. Connections between race and culture were nothing new, though segregationists seemed to recover discourses prominent at the turn of the twentieth century, while remaining blind to more critical work done by scholars like Franz Boas and Robert Ezra Park in the 1940s and 50s. *See, e.g.*, FRANZ BOAS, *RACE, LANGUAGE AND CULTURE* (1940); A.G. KELLER, *REMINISCENCES (MAINLY PERSONAL) OF WILLIAM GRAHAM SUMNER* (1933); ROBERT EZRA PARK, *RACE AND CULTURE* (1950); Floyd N. House, *Some Methods of Studying Race and Culture*, 15 *SOC. FORCES* 1 (1936); J.R. Kantor, *Anthropology, Race, Psychology, and Culture*, 27 *AM. ANTHROPOLOGIST* 267 (1925); Wilson D. Wallis, *Race and Culture*, 23 *SCI. MONTHLY* 313 (1926).

107. Anders Walker, *Blackboard Jungle: Delinquency, Desegregation, and the Cultural Politics of Brown*, 110 *COLUM. L. REV.* 1911, 1927–36 (2010).

108. Letter from James J. Kilpatrick to Edward E. Lane (Jan. 7, 1960) (on file with Special Collections, University of Virginia).

109. *Rogers Gives Views on Segregation Fight*, *NEWS & COURIER* (Charleston, S.C.), Aug. 23, 1955, at 1-B.

like Mississippi Senator James O. Eastland declared that southerners had “to go into the north, and carry the fight into every section of the United States.”<sup>110</sup> “What divides the two areas of our country,” posited Eastland, was “that in each area the people think that those in the other area do not think as they do, when in reality we all think alike . . . .”<sup>111</sup> To Eastland’s mind, all Americans possessed trepidation about racial integration, and—though few would openly endorse racism—most could be persuaded to curtail the Supreme Court. In fact, Eastland proposed an amendment to the Constitution in 1954 providing that “there shall be preserved to the States full control of health, education, marriage, and good order within a State.”<sup>112</sup>

Though few joined Eastland’s amendment, other prominent southerners echoed his national appeal. To take just one example, Georgia Senator Herman Talmadge took the very same arguments about illegitimacy that had been stalking southern legislatures since 1954 to the nation in 1959. On September 1, 1959, Talmadge declared that the “mounting rate of illegitimacy” in America was approaching a “national disgrace.”<sup>113</sup> Carefully tracking southern efforts to cut welfare benefits to illegitimate children, Talmadge “proposed that the Senate Committee on Finance . . . undertake a thorough study of the relationship between the alarming increase in illegitimacy and Federal policies governing welfare assistance to dependent children.”<sup>114</sup> He then entered statistics into the *Congressional Record*, documenting expenditures on illegitimate children by the federal government nationwide, including breakdowns of those expenditures by race.<sup>115</sup>

Even as Eastland and Talmadge waged moral wars in the Senate, so too did southerners wage “sociological warfare” in the House. To take just one example, Mississippi Representative John Bell Williams mounted a vigorous campaign in 1956 to sway popular opinion against integration by focusing on crime statistics. For example, Williams entered into the *Congressional Record* evidence indicating that African Americans committed five times as many murders as whites in Washington, D.C. and seven times as many rapes.<sup>116</sup> Though such numbers may have been inflated due to demographic shifts like white flight, not to mention

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110. 100 CONG. REC. 11,523 (1954) (statement of Sen. James Eastland).

111. *Id.*

112. *Id.*

113. 105 CONG. REC. 17,475 (1959) (statement of Sen. Herman Talmadge).

114. *Id.*

115. *Id.*

116. 102 CONG. REC. 5,692 (1956) (statement of Rep. John Bell Williams).

reporting bias, Williams glossed over scientific explanations for his supposedly scientific data, preferring instead to make broad claims about black inferiority. For example, he cited Federal Bureau of Prisons data to argue that even though African Americans comprised only 10 percent of the population in the United States in 1950, they committed “more than half the homicides, both murder and manslaughter, in our country” that year.<sup>117</sup> Of course, Williams failed to mention that crimes committed by whites, particularly crimes committed by whites in the South, tended to go unpunished as evidenced by the murder of black teenager Emmett Till in his own state of Mississippi only a year before.<sup>118</sup>

Desperate to shift popular attention away from the murderous tendencies of his own people, Williams organized a study of integrated conditions in Washington, D.C. schools, hoping to generate more statistics on black inferiority. Using his position on a subcommittee of the House Committee on the District of Columbia dedicated to investigating delinquency in D.C. schools, Williams enlisted the support of three white southern congressmen to generate a report that grossly exaggerated problems related to integration.<sup>119</sup> For example, Williams began by claiming that there were “very few unusual disciplinary problems in either” black or white schools prior to integration, only to then conclude that desegregation had resulted in “appalling, demoralizing, intolerable, and disgraceful” conditions.<sup>120</sup> Among these conditions were dubiously documented spikes in “fighting, lying, stealing,” and “vandalism,”<sup>121</sup> as well as factors that appeared to have little to do with whether schools were integrated or segregated, like black illegitimacy. Vaguely citing “sex problems,” the committee asserted that “[o]ne out of every four Negro children born in the District of Columbia is illegitimate” and that “[t]he number of cases of venereal disease among Negroes of school age has been found to be astounding and tragic.”<sup>122</sup> Providing no real data on how such rates had been tabulated or why they were even relevant, Williams moved quickly to the now-standard segregationist argument that integrated schools would quickly lead to interracial sex, a fear that in his words

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117. *Id.*

118. *See, e.g.*, John N. Popham, *Mississippi Jury Acquits 2 Accused in Youth's Killing*, N.Y. TIMES, Sept. 24, 1955, at 1.

119. SUBCOMM. TO INVESTIGATE PUB. SCH. STANDARDS AND CONDITIONS, AND JUVENILE DELINQUENCY IN THE DIST. OF COLUMBIA, H. COMM. ON THE DIST. OF COLUMBIA, 84TH CONG., REP. ON THE INVESTIGATION OF PUBLIC SCHOOL CONDITIONS (Comm. Print 1957).

120. *Id.* at 24.

121. *Id.*

122. *Id.* at 45.

explained “the exodus of the white residents of the District of Columbia.”<sup>123</sup> Hoping that white flight might provide a bridge-issue between whites in the North and South, Williams concluded his report by recommending “that racially separate public schools be reestablished for the education of white and Negro pupils in the District of Columbia, and that such schools be maintained on a completely separate and equal basis.”<sup>124</sup>

However, two members of the subcommittee, DeWitt Hyde and A. L. Miller, refused to sign the final report, pointing to larger problems with the way that Williams had marshaled his data.<sup>125</sup> “The report seems to blame all of the educational deficiencies in our school system entirely on the efforts toward integration,” argued the two dissenters, who refused to “believe that everything that is wrong with the educational system can be blamed on integration.”<sup>126</sup> Further, the objectors found methodological problems with the way that the committee had conducted its hearings, including reliance on “leading questions” and carefully “selected” witnesses who ended up providing testimony that “does not appear to be well-balanced, or objective, since persons with views not in accord with those of the counsel were not given full and fair opportunity to testify.”<sup>127</sup>

Though little more than a smear campaign, Williams’s doctored report indicates the extent to which segregationists like him went to link integration, immorality, and delinquency in the post-*Brown* era. Signs that such a move held out real advantages for the South emerged in other places as well, including the archives of well-respected southern moderates like Estes Kefauver.<sup>128</sup> A Tennessee Senator who claimed to support civil rights, Kefauver nevertheless became deeply interested in the degeneration of children, a subject that he pursued while heading the Senate Subcommittee to Investigate Juvenile Delinquency from 1955 to 1957.<sup>129</sup> During his tenure, Kefauver initiated investigations into comic books, television, motion pictures, and pornography, all with an eye to “the impact of their respective products on juvenile behavior.”<sup>130</sup>

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123. *Id.*

124. *Id.* at 47.

125. *Id.* at 48.

126. *Id.*

127. *Id.*

128. JAMES GILBERT, *A CYCLE OF OUTRAGE: AMERICA’S REACTION TO THE JUVENILE DELINQUENT IN THE 1950S* 153 (1986).

129. *Id.* at 143; see also 102 CONG. REC. 5,029–34 (1956); Jason Barnosky, *The Violent Years: Responses to Juvenile Crime in the 1950s*, 38 POLITY 314, 335 (2006); W.H. Lawrence, *Civil Rights Issue in Rivalry of Stevenson and Kefauver*, N.Y. TIMES, Feb. 6, 1956, at 1.

