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A Horrible Fascination: Segregation, Obscenity, & the Cultural Contingency of Rights

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“A HORRIBLE FASCINATION”:
SEGREGATION, OBSCENITY, AND THE CULTURAL CONTINGENCY OF RIGHTS

ANDERS WALKER ♦

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*. Itself 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 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, reframing the manner in which we understand *Brown*, its progeny, and current constitutional debates over the relationship between rights and race.

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“A HORRIBLE FASCINATION”:
SEX, SEGREGATION, AND THE LOST POLITICS OF OBSCENITY

ANDERS WALKER ♦

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.¹ While Kilpatrick was himself a married father of three with a respectable address on Hanover Avenue in Richmond, Billy was “a twenty-three-year-old bakery salesman, a high-school graduate, interested in dirty pictures, dirty movies, [and] sexy correspondence.”² Within weeks, Billy’s inquiries led to a flood of obscene material, including an offer “to buy action films from Copenhagen.”³ 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.”⁴

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*

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

² JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 11 (1960).

³ JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 4 (1960); Kilpatrick mentions his three sons in a letter to Pyke Johnson, Jr. See James Jackson Kilpatrick to Pyke Johnson, Jr. January 20, 1958, Folder: Smut Peddlers, Box 68, Accession No. 6626-b, James Jackson Kilpatrick Papers, Special Collections, University of Virginia, Charlottesville, Virginia.

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

Education.⁵ Since 1955 – a year after the Supreme Court’s landmark decision – Kilpatrick had used his newspaper, the *Richmond News-Leader*, platform-fashion to criticize the ruling.⁶ 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.”⁷ The doctrine of interposition held that states could reject federal authority whenever they believed “that authority violated the Constitution,” a notion rooted in Madisonian opposition to the Alien and Sedition Acts of 1798.⁸ 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.⁹

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 like *Kingsley v. Regents* and *Roth v. United States*?¹⁰ 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 penned by Kilpatrick on January 7, 1960 provides a clue. “All this is now futile,” he began, writing to Virginia state representative Edward Lane.¹¹ Though “the interposition movement of four years ago had great political value ... [y]ou know what happened since then as well as I ... [t]he 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.”¹² Rather than continue massive resistance, argued Kilpatrick, the South needed to change tactics, to “do what the repeal forces did in the early 1920’s” to end Prohibition,

⁵ Garret Epps, *The Littlest Rebel: James J. Kilpatrick and the Second Civil War*, 10 CONST. COMMENT. 19 (1993); JAMES JACKSON KILPATRICK, *THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA* (1957); JAMES JACKSON KILPATRICK, *THE SOUTHERN CASE FOR SCHOOL SEGREGATION* (1962).

⁶ RICHMOND NEWS LEADER, INTERPOSITION: EDITORIALS AND EDITORIAL PAGE PRESENTATIONS (1956); NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S* 129 (1997).

⁷ DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* 168 (2004); NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S* 129 (1997).

⁸ DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* 168 (2004).

⁹ NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S* 129, 131 (1997). See also, MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

¹⁰ *Kingsley Books v. Brown*, 354 U.S. 436 (1957); *Roth v. United States*, 354 U.S. 476 (1957).

¹¹ James Jackson Kilpatrick to Edward E. Lane, Jan. 7, 1960, Folder: L 1960, Box 31, Acc. No. 6626-b, James Jackson Kilpatrick Papers, Special Collections, University of Virginia, Charlottesville, Virginia.

¹²Id. .