130. Estes Kefauver, *The Mass Media* (1960) (on file with Modern Political Archive, Baker

Though he never once mentioned race, Kefauver echoed arguments made by segregationists like Williams, Talmadge, and Eastland about the vulnerability of children. In a speech on July 6, 1955, for example, he proclaimed that children are “subject to a wide variety of influences and conditions which tend to either lessen or increase [their] chances of becoming delinquent.”<sup>131</sup> Such influences included poor family background, particularly parents who suffered from “financial lack, health, or emotional handicaps.”<sup>132</sup> Kefauver also emphasized the role that schools played in child development, noting that they were the “only social agency that comes in contact with every child,” and that they remained “second only to the family in being responsible for preparing the child for life.”<sup>133</sup>

Rather than push for the integration of public schools, however, Kefauver focused instead on “exploring ways in which the Federal Government can assist the States to strengthen and improve . . . correctional institutions, juvenile detention centers, and juvenile police bureaus.”<sup>134</sup> Citing problems with funding and staff training, Kefauver articulated a federal role in juvenile justice, one that might be helpful in “fortifying and strengthening . . . delinquency institutions.”<sup>135</sup> This interest tracked the attention of other moderates in the South who viewed juvenile justice as a critical part of the post-*Brown* paradigm, both as a means of assuaging white fears that integration would damage their children, and as a way of dealing with many of the behaviors that segregationists like John Bell Williams had highlighted in Washington, D.C. schools.<sup>136</sup>

Yet, Kefauver never drew a link between delinquency and desegregation. Why? One possible explanation is that he enjoyed black electoral support, and had been aided significantly by black voters in defeating a “Crump machine” candidate in 1948.<sup>137</sup> Another related possibility is that Kefauver harbored aspirations of even higher office.<sup>138</sup>

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Center, University of Tennessee).

131. Estes Kefauver, Statement of Senator Estes Kefauver on S. 728 Before the Senate Labor and Public Welfare Committee’s Subcommittee on Juvenile Delinquency (July 6, 1955) (on file with the Modern Political Archive, Baker Center, University of Tennessee).

132. *Id.*

133. Memorandum, Senate Subcommittee to Investigate Juvenile Delinquency (July 6, 1956) (on file with Modern Political Archive, Baker Center, University of Tennessee).

134. Estes Kefauver, Opening Statement, United States Senate Judiciary Subcommittee to Investigate Juvenile Delinquency (Mar. 4, 1958) (on file with the Modern Political Archive, Baker Center, University of Tennessee).

135. *Id.*

136. Walker, *supra* note 107, at 1936–44.

137. See Strub, *Black and White*, *supra* note 21, at 685, 693.

138. GILBERT, *supra* note 128, at 144. See generally JOSEPH BRUCE GORMAN, KEFAUVER: A

Hoping for the White House, Kefauver may have deliberately avoided open discussions of race to secure not only black votes, but also white votes in the North and West.<sup>139</sup> Continuing along these lines, Kefauver worked carefully—perhaps more carefully than others—to align his policy positions with moral campaigns that mapped, but did not mention, race.

For example, during his time as head of the Subcommittee to Investigate Juvenile Delinquency, Kefauver developed a committed interest in fighting the evils of pornography. The Subcommittee investigated “pornography and the sale of pornographic literature to juvenile delinquents.”<sup>140</sup> The Committee then recommended “to bar the shipment of indecent literature in interstate commerce.”<sup>141</sup> One year later, Kefauver returned to the question of obscenity, this time issuing the report “Obscene and Pornographic Literature and Juvenile Delinquency.”<sup>142</sup> In his conclusions, Kefauver called for “more stringent penalties for violations of laws concerning pornography,” partly because of the “deleterious effect of pornographic literature” on “today’s teen-age population.”<sup>143</sup>

Just as Kefauver raised the question of obscenity in the national arena, so too did Tennessee officials like Memphis film censor Lloyd Binford raise the question of obscenity at the local level—using it to ban interracial films.<sup>144</sup> To take just a few examples, Binford declared *Island in the Sun*, a film featuring interracial romance, obscene in 1957.<sup>145</sup> Similar controversy exploded over *I Spit on Your Grave*, a film about a “light-skinned black man” who exacts revenge for his brother’s lynching by embarking on “multiple affairs with white girls,” and the *L-Shaped Room*, a film about a

POLITICAL BIOGRAPHY (1971).

139. See GILBERT, *supra* note 128, at 144. See generally GORMAN, *supra* note 138.

140. 102 CONG. REC. 5,030 (1956) (statement of Sen. Estes Kefauver).

141. *Id.*

142. SUBCOMM. TO INVESTIGATE JUVENILE DELINQUENCY, S. COMM. ON THE JUDICIARY, 84TH CONG., REP. ON OBSCENE AND PORNOGRAPHIC LITERATURE AND JUVENILE DELINQUENCY (Comm. Print 1956).

143. *Id.* at 66–67.

144. Strub, *Black and White*, *supra* note 22, at 694–6. For more on southern censorship boards and interracial film, see R. Bruce Brasell, “A Dangerous Experiment to Try”: *Film Censorship During the Twentieth Century in Mobile, Alabama*, 15 *FILM HIST.* 81 (2003); Gregory C. Lisby, “Trying to Define What May Be Indefinable”: *The Georgia Literature Commission, 1953–1973*, 84 *GA. HIST. Q.* 72 (2000); Pat Murdock, *The Lone “Lady Censor”: Christine Smith Gilliam and the Demise of Film Censorship in Atlanta*, *ATLANTA HIST.*, Summer 1999, at 68; Brian O’Leary, *Local Government Regulation of the Movies: The Dallas System, 1966–93*, 48 *J. FILM & VIDEO* 46 (1996).

145. Strub, *Black and White*, *supra* note 22, at 697.

“young pregnant white woman” who enjoys “unexpected intimacy” with a “lonely [N]egro musician.”<sup>146</sup>

While Kefauver may have been motivated to control such films, battling pornography provided him with more than simply an excuse for suppressing interracial media; it also provided him with a facially-neutral, politically viable rationale for joining his southern kinsmen in dramatically curtailing the scope and reach of the Supreme Court. This became apparent in 1959, when Kefauver joined Eastland and Talmadge, both avid segregationists, in proposing an amendment to the United States Constitution.<sup>147</sup> Modeled after Eastland’s earlier amendment removing power from the Court over questions of education, order, and health,<sup>148</sup> the new amendment proved more subtle, declaring simply that the rights of states to “decide on the basis of [their] own public policy questions of decency and morality” be not “abridged.”<sup>149</sup>

The impetus for the law, according to Talmadge, was not *Brown v. Board of Education* but *Kingsley International Picture Corporation v. Regents*, which declared states could not ban films deemed “immoral,” such as *Lady Chatterley’s Lover*.<sup>150</sup> To Eastland’s mind, the ruling “struck a mortal blow to the power of a State to maintain within its borders minimum standards of decency and morality in the content of moving pictures offered for exhibition.”<sup>151</sup> Of course, the ruling also raised the larger question of state regulation of morality generally, a field that had become increasingly active since *Brown*. Though Eastland, Talmadge, and Kefauver probably did not fear that *Kingsley* jeopardized the South’s increasingly complex web of moral regulations on marriage, voting, schools, and public benefits, they undoubtedly saw an opportunity to remove such laws from the purview of the Supreme Court, guaranteeing a new era of racially coded Jim Crow.

Further, *Kingsley* allowed all three southerners—two staunch segregationists and one moderate—to recast themselves in the role of

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146. *Id.* at 699.

147. 105 CONG. REC. 12,547 (1959).

148. *See supra* note 112 and accompanying text.

149. *See supra* note 147.

150. Letter from Herman Talmadge to Estes Kefauver (Sept. 8, 1959), in *Control of Obscene Material: Hearings Before Subcomm. on Constitutional Amendments and Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 86th Cong. 57 (1960). *Kingsley International Pictures v. Board of Regents* 360 U.S. 684 (1959). *Lady Chatterley’s Lover* was a rendition of the 1928 novel by D. H. Lawrence that recounted the tale of an English woman committing adultery with a gardener. *See* D.H. LAWRENCE, *LADY CHATTERLEY’S LOVER* (Michael Squires ed., Cambridge Univ. Press 1993) (1928).

151. 105 CONG. REC. 13,964 (1959) (statement of Sen. James Eastland).



fervent champions of decency, a position that segregationists had worked to occupy since *Brown*. For example, Eastland declared *Kingsley* a boon for pornography even though the decision restricted itself to questions of morality. “Something must be done,” proclaimed Eastland, “to protect the children from these purveyors of filth and indecency in films, books, magazines, and all other forms of communication media.”<sup>152</sup> Though *Kingsley* had nothing to do with “purveyors of filth,” Eastland found the ruling a convenient excuse for raising the more salient issue of “the individual State and local community” being able to “set its standards for morality and public decency within the community.”<sup>153</sup>

Talmadge reiterated this point, positing that the amendment removing moral regulations from the Court was necessary to combat other opinions as well. “The Supreme Court is notorious for its ultraliberal rulings,” lamented the Georgia Senator, “[b]ut freedom, under the Court’s interpretation will wreck this Nation more quickly and more completely than Khrushchev and all his henchmen. History proves what happens to a Nation that loses its moral standards.”<sup>154</sup> Moral standards, southern state legislatures agreed, pointed the way to a new era of state-enforced racial inequality in the South. Not only were southern states rapidly exchanging overtly racist laws for covertly racist moral regulations, but staunch segregationists were beginning to intimate that massive resistance itself was dead.