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.”¹³ This called not for “foolish and useless laws,” concluded Kilpatrick, but “propaganda, publicity, and education.”¹⁴

It was a new turn, and one that helped explain Kilpatrick’s sudden interest in obscenity – a topic that he declared held a “horrible fascination” for him.¹⁵ As this article will demonstrate, Kilpatrick wove threads of interposition into *The Smut Peddlers*, using the battle against pornography to build a new coalition, one determined to prevent the Supreme Court from wresting further power from the states, this time under the rubric of upholding morality – itself a front for undermining civil rights. Rather than a 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 like 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 who, of course, segregationists then painted as illegitimate, immoral, and inept. If successful, Kilpatrick hoped to undermine the persuasive power of black leaders like King, meanwhile winning national support for the struggle against *Brown*. However, accomplishing such a task involved a delicate cultural politics. On the one hand, white officials aimed to delegitimize civil rights by increasing moral regulations of extra-marital sex, common law marriage, and illegitimacy – essentially reframing black culture as pathological – meanwhile recasting 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 will recover 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 will show how said response bled onto legal

¹³ Id.

¹⁴ Id.

¹⁵ JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 289 (1960).

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 both to bridge southern interests with voters in the North and West, even positing 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, such readings only scratch the surface of segregationist strategy in the 1950s and 60s.¹⁶ 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, 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.¹⁷ Rather than invoke prophetic religion, segregationist 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.¹⁸ Even scholars who take segregationist religion seriously have missed this point, arguing instead that southern whites became preoccupied with “proclaiming the end of time and the irrelevance of life in the flesh.”¹⁹

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, laying the foundations for a discourse that would come to win popular support through the end of the Twentieth Century.²⁰

¹⁶ See e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 385-442 (2004).

¹⁷ DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW 5 (2004).

¹⁸ Lord Devlin, *Law, Democracy, and Morality*, 110 U. PA. L. REV. 635, 636 (1962).

¹⁹ Jane Dailey, *Sex, Segregation, and the Sacred after Brown*, 91 JOURNAL OF AMERICAN HISTORY 119, 121 (2004).

²⁰ Whitney Strub, *Perversion for Profit: Citizens for Decent Literature and the Arousal of the Antiporn Public in the 1960s* 15 JOURNAL OF THE HISTORY OF SEXUALITY 258, 260, 291 (2006) (noting that “[p]ornography remained central to the New Right’s moral outrage” into the 1980s); Whitney Strub, *Black and White and Banned All Over: Race, Censorship, and Obscenity in Postwar Memphis* 40 JOURNAL OF SOCIAL HISTORY 703 (2007) (showing how segregationists in Memphis turned to “moralistic fervor” in the struggle against civil rights). See also CHRIS HEDGES, AMERICAN FASCISTS: THE

Indeed, the significance of segregationist turns to personal morality lay precisely in 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.²¹

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, a phenomenon exemplified in the current disconnect between prosecutions of minors for “sexting”; contrasted with the constitutional protection of adult-makers of “crush” videos involving the torture of animals.²² 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 Levison, Jack Balkin, Akhil Amar, and Reva Siegel call the “processes of Constitutional decision-making.”²³ Interested in the role that “other political institutions” besides the Court play in Constitutional interpretation, Brest and company 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.²⁴ Missing, however, is any discussion of what, precisely, those legal means were, how they aimed to curry popular opinion against the Court, and how they carried the constitutional struggle for 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 mid-Century.²⁵ The end of segregation, this article will demonstrate, created fears across the South not simply of racial

CHRISTIAN RIGHT AND THE WAR ON AMERICA (New York: Simon & Schuster, 2006); JOHN C. GREEN, ET AL., THE CHRISTIAN RIGHT IN AMERICAN POLITICS: MARCHING TO THE MILLENNIUM (Washington, D.C., Georgetown University Press, 2003); Marshall Frady, *Billy Graham: A Parable of American Righteousness* (1979, New York: Simon & Schuster, 2006); RONALD J. SIDER & DIANE KNIPPERS, TOWARD AN EVANGELICAL PUBLIC POLICY: POLITICAL STRATEGIES FOR THE HEALTH OF A NATION (Grand Rapids: Baker Books, 2005).

²¹ *Id.*

²² *Rethinking Sex Offender Laws for Youths Showing Off Online*, N.Y. TIMES, March 21, 2010, A1; *Justices Overturn Anti-animal Cruelty Law*, WASHINGTON POST, April 21, 2010, A3; *Crush Animal Cruelty; The Next Step is Up to Congress*, WASHINGTON POST, April 25, 2010, A21.

²³ PAUL BREST, ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (5th ed., 2006).

²⁴ PAUL BREST, ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 904 (5th ed., 2006).

²⁵ 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, THE PRISON NOTEBOOKS (1929).

integration, but 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 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, a staunch segregationist who traveled from his home in Brookhaven, Mississippi to nearby Greenwood to deliver a talk in late May 1954.²⁶ Later distributed by segregationists across the South, Brady's talk posited that desegregation would quickly lead to interracial sex.²⁷ "Constantly," argued Brady, "the [N]egro will be endeavoring to usurp every right and privilege which will lead to intermarriage."²⁸ 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.²⁹

²⁶ NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S*, 85 (1997).

²⁷ For the influence of Brady's speech on massive resistance, see NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S* 85 (1999).

²⁸ THOMAS PICKENS BRADY, *BLACK MONDAY* (Greenwood: Association of Citizens' Councils (1954).

²⁹ PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 19, 225-26 (2009) (discussing the history of miscegenation law generally, and arguments that integration would lead to miscegenation in Mississippi specifically). See also, Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890-1934* 20 *LAW & HISTORY REV.* 225 (2002); Martha Hodes, *The Sexualization of American Politics: White Women and Black Men in the South after the Civil War* 3 *JOURNAL OF THE HISTORY OF SEXUALITY* 402 (1993); MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-*

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 race prejudice.³⁰ "[Y]ou cannot place little white and [N]egro children together in classrooms and not have integration," asserted Brady, "[t]hey will grow up together and the sensitivity of the white children will be dulled."³¹ 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 Monthly* in 1956, South Carolina journalist Herbert Ravenal Sass declared that "the elementary public school" had to remain segregated "at all costs" because white youth possessed "unprejudiced" minds.³² "[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."³³

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 O. Eastland only weeks after *Brown* was handed down.³⁴ "[T]ensions and frictions generally found in an interracial school," continued 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."³⁵ South Carolina journalist William D. Workman echoed Eastland's concerns in a book defending Jim

CENTURY SOUTH (1997); JOEL WILLIAMSON, *NEW PEOPLE: MISCEENATION AND MULATTOES IN THE UNITED STATES* (1993); *See also* KEVIN MUMFORD, *INTERZONES: BLACK/WHITE SEX DISTRICTS IN CHICAGO AND NEW YORK IN THE EARLY TWENTIETH CENTURY* (1997); Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock's Central High*, 62 *ARKANSAS HISTORICAL QUARTERLY* 42 (2003).

³⁰ 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, leading to an entire discourse on the proper training, or education, of white youth, discourses that prefigured white concerns in the American South during the 1950s. Ann Laura Stoler, *Sexual Affronts and Racial Frontiers*, in *TENSIONS OF EMPIRE: COLONIAL CULTURES IN A BOURGEOIS WORLD* 215 (Frederick Cooper and Ann Laura Stoler, eds, 1997); ANN LAURA STOLER, *THE EDUCATION OF DESIRE: FOUCAULT'S HISTORY OF SEXUALITY AND THE COLONIAL ORDER OF THINGS* 105 (1995).

³¹ *Id.* at 65.

³² Herbert Ravenal Sass, *Mixed Schools and Mixed Blood*, *ATLANTIC MONTHLY*, Nov. 1956, 18, 19.

³³ Herbert Ravenal Sass, *Mixed Schools and Mixed Blood*, *ATLANTIC MONTHLY*, Nov. 1956, 18.

³⁴ James O. Eastland, *Congressional Record – Senate*, July 23, 1954, 11523.