Indeed, just as Talmadge, Eastland, and Kefauver focused their attention on an apparently innocuous amendment concerning morals, so too did segregationist James Jackson Kilpatrick become interested in the question of obscenity. Not only did he begin a book on the pornography trade—*The Smut Peddlers*—but he also volunteered to write a bill on obscenity for a subcommittee of the Virginia State Senate.<sup>155</sup> Why? One possibility, of course, is that he arrived independently at the conclusion that pornography was a growing threat to the welfare of the nation. Yet, Kilpatrick’s private correspondence hinted at two slightly more subtle rationales. First, Kilpatrick was already beginning to doubt the efficacy of massive resistance. In a letter dated March 12, 1959, he confessed that any law designed to thwart *Brown* that explicitly mentioned segregation or race comprised little more than “a sitting duck for the guns of Federal

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152. 105 CONG. REC. 16,973 (1959) (statement of Sen. James Eastland).

153. *Id.*

154. Letter from Herman Talmadge to Estes Kefauver, *supra* note 150.

155. James J. Kilpatrick to Pyke Johnson, Jr. (Feb. 24, 1960) (on file with Special Collections, University of Virginia).

judges.”<sup>156</sup> Further, any “plan” aimed at preserving segregation, reasoned Kilpatrick, “never can succeed at all if it is tied in any way to the integration controversy.”<sup>157</sup> Here, from the pen of interposition’s architect, was a call for subterfuge—just the kind of subterfuge that Eastland’s amendment reserving moral regulations to the states represented. And, here was an argument for making an appeal to the nation that might actually work.

Three years earlier, Kilpatrick had held out a similar hope for interposition, describing it as a viable theory that “offered a constitutional justification for resistance at a high level.”<sup>158</sup> Unfortunately for him, few agreed. Rather than elevate southern discourse, interposition seemed to have corrupted it, giving white extremists more bile to spew at the nation’s highest tribunal. By 1959, that bile had sickened America: Little Rock remained a painful memory, the Supreme Court had reaffirmed its judicial supremacy, and massive resistance had entered a “thermidorean reaction.”<sup>159</sup> For Kilpatrick, who had long realized the South’s desperate need to appeal to majority voters in the North and West, a new strategy was needed, a new slogan that might unite the region with the rest of the country and might turn back the federal tide.<sup>160</sup> Enter pornography. “I have come down pregnant with another book,” wrote Kilpatrick in September 1959, “a serious, and I hope a thoughtful and a profitable book on the obscenity racket.”<sup>161</sup> Though he did not mention segregation or race, familiar themes began to emerge between the new project and the old. As Kilpatrick described it, the “heart and soul” of the pornography trade was “not the grown-up sucker,” but “the curious child, the adolescent of sixteen or seventeen receptive to a little dirty sex.”<sup>162</sup> Kilpatrick noted that the officials questioned by the Committee to Investigate Juvenile

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156. Letter from James J. Kilpatrick to Allen Taylor (Mar. 12, 1959) (on file with Special Collections, University of Virginia).

157. *Id.*

158. James Jackson Kilpatrick to Edward E. Lane (Jan. 7, 1960) (on file with Special Collections, University of Virginia).

159. BARTLEY, *supra* note 7, at 320.

160. Kilpatrick revealed his interest in northern appeals in an August 1957 letter:

We need to win friends and influence people in New England, the upper midwest, the Southwest, and the Pacific Coast States. We need to sell our position to them exactly as if we were selling automobiles, toothpaste or chewing gum, but we have yet to find any method of merchandising that seems to get the story across.

Letter from James J. Kilpatrick to Marie E. Jamison (Aug. 1957) (on file with Special Collections, University of Virginia).

161. Letter from James J. Kilpatrick to Pyke Johnson, Jr. (Sept. 11, 1959) (on file with Special Collections, University of Virginia).

162. KILPATRICK, *supra* note 1, at 5.

Delinquency tended to agree “that lewd photographs and magazines stimulate latent sexual desires among adolescents and tend to trigger serious sex crimes.”<sup>163</sup> Conceding that concrete data proving obscenity caused delinquency was elusive, Kilpatrick nevertheless invoked “common sense,” noting that “[b]etween 1948 and 1957 juvenile court cases increased by 136 per cent while the under-seventeen population [increased] by only 27 per cent.”<sup>164</sup> Then, Kilpatrick referred to the testimony of Dr. George W. Henry, a professor of clinical psychiatry at Cornell, who agreed that children could “be sexually perverted by looking at, by studying, and by dwelling upon photos” that were pornographic.<sup>165</sup>

Kilpatrick’s “common sense” view that obscenity encouraged delinquency coincided with the equally common sense view that integration encouraged delinquency, marking a tendency to view social reform generally through the lens of degeneracy. Precisely because pornography was increasingly considered a national threat to children—as Kefauver claimed—Kilpatrick saw in it bridge possibilities, an opportunity for communicating southern political positions to the nation, much like interposition. After documenting the myriad harms that pornography caused youth, in other words, Kilpatrick concluded that a localized, state-centered approach to the problem of porn made the most sense—a position that coincided nicely with opposition to *Brown*. Invoking Justice Harlan’s opinions in the consolidated cases of *Alberts v. California* and *Roth v. United States*,<sup>166</sup> Kilpatrick noted that “Congress has no substantive power over matters of sexual morality,” a nod to the myriad moral regulations rapidly spreading through the South.<sup>167</sup> The only relevant constitutional provisions, he posited, were congressional powers “to establish post roads, to regulate commerce, and to control goods imported into the country.”<sup>168</sup> To Kilpatrick’s mind, none of these were particularly relevant to obscenity, meaning that “federal authority thus is attenuated, and ‘the dangers of federal censorship in this field are far greater than anything the states may do.’”<sup>169</sup> Instead, he argued, the states should take control. “The fifty states,” argued Kilpatrick, “provide fifty experimental laboratories, in which legislative bodies may experiment in different ways with the

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163. *Id.* at 8.

164. *Id.* at 235.

165. *Id.* at 236.

166. *Roth v. United States*, 354 U.S. 476, 500–03 (1957) (Harlan, J., concurring in *Alberts*); *id.* at 503–08 (Harlan, J., dissenting in *Roth*).

167. KILPATRICK, *supra* note 1, at 290.

168. *Id.*

169. *Id.* (quoting *Roth*, 354 U.S. at 505 (Harlan, J., dissenting in *Roth*)).

treatment of social problems.”<sup>170</sup> Acknowledging that certain states may choose to ban material that had literary merit, Kilpatrick took a remarkably federalist view. “If the State of Georgia sought to ban” a particular work, he surmised, “the literati of Atlanta could pick up a copy in New Orleans or New York, or order it by mail.”<sup>171</sup> Presumably, the same would be true if “the State of Georgia” chose to assign students to schools based on attenuated notions of their moral character. Once reduced to the conscience of the community, segregation might live again.

Yet, Kilpatrick remained cautious. Already aware of how sterling arguments like interposition could be galloped through the mud, he took a conservatively liberal stance on the question of obscenity. To his mind, a second cultural conflict existed in the South, not a struggle between blacks and whites, but a “war” as Kilpatrick described it, “between the Philistines and the literati.”<sup>172</sup> In this war, the Philistines—represented by the likes of James Eastland and Herman Talmadge—consistently risked jeopardizing the South’s politics by making those politics appear so histrionic that voters in the North and West recoiled—just as they had recoiled when extremists besmirched the legal theory of interposition. If the South were to truly wage, and win, a new cultural war, believed Kilpatrick, it would have to adopt a more educated tone and acquire a more discerning taste. The discriminators, literally, had to become more discriminating. “It is this inability to discriminate, on the part of the Philistines,” wrote Kilpatrick, “that has caused me so much trouble.”<sup>173</sup> “The same unreasoning illogic that alphabetizes *Tortilla Flat* and *Turbulent Daughters* side by side in [a National Organization for Decent Literature] list,” he lamented, “sees a work of D. H. Lawrence, a dirty picture from Roy Oakley, and a contraceptive device all brought to bar under the same” obscenity law.<sup>174</sup> Such failures to discriminate, he complained, make “no sense to me.”<sup>175</sup>

To rescue the South’s Philistines from themselves, Kilpatrick advanced a moderate obscenity law for Virginia, meanwhile establishing a fund for cultural uplift in the state. Perhaps ironically, he received a donation for his fund from Harper Lee, one of the South’s most nationally recognized authors.<sup>176</sup> Just as Kilpatrick had feared, a local white school board had

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170. *Id.*

171. *Id.* at 291.

172. Letter from James J. Kilpatrick to Editor, Publishers’ Weekly (Mar. 14, 1960) (on file with Special Collections, University of Virginia).

173. KILPATRICK, *supra* note 1, at 288.

174. *Id.*

175. *Id.*

176. *Harper Lee Twits School Board in Virginia for Ban on Her Novel*, N.Y. TIMES, Jan. 16,

embarrassed itself by banning Lee's novel *To Kill a Mockingbird* for being "immoral,"<sup>177</sup> the same charge leveled at *Lady Chatterley's Lover* in *Kingsley v. Regents*.<sup>178</sup> Outraged, Lee sent Kilpatrick ten dollars to enroll the Hanover County, Virginia, school board "in any first grade of its choice."<sup>179</sup> Rather than an "immoral" celebration of integration, lamented Lee, *To Kill a Mockingbird* represented "a code of honor" that was "the heritage of all Southerners,"<sup>180</sup> an odd formulation given that the book had come to be associated with the black struggle for civil rights, not southern honor or history.<sup>181</sup> Yet, Lee's invocation of southern honor implied that she too was interested in advancing a positive stereotype of the white segregationist, a move exemplified by Lee's lead character Atticus Finch, an endearing lawyer who treated blacks with affection and respect.<sup>182</sup> That Lee enlisted Kilpatrick in a defense of her book underscores the manner in which white cultural elites struggled to reframe Jim Crow in a positive light, countering negative frames of segregationists perpetuated by both white extremists and the Civil Rights Movement.

To illustrate just how intensely movement activists and segregationists engaged one another on cultural terrain, the next Part will recover direct exchanges between prominent segregationists like James Jackson Kilpatrick and black proponents of civil rights like James Baldwin and Martin Luther King, Jr., over the question of stereotyping. Out of this picture emerges a glimpse of the significance that popular culture played in the struggle for civil rights.

#### IV. CULTURAL EXCHANGE

Lee's frustration with Virginia extremists—the very whites who banned her book in Hanover County—belied a larger struggle that the white "literati" would wage in the 1960s to preserve a dignified defense of segregation in the South. The effort to advance a culturally positive frame for Jim Crow suffered setbacks by white extremists and black activists, including black "literati" who openly challenged white claims to cultural

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1966, at 82.

177. *Id.*

178. *See supra* note 150.

179. *Harper Lee Twists School Board in Virginia for Ban on Her Novel, supra* note 176.

180. *Id.*

181. *To Kill a Mockingbird* had sold over three million copies by May 1962. *See* Thomas McDonald, 'Bird' in Hand: Producers Accent Authentic Southern Ways in Adapting Novel to Screen, *N.Y. TIMES*, May 6, 1962, at 149.

182. *See* HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

supremacy. To take just a few examples, in 1963 black author James Baldwin took on Kilpatrick in an anthology commemorating the 100th anniversary of emancipation in America. Baldwin's comments targeted segregationist efforts to advance negative black stereotypes. "White people," charged Baldwin, "will have to ask themselves precisely why they found it necessary to invent [negative racial stereotypes of African Americans]" while "[b]lack people will have to do something very hard, too, which is to allow the white citizen his first awkward steps toward maturity."<sup>183</sup> A clear slap in the face to Kilpatrick and others who claimed that whites were culturally superior, Baldwin's allusion to white immaturity underscored the manner in which black activists sought to invert racial stereotypes—in this case recasting African Americans as superior to whites, a point that Baldwin sharpened by suggesting blacks cure whites of their psychological shortcomings. "We have, indeed," Baldwin continued, subtly alluding to the psychological data in footnote 11 of *Brown*, "functioned in this country in precisely that way for a very long time—we were the first psychiatrists here."<sup>184</sup> Baldwin's reference to blacks as psychiatrists echoed *Brown*'s reliance on psychiatry, even as it underscored a larger point, exemplified in the title of his essay, that southern whites suffered psychological dysfunction, a "White Problem," as he put it, that African Americans needed to help them with.<sup>185</sup> Incensed, Kilpatrick responded to Baldwin's charge, but not before reading Baldwin's *Fire Next Time*, which deliberately challenged the segregationist claim that blacks suffered from lower cultural standards than whites. "White people cannot, in the generality," wrote Baldwin, "be taken as models of how to live. Rather, the white man is himself in sore need of new standards, which will release him from his confusion and place him once again in fruitful communion with the depths of his own being."<sup>186</sup> Indignant, Kilpatrick confessed to being shocked that Baldwin did not want to adopt "the white man's cultural, social, religious, or moral values," and he countered briskly that neither were whites "interested in adopting the Negro's cultural, social, religious, or moral values," values that, in Kilpatrick's prejudiced view, had contributed little to Western Civilization since the days of slavery.<sup>187</sup> Africa's "phallic sculptures,"

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183. James Baldwin, *The White Problem*, in 100 YEARS OF EMANCIPATION 88 (Robert A. Goldwin ed., 1964).

184. *Id.*

185. *Id.*

186. JAMES BALDWIN, *THE FIRE NEXT TIME* 110–11 (Dial Press 1963) (1962).

187. James Jackson Kilpatrick, *View from a Southern Exposure*, in 100 YEARS OF EMANCIPATION 124 (Robert A. Goldwin ed., 1964).

mocked Kilpatrick, “are truly very fine phallic sculptures. Doubtless they are. The mud huts were the strongest mud huts ever contrived. . . . [B]ut if true, what then? Is a mud hut a Monticello, a carved root a bust by Rodin?”<sup>188</sup>

Kilpatrick’s invocation of art and architecture to counter Baldwin underscores the extent to which debates about culture infused the discourse of civil rights in the 1960s. Direct action protest contributed to these debates, often challenging segregationist stereotypes and pressing theorists like Kilpatrick to amend—though not surrender—their cultural positions. For example, during the student sit-ins of 1960, Kilpatrick conceded that well-dressed, disciplined black college students posed a challenge to white stereotypes of black cultural inferiority, even inverting these stereotypes and making whites look backward and uncivilized. In 1960, Kilpatrick wrote:

Many a Virginian must have felt a tinge of wry regret . . . in reading of Saturday’s “sitdowns” by Negro students in Richmond stores. Here were the colored students, in coats, white shirts, ties, and one of them was reading Goethe and one was taking notes from a biology text. And here, on the sidewalk outside, was a gang of white boys come to heckle, a ragtail rabble, slack-jawed, black-jacketed, grinning fit to kill, and some of them, God save the mark, were waving the proud and honored flag of the Southern States in the last war fought by gentlemen. *Eheu!* It gives one pause.<sup>189</sup>

Kilpatrick’s disappointment with the poor behavior of white hecklers—the very philistines that he and Harper Lee loathed—pointed to the manner in which direct action protest inverted racial stereotypes of black cultural inferiority. Black demonstrators deliberately upset such stereotypes, purposely remaining non-violent, intentionally embarrassing their white counterparts, and, as Kilpatrick noted in Richmond, even appropriating elite cultural markers—in this case Goethe—something that the white “rabble” eschewed.

Aware of the manner in which such protest could either challenge or reinforce stereotypes, black activist James Lawson stressed the importance of maintaining a particular cultural image to the success of direct action protest. One of the leaders of the student sit-ins in Nashville, Lawson advised women who wanted to participate in demonstrations to wear

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188. *Id.* at 113.

189. *The Sitdowns*, RICHMOND NEWS LEADER, Feb. 22, 1960, at 8.

stockings and heels, while men should don coats and ties.<sup>190</sup> John Lewis, who also worked with Lawson, routinely handed out rules of engagement to student demonstrators that focused not only on dress, but on manners, including directives that students remain courteous, sit straight while at the counter, and refrain from cursing.<sup>191</sup>

As black demonstrators deliberately enlisted cultural practice, language, dress, and so on, white voices joined Kilpatrick in lamenting the precise manner in which the sit-ins exposed white cultural deficiencies. “[S]outhern white people are human,” exclaimed Georgia Senator Richard Russell.<sup>192</sup> He continued, “They feel that they are being baited like animals . . . . What is more, they feel that they are being baited for political purposes . . . . They are sensitive; this is no time to be trying to provoke a race riot.”<sup>193</sup> Russell’s confession that southern whites were easily baited—“like animals”—hinted at an insecurity that gripped elite southerners, an insecurity that the white South generally could not, in fact, live up to its pretensions of cultural superiority. If black demonstrators continued exposing those pretensions, both Kilpatrick and Russell feared that national attitudes towards the region might shift in favor of civil rights. In reference to the violence that the sit-ins risked provoking from “sensitive” southern whites, Russell claimed to “know who will be blamed for it” and “who will be denounced all over the country.”<sup>194</sup> He concluded, “It will be the white people of the South.”<sup>195</sup>

To bolster white legitimacy, Russell turned to personal morality, underscoring the link between civil rights and sex. “Why do not those newspapers that constantly criticize” the South, argued Russell, “advise our Negro friends to do something to improve themselves,” including “reduce their illegitimacy from 10 times that of the rest of the country to 5 times.”<sup>196</sup> Russell’s charge resonated with arguments made by other segregationists, including Judge Thomas Pickens Brady’s argument that “obscenity and depravity” permeated black culture and justified Jim Crow.<sup>197</sup> Of course, such malevolent portrayals of black life as obscene

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190. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63, at 274 (1988).

191. TOWNSEND DAVIS, WEARY FEET, RESTED SOULS: A GUIDED HISTORY OF THE CIVIL RIGHTS MOVEMENT 356 (1998).

192. 106 CONG. REC. 3,700 (1960) (statement of Sen. Richard Russell).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 3,699 (internal quotation marks omitted).