³⁵ *Id.*

Crow. “[T]he integrationists, who cry for racial admixture in the cause of bolstering the personality development of a Negro minority,” complained Workman, “do not hesitate to compel the mingling of a white minority with a black majority without any consideration of the inevitable psychological impact upon the personalities of the white children. Indeed, there has been monumental indifference on the part of the race-mixers concerning the likelihood of adverse psychological effects upon white children.”³⁶

Exacerbating southern interest in “psychological effects” was *Brown’s* own reasoning which cited 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.³⁷ 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.”³⁸ 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 this did not include supporting “sociological pronouncements of a Supreme Court” that replaced law with arbitrary “judicial dictatorship.”³⁹

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, prompting him to launch a legal campaign of “interposition” from his desk

³⁶ WILLIAM D. WORKMAN, *THE CASE FOR THE SOUTH* (1960), 241.

³⁷ Even northern sources commented on the Court’s reliance on social psychology. “Relying more on the social scientists than on legal precedents – a procedure often in controversy in the past,” noted *The New York Times*, “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,” continued the *Times*, “it sustained the argument of experts in education, sociology, psychology, psychiatry and anthropology.” James Reston, *A Sociological Decision: Court Founded Its Segregation Ruling on Hearts and Minds Rather Than Laws*, N. Y. TIMES, May 18, 1954, p. 14-L. See generally, DARRYL MICHAEL SCOTT, *CONTEMPT & PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880-1996* (1997).

³⁸ 53 NAACP Heads Reds, Says Cook: Georgia Attorney General Talks at N.O. Rally, TIMES-PICAYUNE (New Orleans), March 21, 1956, p. 3.

³⁹ *Centralization Hit by SC Solons: Lawmakers Issue Warnings In Both Senate, House, THE STATE* (Columbia, SC), March 2, 1956, p. 1. Even moderate Florida protested. According to the Florida legislature, the Supreme Court had “cited as authority for the assumed and asserted facts the unsworn writings of men, one of whom was the hireling of an active participant in the litigation. Others were affiliated with organizations declared by the attorney general of the United States to be subversive, and one of whom, in the same writing which the court cited as authority for its decision stated that the Constitution of the United States is ‘impractical and unsuited to modern conditions.’” THE LAWS OF FLORIDA, 1956.

in Richmond.⁴⁰ 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. 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. Yet, Kilpatrick viewed it – at the time – to be a genteel means of refuting *Brown*.⁴¹ 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. “[T]he fate of the schools,” argued Kilpatrick in 1957, for example, “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,” he continued, “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.”⁴² 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.⁴³ Also indicative of federal creep were *Garner v. Teamsters Union*, dismissing state remedies for labor disputes, and *Pennsylvania v. Nelson*, overturning state convictions of suspected communists.⁴⁴ Such rulings, argued Kilpatrick represented a frightening

⁴⁰ NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S* 126-149 (1999).

⁴¹ JAMES JACKSON KILPATRICK, *THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA* 77, 86-98, 178-79, 186-99 (1957). “The Supreme Court can be resisted in a dozen lawful ways,” wrote Kilpatrick in 1956, “[i]ts 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.” James Jackson Kilpatrick, *Fringes of the Storm*, RICHMOND NEWS-LEADER, Sept. 5, 1956, 10.

⁴² JAMES JACKSON KILPATRICK, *THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA* 286-87 (1957).

⁴³ JAMES JACKSON KILPATRICK, *THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA* 287 (1957), citing *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950).

⁴⁴ JAMES JACKSON KILPATRICK, *THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA* 2 (1957); citing *Garner, et al, trading as Central Transfer Co. vs. the Teamsters Union*, 346 U.S. 485; *Pennsylvania v. Nelson*, 24 L.W. 4178 (1956). That *Brown* might be successfully opposed was perhaps not as farfetched as it seemed. After all, Robert Dahl’s seminal article, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker” (1957). Dahl argues 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

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.