197. BRADY, *supra* note 29, at 47.



belied segregationists' own efforts to artificially exaggerate the extent of black degeneracy, something that the Mississippi legislature attempted by invalidating common law marriage. Further, segregationist attempts to portray black culture as sexually licentious did little to assuage their own fears that a majority of whites might in fact be more than happy to mix socially and romantically with blacks under integrated conditions.

Such fears became apparent in 1957, when Twentieth Century Fox released *Island in the Sun*, which featured two interracial couples,<sup>198</sup> these two relationships disturbed segregationists in Memphis so much that they declared the film "offensive to moral standards" and censored it, a move replicated in other cities across the South.<sup>199</sup> Of course, such outright declarations of interracial relations as obscene were unconstitutional, even as they underscored the manner in which obscenity itself became part of a larger discourse on race, rights, and sex.

Picking up on the same discourse that had driven states like Mississippi and North Carolina to tinker with illegitimacy rates, for example, Richard Russell argued that Congress "should put a stop to this business of establishing relief programs that encourage illegitimacy,"<sup>200</sup> even as he leveled his guns at civil rights leaders who also happened to be ministers, a clear attempt to counter the "moral" message of Martin Luther King, Jr., Andrew Young, and others. "Why do the Negro preachers not do something," queried Russell, "about unfortunate conditions such as I have mentioned?"<sup>201</sup>

Of course, black preachers involved in the Civil Rights Movement focused on obtaining civil rights, not reducing out-of-wedlock births—an issue that should have had little to do with constitutional rights. Yet, even high-ranking black activists like King recognized the manner in which white segregationists would, and did, use questions of sexual culture to undermine black constitutional positions: "The 'behavior deviants' within the Negro community stem from the economic deprivation, emotional frustration, and social isolation which are the inevitable concomitants of segregation. When the white man argues that segregation should continue because of the Negro's lagging standards, he fails to see that the standards lag because of segregation."<sup>202</sup> Despite King's awareness that differences

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198. ISLAND IN THE SUN (Twentieth Century Fox 1957).

199. See *supra* note 145 and accompanying text.

200. 106 CONG. REC. 3,699 (1960) (statement of Sen. Richard Russell).

201. *Id.*

202. MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY 222–23 (1958).

in standards had little to do with innate racial traits, he conceded that the question of standards was so linked to the question of legal rights in the South that improving black standards—even though they had nothing to do with formal, constitutional claims—could in fact have a constitutional effect:

“By improving our standards here and now we will go a long way toward breaking down the arguments of the segregationist. . . . [W]e must work on two fronts. On the one hand, we must continue to resist the system of segregation which is the basic cause of our lagging standards; on the other hand we must work constructively to improve the standards themselves. There must be a rhythmic alternation between attacking the causes and healing the effects.”<sup>203</sup>

King’s awareness of the standards/rights link derived directly from his experience in Montgomery. In fact, leaders in Montgomery had wrestled with the cultural contingency of rights since at least 1955, when an African American woman named Claudette Colvin refused to give up her seat on a city bus.<sup>204</sup> Interested in launching a test case challenging Montgomery’s segregated transportation system, local civil rights leaders Edgar Daniel Nixon and Jo Ann Robinson considered using Colvin as a plaintiff but ultimately rejected the idea once they discovered that she was pregnant and single.<sup>205</sup> Colvin’s own mother confessed that her daughter had “done took a tumble.”<sup>206</sup> Shortly thereafter, another African American woman—Mary Louise Smith—also refused to give up her seat to a white on a Montgomery bus. Smith’s candidacy failed because of her family background, particularly her father’s alcoholism.<sup>207</sup> As Nixon later put it, if reporters attempted to interview the Smith family, “we wouldn’t have a leg to stand on.”<sup>208</sup>

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203. *Id.* at 223–24.

204. See J. MILLS THORNTON III, *DIVIDING LINES: MUNICIPAL POLITICS AND THE STRUGGLE FOR CIVIL RIGHTS IN MONTGOMERY, BIRMINGHAM, AND SELMA* 54–55 (2002).

205. *Id.*

206. DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER* 74 (2010). J. Mills Thornton places responsibility for Colvin’s failed candidacy on both her parents and Nixon. THORNTON, *supra* note 204, at 54–55. Taylor Branch also describes Nixon’s role in rejecting Colvin due to her pregnancy. BRANCH, *supra* note 190, at 122–23; see also DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 15–16 (1988); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 53 (1984).

207. BRANCH, *supra* note 190, at 127.

208. *Id.*

Cultural considerations pushed movement leaders to advance the case of Rosa Parks, a longtime member of the local NAACP and Claudette Colvin's NAACP Youth Council mentor.<sup>209</sup> Unlike Colvin and Smith, Parks had no illegitimate children and no history of familial alcoholism. While this quality should have been as irrelevant as basic citizenship, it made her better suited, culturally, to bring a constitutional case.<sup>210</sup> According to Jo Ann Robinson, "Mrs. Parks had the caliber of character we needed to get the city to rally behind us."<sup>211</sup>

Just as Rosa Parks satisfied the invisible cultural requirements needed to claim constitutional rights, so too did the college students that participated in the 1960 sit-ins challenge the cultural presumptions bolstering black repression and white supremacy. As black activist James Farmer noted:

Newspaper and television accounts of the sit-ins suggested a picture which reversed the common stereotypes. Inside, at the lunch counters, sat well-dressed, well-mannered Negro college students with their calculus and philosophy books, quietly asking for a cup of coffee; outside, crowds of white boys with duck-tail haircuts and leather jackets grinned and shuffled their feet and tried to start trouble.<sup>212</sup>

That hairstyles, clothing, and other distinctly cultural attributes factored into the significance of civil rights demonstrations reveals the cultural contingency of rights in the 1960s, a subtext rarely acknowledged by constitutional scholars of the period.

Yet, Kilpatrick continued to hammer the question of illegitimacy. "[T]he rate of illegitimacy among American Negroes creeps steadily," he wrote in 1963, "toward the point at which one of every four Negro babies will be born in bastardy."<sup>213</sup> Conceding that "the white man is no paragon of virtue," Kilpatrick maintained that beneath the legalist debate over constitutional rights lay a much larger debate over culture and behavior.<sup>214</sup> "We are talking of manners," he posited, "of civility, of sobriety, of restraints upon carnality."<sup>215</sup>

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209. *Id.*

210. *Id.*

211. GARROW, *supra* note 206, at 16.

212. JAMES FARMER, FREEDOM—WHEN? 67–68 (1965).

213. Kilpatrick, *supra* note 187, at 127.

214. *Id.*

215. *Id.*

Even as he worked to preserve a link between “carnality” and constitutional law, so too did Kilpatrick express further outrage at the movement’s tactics, particularly its deliberate provocation of white violence in places like Greensboro and Birmingham. This became particularly apparent when Kilpatrick read Martin Luther King, Jr.’s memoir about the Birmingham protest, *Why We Can’t Wait*:

[T]he work should be required reading in every police department in the nation. Here Dr. King spells it out, with impersonal detachment, just how these things work: Committees must be organized, and schedules must be arranged of persons to be arrested; the police must be provoked into acts of brutality, calculated to look good on television (he recalls that his demonstration in Birmingham almost failed two years ago, when the police were at first too polite and cheerful).<sup>216</sup>

Though appalled at the manner in which King had successfully manipulated white authorities, Kilpatrick expressed a begrudging admiration for the “reverend doctor.”<sup>217</sup> “One does not have to admire the techniques of Martin Luther King,” he wrote, “to respect his mastery of them.”<sup>218</sup> To his mind, King possessed “a certain genius in timing, showmanship, publicity management, administrative leadership, and the ability to influence the opinions of others.”<sup>219</sup> Of course, Kilpatrick had himself attempted to influence the opinions of others since at least the beginning of his interposition campaign in 1956. Yet, King proved more successful, so successful in fact that the Birmingham demonstrations pushed Kilpatrick to confess that the white governor of the state, rather than a paragon of cultural superiority, was an “idiot.”<sup>220</sup>

Kilpatrick would again concede ground after the movement staged another round of successful demonstrations in Selma, Alabama, during the spring of 1965. After months of buildup, black protesters launched a march across Selma’s Edmund Pettus Bridge only to be physically stopped by Alabama police who, in a well-televised sequence, gassed, clubbed, and horsewhipped them back across the Alabama River.<sup>221</sup> One week later,

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216. *Blunders on the Left*, RICHMOND NEWS LEADER, Mar. 30, 1965, at 8.

217. *Id.*

218. *Id.*

219. *Id.*

220. Letter from James J. Kilpatrick to Robert Goldwin (June 11, 1963) (on file with Special Collections, University of Virginia).