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*.⁴⁵ Yet, interposition was not the only strategy pursued by southern states.⁴⁶ Across the South, moderates proclaimed that *Brown* could be circumvented through other, more subtle means.⁴⁷ 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.⁴⁸ 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.⁴⁹

What kind of means? Coleman developed a model for circumventing *Brown* that states across the South emulated, one that focused on removing all mention of race from southern state law, meanwhile using coded signifiers to assign students to schools.⁵⁰ Called "pupil placement," Coleman developed this plan while listening to oral arguments in *Brown*, months before the case was decided.⁵¹ The strategy hinged on using social science evidence, particularly illegitimacy rates, to assign students to schools based on "public health," and "morals."⁵² As the next section will show, such "pupil placement plans" spread across the South, sparking a wave of related, moral regulations aimed at preserving Jim Crow.⁵³

should not be expected to "long hold to norms of Right and Justice substantially at odds with the rest of the political elite" (285, 291).

⁴⁵ BARTLEY, *RISE OF MASSIVE RESISTANCE*, 126.

⁴⁶ 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).

⁴⁷ ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* 88-89 (2009).

⁴⁸ ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* 88-89 (2009).

⁴⁹ WALKER, *GHOST*, 12.

⁵⁰ Coleman's strategy came to be known as "pupil placement" a method by which students were assigned to schools based not on race but "sociological or psychological factors," including moral character, intelligence, family background, and so on. WALKER, *GHOST*, 119-120.

⁵¹ WALKER, *GHOST*, 39-40. Coleman had personally prosecuted the case of Willie McGee, an African American who garnered the legal aid of New York City attorney Bella Abzug, instructing Coleman on the manner in which northern attention could lead to rights reform as early as the 1940s. ALEX HEARD, *THE EYES OF WILLIE MCGEE: A TRAGEDY OF RACE, SEX, AND SECRETS IN THE JIM CROW SOUTH* 313 (2010).

⁵² WALKER, *GHOST*, 40.

⁵³ WALKER, *GHOST*, 40.

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 abolished common law marriage, hoping to boost black illegitimacy rates and "aid segregation by permitting the state to segregate on a basis of 'unfavorable moral background' instead of race."⁵⁴ 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.⁵⁵ Of course, in citing such rates segregationists did not bother to mention whether they may have been artificially suppressed in white communities through either abortions or adoptions, a recurring practice according to the Virginia League of Local Welfare Executives, who argued that adoptions were facilitated by whites-only maternity homes and abortions handled "by the girls themselves or their families with no call on the taxpayers."⁵⁶ The "10 per cent" of pregnancies that befell women on welfare, consequently, were "the ones that produce the cries of alarm," and those tended – due to Jim Crow's devastating impact on education, economic opportunity, and political power – to be black.⁵⁷

Yet, segregationists turned a blind eye to adoptions and abortions in white communities, preferring instead to argue that "[southern whites] are the only people in America who can testify to ... the low moral level of the Colored in marriage relationships."⁵⁸ 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."⁵⁹ A Mississippi source agreed, holding that "[n]ot more than 20 per cent of the Negroes are married ... if you will pick out ten Negro families and check the records, you will find that not over two of them are actually legitimately married."⁶⁰

⁵⁴ *Common Law Marriage Ban Sent to Coleman*, MORNING ADVOCATE (Baton Rouge), April 1, 1956, 1.

⁵⁵ *Legislators in Mississippi End Session*, MORNING ADVOCATE (Baton Rouge), April 1, 1956, 10-D.

⁵⁶ WALKER, GHOST, 80-81. According to Virginia welfare official E.P. Boyden, about 12 percent of all pregnancies in the South ended in abortion, but were never discovered. See Celestine Sibley, *Sex Hoopla, Not Funds, Is Illegitimacy Cause*, ATLANTA CONSTITUTION, Feb. 15, 1960, 16.

⁵⁷ Celestine Sibley, *Sex Hoopla, Not Funds, Is Illegitimacy Cause*, ATLANTA CONSTITUTION, Feb. 15, 1960, 16.

⁵⁸ LOUIS E. DAILEY, *THE SIN OR EVILS OF INTEGRATION* 39 (1962).

⁵⁹ *Integration and Moral Standards*, CONGRESSIONAL RECORD – APPENDIX July, 181958, A6455.