221. GARROW, *supra* note 206, at 397–98.

northern activist Viola Liuzzo was shot by members of the Ku Klux Klan,<sup>222</sup> prompting even Kilpatrick to express profound regret:

Those of us who have lived all our lives in the South, and loved the South abidingly, must feel the stain of Alabama like a wound. . . . The South has many needs, but perhaps the greatest of these is its need to recognize more clearly its membership in the American Union . . . . They [Liuzzo and Reverend James Reeb, also killed by the Klan] had moral rights and constitutional rights . . . . And Governor, it was the first duty of State and local government to make those rights secure.<sup>223</sup>

Chastened by philistines in Alabama, Kilpatrick stood by helplessly as Congress enacted a robust voting rights bill that would ultimately empower the federal government to strike down unreasonable restrictions on voting, including the kinds of restrictions that disenfranchised unwed mothers in Georgia and Louisiana. “[U]nder the Constitution,” complained Kilpatrick, “each State clearly has the power ‘to determine the qualifications of electors,’” a reality that neither Congress nor the President seemed interested in upholding as they “trampled” the nation’s founding document “underfoot.”<sup>224</sup> Yet, Kilpatrick’s whimpers won few listeners. The violence in Selma galvanized national opinion against southern recalcitrance, closing the curtain on constitutionally strained arguments about racial standards, illegitimacy rates, and cultural “shortcomings”—at least for the moment.

#### V. PERFECT AMMUNITION

Though muted by Selma, segregationist discourses on race and culture reemerged later that year, after an unforeseen explosion in California. One week after President Lyndon Johnson signed the Voting Rights Act into law, there was an altercation between an African American male and a Los Angeles police officer in the heavily black L.A. neighborhood of Watts.<sup>225</sup> The officer, while trying to arrest twenty-one year old Marquette Frye for drunk driving, also subdued Frye’s mother, triggering sporadic rock

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222. *Id.* at 413.

223. James J. Kilpatrick, *A Conservative View*, NEWSDAY, Apr. 1, 1965 (on file with Special Collections, University of Virginia).

224. James J. Kilpatrick, *A Conservative View*, NEWSDAY, Mar. 20/21, 1965 (on file with Special Collections, University of Virginia).

225. Peter Bart, *New Negro Riots Erupt on Coast; 3 Reported Shot*, N.Y. TIMES, Aug. 13, 1965, at 1.

throwing and violence.<sup>226</sup> By 10:00 p.m. that night, eighty police officers had been deployed to cordon off a sixteen-block area. Unrest continued through the following day as black youth attacked police and passersby, burning cars and throwing rocks.<sup>227</sup> By nightfall, papers reported crowds of up to 7,000 in the streets, stores looted, and cars burned. Over three hundred police, sheriffs, and highway patrolmen were deployed to quell the disorder as fires erupted and firefighters were shot at, leaving entire city blocks burning out of control.<sup>228</sup> According to one account, “[t]he 150-block section of Los Angeles last night took on the pearance [sic] of a war zone with men crouching in the shadows, streets littered with debris or completely torn up, store windows broken and scorched and a pall of smoke hanging over the area.”<sup>229</sup> Six days, thirty-four deaths, and over 1000 injured after it began, one of the largest riots in American history drew to a close.<sup>230</sup>

Stunned, President Johnson ensured that former Central Intelligence Agency director John McCone would become chairman of the California state inquiry commission charged with investigating the causes of the unrest.<sup>231</sup> Before McCone had time to issue a report, however, critics pounced. On August 14, 1965, three days after the arrest of Marquette Frye and in the middle of the rioting, the *Los Angeles Times* printed a story asserting that the cause of the riots was not police brutality, poor housing, or lack of opportunity but a breakdown in the black family. “The administration,” asserted the article, “is redirecting its main focus on racial problems from the South to large urban areas as the result of an unpublished Labor Department report that blames Negro unrest on the breakdown of the Negro family structure.”<sup>232</sup> The report to which the *Los Angeles Times* referred was an in-house memo drafted by Daniel Patrick Moynihan, then Assistant Secretary of Labor and Director of the Department’s Office of Policy Planning and Research.<sup>233</sup> Apparently unaware of the extensive debate over illegitimacy that had simmered in the

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226. *Id.*

227. *7,000 in New Rioting; Troops Alerted*, L.A. TIMES, Aug. 13, 1965, at 1.

228. *Id.*

229. Peter Bart, *Youths Run Wild: Violence Spreads to City’s White Areas—Shots Exchanged*, N.Y. TIMES, Aug. 14, 1965, at 1.

230. IRVING BERNSTEIN, *GUNS OR BUTTER: THE PRESIDENCY OF LYNDON JOHNSON* 386–87 (1996).

231. *Id.* at 386.

232. Thomas J. Foley, *Racial Unrest Laid to Negro Family Failure*, L.A. TIMES, Aug. 14, 1965, at 1.

233. OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965) [hereinafter *THE MOYNIHAN REPORT*].

South since *Brown*, Moynihan took illegitimacy and divorce rates in the North and recast them not as symptoms of economic inequality—which black sociologist Franklin Frazier claimed they were<sup>234</sup>—but as causes of economic inequality. “As the result of family disorganization,” asserted Moynihan quoting Frazier, “a large proportion of Negro children and youth have not undergone the socialization which only the family can provide. . . . [F]amily disorganization has been partially responsible for a large amount of juvenile delinquency and adult crime among Negroes,” a point that papers like the *Times* would use to suggest a cause of the riots.<sup>235</sup> Further, Moynihan posited that the primary source of familial “disorganization” was not racism but “the failure of the [black] father to play the role in family life required by American society,” and that “the mitigation of this problem must await those changes in the Negro and American society which will enable the Negro father to play the role required of him.”<sup>236</sup>

Moynihan’s report constituted a dramatic counterpoint to the Supreme Court’s ruling in *Brown*, which had argued that segregation damaged black youth, not black fathers. Yet, the *Wall Street Journal* printed an article on August 16, 1965, that declared the Moynihan report to be an explanation for the Watts riot:

Behind the past week’s orgy of Negro rioting . . . lies a sickness that all the new civil rights legislation is powerless to cure in the foreseeable future—the spreading disintegration of Negro family life in the big cities of the North and West. The rioters who by yesterday had brought death to 31 people and injuries to another 676, and who had burned an estimated \$175 million worth of property, including entire blocks, in Los Angeles were not protesting any specific civil rights grievances. They were primarily young hoodlums lashing out against society. . . . A growing army of such youths is being bred in the Negro sections of cities across the country by broken homes, illegitimacy and other social ills that have grown steadily worse in recent decades . . . .<sup>237</sup>

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234. E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (1939).

235. THE MOYNIHAN REPORT, *supra* note 233, at 48 (quoting E. Franklin Frazier, *Problems and Needs of Negro Children and Youth Resulting From Family Disorganization*, *J. NEGRO EDUC.*, Summer 1950, at 276–77).

236. *Id.*

237. *Family Life Breakdown in Negro Slums Sows Seeds of Racial Violence: Husbandless Homes Spawn Young Hoodlums, Impede Reforms*, *Sociologists Say*, *WALL ST. J.*, Aug. 16, 1965, at 1.

The *Journal's* emphasis on broken homes led directly to the citation of black illegitimacy rates:

The breakdown of family life . . . can be glimpsed in nearly any set of Negro social statistics—nationwid . . . In New York City's Harlem, for instance, where Negro rioting flared for a week last year, it's estimated one of every five Negro children born is illegitimate. An indication of the social evils this breeds: Researchers in one Harlem district not long ago found venereal disease running at 2,143 cases per 100,000 people . . . Against this background, the Los Angeles explosion begins to come a bit clearer. Otherwise it might seem inexplicable.<sup>238</sup>

The *Journal's* turn to black illegitimacy rates as a cause of rioting proved a haunting parallel to southern discourses on black moral shortcomings workshopped across the South since the 1950s. Indeed, James Jackson Kilpatrick himself had focused on such rates in the aftermath of Birmingham in 1963.<sup>239</sup> Now he reentered the debate, this time writing for a nationally syndicated column called "A Conservative View":

Say what you will about the South . . . the American Negro has had two generations of reasonable opportunity in the unsegregated North and West. How has he developed the opportunities put before him? In squalor, in apathy, in crime, in cadging off "the welfare," in dropping out of integrated schools, [and] in breeding swarms of children out of wedlock. This is the sorry record. And now, in Los Angeles, we witness barbarian hordes.<sup>240</sup>

Once ashamed of white delinquents acting out at lunch counters, Kilpatrick rejoiced over blacks rioting in Watts. "Outside the South," wrote Kilpatrick, "this autumn also sees a changing mood, far more abrupt, much easier to read. The sacking of Los Angeles marked high water in the long-suffering tolerance of the American people for the criminal excesses of a Negro minority."<sup>241</sup>

Kilpatrick's mention of a changing mood belied a larger discursive convergence, at least within conservative circles, between segregationist