⁶⁰ J.A. Thigpen, *Thigpen Report Shows Less Than A Fifth of Negro Parents Are Wed*, DELTA DEMOCRAT-TIMES (Greenville, Miss.), Nov. 17, 1955, at 13.

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,” including not only its ban on common law marriage but also a requirement that all marriage licenses provide information on the applicants, including their race, number of past marriages, and manner of termination of past marriages.⁶¹ Further, the bill required that all data be sent to the Bureau of Vital Statistics of the State Board of Health, a measure that insured the new data would be tabulated.⁶² 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 A.M. and 12 P.M.⁶³ As an accommodation to working people, the act declared that the clerk of court could also grant licenses at his personal residence, no doubt a provision that catered to whites – who were undoubtedly more comfortable approaching white homes after hours than African Americans.⁶⁴ One year later, Georgia further complicated the process of requiring a marriage license by declaring that the dissolution of previous marriages would no longer be presumed when an individual applied for a marriage license.⁶⁵ Instead, the applicant carried the burden of proving that any prior marriages had been legitimately dissolved via divorce.⁶⁶ For those who did happen to be in a common law marriage, such a measure made the prospect of remarrying significantly harder, if not impossible.⁶⁷

In 1957, North Carolina required that all newborns be registered within five days of birth with the Central Office of Vital Statistics and that a birth certificate be obtained for each child.⁶⁸ Further, information regarding the marital status of parents was to be included on each birth certificate, meanwhile each certificate was then to be sent to the Central Office of Vital Statistics, presumably for tabulation purposes.⁶⁹ The significance of birth certificates 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 authorities such child’s birth certificate.”⁷⁰ Louisiana passed a similar rule, holding that “all children,

⁶¹ Act of April 5, 1956, 1956 Miss. Laws at 289.

⁶² Act of March 22, 1956, ch. 302, 1956 Miss. Laws 399.

⁶³ Act of Feb. 14, 1956, No. 37, 1956 Ga. Laws 43, 44.

⁶⁴ Act of Feb. 14, 1956, No. 37, 1956 Ga. Laws 43, 44.

⁶⁵ Act of Feb. 22, 1957, no. 85, 1957 Ga. Laws 83, 84.

⁶⁶ Act of Feb. 22, 1957, no. 85, 1957 Ga. Laws 83, 84.

⁶⁷ Act of Feb. 22, 1957, no. 85, 1957 Ga. Laws 83, 84.

⁶⁸ 1957 N.C. Sess. Laws at 1478.

⁶⁹ 1957 N.C. Sess. Laws at 1479.

⁷⁰ Act of March 3, 1959, no. 139 Ark. Acts 382.

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.”⁷¹ Meanwhile, Louisiana passed a law that required individuals applying for a marriage license to present certified copies of their original birth certificates – along with medical documents dated within ten days of the license application asserting that neither applicant was a carrier of venereal disease.⁷²

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.⁷³ D.A.’s would also receive lists of Aid to Dependent Children (ADC) recipients and be required to investigate them for similar violations.⁷⁴ If the prosecutors happened to find that unwed parents were misusing funds, they could charge them with a misdemeanor.⁷⁵

Immediately, cries emerged from North Carolina’s white community, particularly that portion of the community which dealt with white adoptions.⁷⁶ On May 12, 1959, for example, Galt Braxton, a member of the Board of Trustees of the Children’s Home Society of Greensboro, wrote to the chair of the House Health Committee complaining that the bill made for bad policy.⁷⁷ In particular, he complained of the requirement that prosecutors be supplied with the names and addresses of illegitimate children and their unwed mothers. “Such a law,” argued Braxton would “brand” every “innocent child born in North Carolina out of wedlock as illegitimate.”⁷⁸ 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.”⁷⁹ Not only that, but the bill “would brand every young woman in the State who unfortunately becomes an unwed

⁷¹ Act of July 8, 1954, no. 573, 1954 La. Acts 1061.

⁷² Act of July 1, 1958, no. 160, 1958 La. Acts 609, 609-10. Evidence that this requirement 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).

⁷³ *Davis-Jolly Morals Bill is Discarded*, NEWS & OBSERVER (Raleigh), April 22, 1959, 1.

⁷⁴ *Davis-Jolly Morals Bill is Discarded*, NEWS & OBSERVER (Raleigh), April 22, 1959, 1.

⁷⁵ *Sterilized Illegitimacy Bill Okayed* NEWS & OBSERVER (Raleigh), May 30, 1959, 3.

⁷⁶ *Davis-Jolly Substitute is Opposed*, NEWS & OBSERVER (Raleigh), May 7, 1959, 10.

⁷⁷ Galt Braxton to Carl Venters, 12 May 1959. Box 358, Illegitimate Children Folder, Governor Luther Hodges’s Papers, North Carolina State Archives, Raleigh.

⁷⁸ Galt Braxton to Carl Venters, 12 May 1959. Box 358, Illegitimate Children Folder, Governor Luther Hodges’s Papers, North Carolina State Archives, Raleigh.

⁷⁹ Galt Braxton to Carl Venters, 12 May 1959. Box 358, Illegitimate Children Folder, Governor Luther Hodges’s Papers, North Carolina State Archives, Raleigh.

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.”⁸⁰

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.⁸¹ Further, Braxton’s concern that whites be “redeemed” from their pre-marital 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.⁸² 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.⁸³ 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 disqualified.⁸⁴ Florida writer Stetson Kennedy commented on these disqualifications, noting that arbitrary determinations of moral character were often involved.⁸⁵ “The purge procedure as evolved by Georgia is simplicity itself,” argued Kennedy “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 appear, your name is stricken; if you do appear, it is usually stricken just the same.”⁸⁶ 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, a measure adopted by the Senate on April 28, 1960, and by the House a few days later.⁸⁷

Meanwhile, the Louisiana legislature submitted two constitutional amendments to a statewide referendum limiting voting rights to those who could establish good moral character.⁸⁸ 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

⁸⁰ Galt Braxton to Carl Venters, 12 May 1959. Box 358, Illegitimate Children Folder, Governor Luther Hodges’s Papers, North Carolina State Archives, Raleigh.

⁸¹ WALKER, GHOST, 80; KENNETH J. NEUBECK & NOEL A. CAZENAVE, WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA’S POOR 71 (2001).

⁸² Voter Registration Act, No. 321, 1958 Ga. Laws 269, 278.

⁸³ Voter Registration Act, No. 321, 1958 Ga. Laws 269, 278.

⁸⁴ *Georgians Stick with State Law on Negro Voting*, MORNING ADVOCATE (Baton Rouge) Mar. 1, 1960, 4A

⁸⁵ STETSON KENNEDY, JIM CROW GUIDE TO THE U.S.A. 157 (1959).

⁸⁶ STETSON KENNEDY, JIM CROW GUIDE TO THE U.S.A. 157 (1959)

⁸⁷ *Plan to Limit Negro Voters in Mississippi*, MORNING ADVOCATE (Baton Rouge), April 4, 1960, at 11-A; Act of May 23, 1962, 1962 Miss. Laws at 1012.

⁸⁸ Act No. 613, 1960 La. Acts 24, 25 (Constitutional Amendment).

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.”⁸⁹ 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.⁹⁰

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.”⁹¹ 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.”⁹² Almost immediately, the new measures “removed over a quarter of Louisiana’s ADC recipients from the state’s welfare rolls by eliminating the eligibility of 6,000 families with 22,500 children – 95 percent of whom were African American.”⁹³

Florida engaged in a similar pogrom. Citing “the pressing problem of illegitimacy,” Florida Governor LeRoy Collins recommended that welfare be cut to children living in unsuitable homes.⁹⁴ A home’s suitability was determined by a set of vague criteria, each one capable of disqualifying the recipient.⁹⁵ For example, if children were left alone while their parents engaged in “social activities or undesirable pursuits,” they could lose welfare benefits.⁹⁶ 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.⁹⁷ Of a total of 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.⁹⁸

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

⁸⁹ Act No. 613, 1960 La. Acts 24, 25 (Constitutional Amendment).