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238. *Id.*

239. Kilpatrick, *supra* note 187, at 127.

240. James J. Kilpatrick, *A Conservative View*, WASH. STAR SYNDICATE, Aug. 19, 1965 (on file with author).

241. James J. Kilpatrick, *A Conservative View*, WASH. STAR SYNDICATE, Sept. 4/5, 1965 (on file with author).



discourses of race and national explanations for riots. On August 18, 1965, for example, conservative columnists Rowland Evans and Robert Novak also cited the Moynihan Report. “Weeks before [the Negro ghetto of Los Angeles erupted in violence,” wrote Evans and Novak, “intense debate over how to handle such racial powder kegs was under way deep inside the Johnson administration.”<sup>242</sup> The “pivot of this debate,” they continued, was the Moynihan Report, “a much-suppressed, much-leaked Labor Department document which strips away usual equivocations and exposes the ugly truth about the big-city Negro’s plight.”<sup>243</sup> Evans and Novak framed the report as something that the Johnson administration was reluctant to endorse openly. “[W]hen Moynihan wanted to release the report,” they asserted, “he was stopped by his boss—Secretary of Labor Willard Wirtz. In private conversation, Wirtz expressed fear that evidence of Negro illegitimacy would be grist for racist propaganda mills.”<sup>244</sup>

The idea that Moynihan’s report might bolster southern critiques of black rights was not lost on the White House. Others within the Johnson administration expressed similar views. Harry McPherson, special assistant and counsel to the President, recounted an argument with Moynihan over possible southern responses. “I was afraid that it was going to be perfect ammunition for the Southerners,” explained McPherson later.<sup>245</sup> McPherson continued, “I could imagine Holmes Alexander or someone like that writing a mocking piece, ‘Aha, I told you so. They’re all a bunch of bastards and immoral people!’”<sup>246</sup>

Despite McPherson’s warnings, Moynihan continued to push his report, and the White House went along. President Johnson himself referenced black illegitimacy rates during a speech drafted by Moynihan and delivered at Howard University on June 4, 1965:<sup>247</sup>

Perhaps most important . . . is the breakdown of the Negro family structure. . . . Only a minority—less than half—of all Negro children reach the age of 18 having lived all their lives with both of their parents. At this moment little less than two-thirds are living with both of their parents. Probably a majority of all Negro children

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242. LEE RAINWATER & WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 375 (1967).

243. *Id.*

244. *Id.* at 376.

245. Transcript, Harry McPherson Oral History Interview IV (Mar. 24, 1969) (on file with Lyndon Baines Johnson Library Oral History Collection).

246. *Id.*

247. RAINWATER & YANCEY, *supra* note 242, at 125.

receive federally aided public assistance sometime during their childhood.<sup>248</sup>

Though President Johnson claimed that “white America” was partly to blame for the disintegration of the black family,<sup>249</sup> some saw a more strategic motive behind his reference to illegitimacy rates. As Lee Rainwater and William Yancey put it, President Johnson’s adoption of Moynihan’s report gave him a way to “leap-frog” the Civil Rights Movement, to take the moral high ground from blacks and return it to whites, providing the administration with a rhetorical tool for countering increasingly radical movement demands.<sup>250</sup>

Whether he was aware of segregationist strategy in the South or not, Moynihan placed the question of black marital customs, and consequently black culture, at the forefront of the national racial debate, revivifying Christian defenses of Jim Crow. Once battered by Selma, southern segregationists rallied, joining Moynihan’s chorus on the floor of the Senate. In the wake of the L.A. riots, South Carolina Senator Strom Thurmond introduced the following letter into the *Congressional Record*:

DEAR CITIZENS: No society or nation is stronger than the homes that make up that nation or society. Until every man and woman is willing to stand before God and his neighbors and say: “We are united ‘til death do us part,” and every parent is willing to say: “You are my child until death do us part,” we as a nation will find our Government corrupt. Democracy, values, sharing, and respect for the rights of human beings must be taught and learned at home.<sup>251</sup>

West Virginia Senator Robert C. Byrd agreed. Lamenting the “5-day orgy of rioting, murder, racial battling, setting of fires, looting, and wanton destruction of property” in Los Angeles,<sup>252</sup> Byrd stood before Congress and called for family planning:

[F]amily planning is imperative, and civil rights organizations should make intensive efforts to promote such. The high birth rate among low-income Negro families simply cannot be overlooked.

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248. President Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), in RAINWATER & YANCEY, *supra* note 242, at 130.

249. *Id.*

250. RAINWATER & YANCEY, *supra* note 242, at 14, 274, 284, 291–93.

251. Letter from Lillie Schuster (Aug. 8, 1965), in 89 CONG. REC. A4720 (appendix Aug. 24, 1965) (extension of remarks of Sen. Strom Thurmond).

252. 111 CONG. REC. 21,372 (1965) (statement of Sen. Robert C. Byrd).

. . . Additionally, the problem of illegitimacy must be dealt with. In New York City's Harlem, where Negro rioting flared last year, one out of every five Negro children is illegitimate.<sup>253</sup>

Though Senator Byrd's tendency to link illegitimacy to riots was not particularly surprising for a southerner, more surprising was Moynihan's agreement, months after his report was completed:

On September 18, three weeks after Senator Byrd's statement before the Senate,

Moynihan wrote:

From the wild Irish slums of the 19th-century European seaboard, to the riot-torn suburbs of Los Angeles, there is one unmistakable lesson in American history: a community that allows a large number of young men to grow up in broken families, dominated by women . . . that community asks for and gets chaos. Crime, violence, unrest, disorder—most particularly the furious, unrestrained lashing out at the whole social structure—that is not only to be expected; it is very near to inevitable. And it is richly deserved.<sup>254</sup>

No longer ignorant of southern claims, Moynihan joined them, marking a rare North/South, bipartisan convergence on the question of race and culture in the 1960s, a convergence that liberals would fight, desperately, to unravel in the courts.

Even as officials within the Johnson administration, like Moynihan, joined segregationists in targeting illegitimacy as an explanation for urban unrest, more sympathetic voices responded by arguing that illegitimate children should be protected from the "disabilities and moral prejudices" facing them.<sup>255</sup> One such liberal was Harry Krause, an associate professor of law at the University of Illinois, who proposed a Uniform Act on Legitimacy to counter state discrepancies—like those that had emerged in the South in the 1950s.<sup>256</sup> In 1966, Krause joined Jack Greenberg of the NAACP Legal Defense Fund in a challenge to an illegitimacy rule in Louisiana. The case dealt with a claim by five illegitimate children demanding compensation for the wrongful death of their unwed mother.<sup>257</sup>

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253. *Id.* at 21,374.

254. Daniel Patrick Moynihan, *A Family Policy for the Nation*, AM., Sept. 18, 1965, at 280, 283.

255. Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 858–59 (1966).

256. *Id.*

257. *Levy v. Louisiana*, 391 U.S. 68 (1968).

In their brief, NAACP attorneys Greenberg and Leroy Clark posited that “classification by the criterion of illegitimacy, which appears to be racially neutral on its face,” was in fact “covert *racial discrimination*.”<sup>258</sup> Recognizing that whites possessed ways to hide their illegitimate births, Greenberg and Clark confirmed that “a very high percentage of white illegitimate children are adopted, thereby achieving status under the Wrongful Death Act with regard to their adoptive parents, whereas nearly no Negro children find adoptive parents.”<sup>259</sup> Consequently, “95.8 percent of all persons affected by discrimination against illegitimates under the statute are Negroes.”<sup>260</sup> To make matters worse, both Greenberg and Clark recognized that southern states like Louisiana and Mississippi had resorted to punitive welfare regulations in the aftermath of *Brown*, including the criminalization of “conceiving and giving birth to two or more illegitimate children,” an offense that could garner as much as a \$1000 fine or a year in jail.<sup>261</sup>

The Supreme Court, led by Justice William Douglas, sided with the NAACP.<sup>262</sup> To deny illegitimate children the same benefits that went to children with married parents, held the Court, violated equal protection.<sup>263</sup> This holding, which boldly carved out new law, indicated that the Court was beginning to see illegitimacy in the same way that Greenberg did, as the next phase in the struggle for civil rights.<sup>264</sup> Greenberg made this explicit in his brief, which posited that “the psychological effect of the stigma of bastardy upon its victim seems entirely comparable to the damaging psychological effects upon the victims of racial discrimination,” an argument that had formed the basis of the Court’s equal protection claim in *Brown*.<sup>265</sup> Here, southern recalcitrance backfired, pushing the Supreme Court to create “new doctrine,” particularly in the realm of equal protection.<sup>266</sup>

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258. Motion for Leave to File Brief Amicus Curiae and Accompanying Brief at 2, *Levy v. Louisiana*, 391 U.S. 68 (1968).

259. Brief Amicus Curiae for the NAACP Legal Defense and Educational Fund at 2–3, *Levy v. Louisiana*, 391 U.S. 68 (1968).

260. *Id.* at 6.

261. *Id.* at 12 n.8.

262. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 448 (2000).

263. *Levy v. Louisiana*, 391 U.S. 68, 71–72 (1968); *see also* *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

264. Brief Amicus Curiae for the NAACP Legal Defense and Educational Fund, *supra* note 259, at 9.

265. *Id.*; *see* POWE, *supra* note 262, at 449.

266. POWE, *supra* note 262, at 449.

The Court took equal protection even farther in an Alabama case that derived from southern turns to moral regulation. In *King v. Smith*, the Court struck down “man-in-the-house” rules, measures denying welfare benefits to children who lived in the same household as a man not their father.<sup>267</sup> At the time, “[s]tate welfare policies had to be approved by what was then called the Department of Health, Education, and Welfare,” an agency that traditionally approved man-in-the-house rules because they precluded welfare fraud (if a man was in the house, reasoned the government, then he could support the family).<sup>268</sup> Though eight of nine Justices argued that the “applicable statute” prevented denials of funds, Justice Douglas rounded out the unanimous vote against the rules, pronouncing them a violation of equal protection.<sup>269</sup>

One year later, Justice Thurgood Marshall dealt forthrightly with the question of law’s role in regulating morality in *Stanley v. Georgia*, a southern case involving the seizure of pornography in a Georgia man’s home, resulting in an arrest for obscenity possession.<sup>270</sup> Though the Court had confronted a similar fact pattern eight years earlier in *Mapp v. Ohio*, it had avoided the obscenity issue, ruling instead against the police search as a violation of the Fourth Amendment.<sup>271</sup> In *Stanley*, Justice Marshall took the question of pornography head-on, holding that “the mere private possession of obscene matter cannot constitutionally be made a crime.”<sup>272</sup> Though obscenity had clearly been divorced from First Amendment protections in earlier rulings,<sup>273</sup> Justice Marshall imposed a tenuous distinction, noting that “[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness,” therefore protecting the right to possess any material, no matter how prurient, in “the privacy of his own home.”<sup>274</sup>

Though Justice Marshall did not mention race, he had long chafed at the South’s effort to use “morality arguments” against black rights, particularly its claims “that Negroes have higher ratios of illegitimacy, immorality and venereal disease.”<sup>275</sup> Now, he struck directly at the ability

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267. *King v. Smith*, 392 U.S. 309, 333 (1968).

268. POWE, *supra* note 262, at 450.

269. *King*, 392 U.S. at 334–36 (Douglas, J., concurring).

270. *Stanley v. Georgia*, 394 U.S. 557, 558–59 (1969).

271. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

272. *Stanley*, 394 U.S. at 559.

273. See POWE, *supra* note 262, at 350–51 (2000).

274. *Stanley*, 394 U.S. at 564–65.

275. Samuel L. Adams, *Masonic Chiefs, Atlantans Hear Marshall Hit Integration Foes*, ATLANTA DAILY WORLD, May 4, 1955, at 1.

of southern states to regulate morals, engaging segregationists on the same cultural terrain that they had used, through constitutional amendment and otherwise, to build national support for curtailing federal judicial power. Further, *Stanley* involved the pornography collection of a southern white plaintiff—a subtle jab at segregationist pretensions of cultural superiority mobilized since *Brown*.

Outraged, moralist voices lobbied President Richard Nixon to investigate the matter, prompting him to assign a commission to study the problem of obscenity. In 1970 the Commission on Obscenity and Pornography concluded that the Court's three-part test for obscenity—whether material “appeals to the ‘prurient’ interest of the average person, is ‘patently offensive’ in light of ‘community standards,’ and lacks ‘redeeming social value’”—did not “provide meaningful guidance for law enforcement officials, juries or courts.”<sup>276</sup> Consequently, “distinctions . . . between prohibited and permissible materials” had become hopelessly confused, leading to “interference with the communication of constitutionally protected materials.”<sup>277</sup>

With the commission's report not quite the repudiation of *Stanley* that conservatives had hoped, Nixon achieved more success by replacing liberal justices on the Court. In 1969, he replaced Earl Warren with Warren Burger, and in 1972, he successfully appointed Lewis F. Powell, Jr., and William Rehnquist, both conservatives with questionable commitments to civil rights. With Justices Powell and Rehnquist on board, the Court took a quick right turn, particularly on questions of obscenity. For example, in *Miller v. California*, the new Court ruled that the regulation of obscene materials should indeed revert to the states, just as segregationists had long argued.<sup>278</sup> “We emphasize,” opined the Court, “that it is not our function to propose regulatory schemes for the States.”<sup>279</sup> Rather, “community standards” should determine whether literature, and for that matter speech, was obscene, independent of “national” norms.<sup>280</sup>

While *Miller* did not overturn *King*, it coincided with a second ruling that dramatically changed the way the Court perceived race, shifting its emphasis away from compensation for past harm and towards a new celebration of racial/cultural difference. In *Regents v. Bakke*, the Court vindicated a white plaintiff who complained that the University of

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276. THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 53 (1970).

277. *Id.*

278. *Miller v. California*, 413 U.S. 15 (1973).

279. *Id.* at 25.

280. *Id.* at 32.

California at Davis had rejected his application to medical school in lieu of less qualified black applicants who were perceived to be “disadvantaged.”<sup>281</sup> Noting that “[t]he concept of ‘discrimination’ . . . is susceptible of varying interpretations,” Justice Powell—a native of Richmond, Virginia—made the remarkable claim that it was impossible to determine whether blacks had suffered any more “societal injury” or “societal discrimination” than whites.<sup>282</sup> Indeed, whites themselves constituted a conglomeration of “various minority groups,” argued Justice Powell, including “Celtic Irishmen,” “Austrian resident aliens,” and “white Anglo-Saxon Protestants,” many of whom “can lay claim to a history of prior discrimination at the hands of the State.”<sup>283</sup>

At first glance absurd, Justice Powell’s re-characterization of whites as an assemblage of suffering minorities actually echoed claims that white southerners—of whom Justice Powell was one—had long made.<sup>284</sup> Indeed, white suffering became, as we have seen, the crux of segregationist arguments about integration and culture.<sup>285</sup> In a manner that dovetailed nicely with these arguments, Justice Powell brokered a compromise that effectively shut the door on making “societal discrimination” a constitutional priority, turning instead to the cultural frame of diversity as a preferred category of constitutional analysis.<sup>286</sup> Here, Justice Powell scored points with liberals even as he revived longstanding segregationist claims that blacks and whites were fundamentally, culturally different.<sup>287</sup> Not only did blacks possess different “ideas,” posited Justice Powell, but they also possessed different “mores,”<sup>288</sup> a clear allusion to the types of cultural arguments that James Jackson Kilpatrick and other segregationists had made since the 1950s. Though Justice Powell had disagreed with Kilpatrick’s endorsement of interposition in 1956,<sup>289</sup> he canonized the discourse of race and culture in 1978, a move that was not lost on veterans of civil rights like Justice

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281. *Regents v. Bakke*, 438 U.S. 265 (1978).

282. *Id.* at 284, 297, 310.

283. *Id.* at 292, 295–96.

284. See Anders Walker, *Diversity’s Strange Career: Recovering the Racial Pluralism of Lewis F. Powell, Jr.*, 50 SANTA CLARA L. REV. 647 (2010).

285. See *supra* Part I.

286. *Bakke*, 438 U.S. at 294, 310.

287. For begrudging liberal acceptance of *Bakke*, see JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 467 (1994).

288. *Bakke*, 438 U.S. at 313.

289. Lewis F. Powell, “Interposition”—A Twentieth Century Revival of “Nullification” 2 (Mar. 29, 1956) (unpublished manuscript) (on file with author).

Marshall. “[I]t is more than a little ironic,” argued Justice Marshall in his dissenting opinion in *Bakke*, “that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible.”<sup>290</sup> Equating Justice Powell’s opinion in *Bakke* to *Plessy v. Ferguson*, Justice Marshall lamented, “I fear that we have come full circle. After the Civil War . . . [t]his Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. . . . Now, we have this Court again stepping in, this time to stop affirmative-action programs . . . .”<sup>291</sup>

#### CONCLUSION

Massive resistance comprised only one aspect of the South’s struggle against civil rights in the 1950s and 60s. More insidious was a campaign rooted in notions of sexual morality and culture, a struggle that invoked seemingly unrelated discursive constructs of family, marriage, illegitimacy, and even pornography. State regulations of such constructs followed, as public officials struggled to perpetuate Jim Crow in facially neutral ways while working to build a constitutional coalition with moral conservatives in the North and West. Cognizant of such discursive moves, civil rights activists responded, deliberately engaging segregationists on explicitly cultural terrain. As a result, the activists forced concessions from architects of interposition like James Jackson Kilpatrick—who abandoned massive resistance in favor of tacit endorsements of black rights.

Yet, even as segregationists jettisoned defiance, so too did they intensify discursive invocations of culture to steal the movement’s moral high ground. Hence, by 1960, Kilpatrick had embarked on a crusade against pornography that, by 1965, evolved into a full-scale assault on the black family—an assault joined by conservatives across the country in the aftermath of the Watts riots. By recovering such discursive moves, we catch a glimpse of previously unrecognized “processes of constitutional decision-making,” particularly efforts to restrain the Court by building popular conservative coalitions. Meanwhile, we gain a stark look at the fundamental ways in which constitutional rights are themselves culturally contingent, dependent on variables that have little to do with legal precedent, litigation strategies, or courts.

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290. *Bakke*, 438 U.S. at 400 (Marshall, J., dissenting).

291. *Id.* at 402.