⁹⁰ Act No. 613, 1960 La. Acts 24, 25 (Constitutional Amendment).

⁹¹ Act of July 7, 1960, Act No. 306, 1960 La. Acts 634, 634.

⁹² Act of July 7, 1960, Act No. 251, 1960 La. Acts 525, 527.

⁹³ KENNETH J. NEUBECK & NOEL A. CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA’S POOR* 71 (2001).

⁹⁴ WALKER, *GHOST*, 112.

⁹⁵ House Bill No. 312, Chap. 59-202, 1959 Laws of Florida, May 29, 1959.

⁹⁶ House Bill No. 312, Chap. 59-202, 1959 Laws of Florida, May 29, 1959.

⁹⁷ House Bill No. 312, Chap. 59-202, 1959 Laws of Florida, May 29, 1959.

⁹⁸ FRANCIS FOX PIVEN AND RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE*, 2d ed., 139-40 (1993).

African Americans possessed “a new and rapidly developing culture,” while whites retained an “older culture,” that threatened to be destroyed under integrated conditions.⁹⁹ “[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.”¹⁰⁰ 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,” while Judge Thomas Pickens Brady warned that wherever integration was attempted, “the white man, his intellect, and his culture have died.”¹⁰¹ 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.¹⁰² 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 both animated – and was animated by – state law. As the next section will illustrate, segregationists carried this discourse to the national stage, hoping to build bridges between the South and 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

⁹⁹ Luther Hodges, “Address by Governor Luther H. Hodges of North Carolina on State-wide Radio-Television Network,” August 8, 1955, Box 39, Folder: Segregation Advisory Committee on Integration,” Luther Hodges Papers, North Carolina State Archives, Raleigh, North Carolina.

¹⁰⁰ Luther Hodges, “Address by Governor Luther H. Hodges of North Carolina on State-wide Radio-Television Network,” August 8, 1955, Box 39, Folder: Segregation Advisory Committee on Integration,” Luther Hodges Papers, North Carolina State Archives, Raleigh, North Carolina.

¹⁰¹ James Jackson Kilpatrick to Luther Hodges, May 28, 1956, Folder: “G,” Box 12, Acc. No. 6626-b, James Jackson Kilpatrick Papers, Special Collections, University of Virginia, Charlottesville, Virginia; THOMAS PICKENS BRADY, BLACK MONDAY 7 (1954).

¹⁰² Connections between race and culture were nothing new, though segregationists seemed to recover discourses prominent at the turn of the twentieth century, meanwhile remaining blind to more critical work done by scholars like Franz Boas and Robert Ezra Park in the 1940s and 50s. *See, e.g.* ROBERT EZRA PARK, RACE AND CULTURE (1950); FRANZ BOAS, RACE, LANGUAGE, CULTURE (1940); Floyd N. House, *Some Methods for Studying Race and Culture* 15 SOCIAL FORCES 1 (1936); Wilson D. Wallis, *Race and Culture* 23 SCIENTIFIC MONTHLY 313 (1926); J.R. Kantor, *Anthropology, Race, Psychology, and Culture* 27 AMERICAN ANTHROPOLOGIST 267 (1925); Albert Galloway Keller, REMINISCENCES OF WILLIAM GRAHAM SUMNER (1933).

nationally.¹⁰³ 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."¹⁰⁴ As one of the South Carolina attorneys who argued against the NAACP in *Brown* put it in 1955, "[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."¹⁰⁵

One place where segregationists hoped to take the battle to the people, or at least their representatives, was Congress. There, prominent Senators 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."¹⁰⁶ "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."¹⁰⁷ 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."¹⁰⁸

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."¹⁰⁹ 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."¹¹⁰ He then entered reams of statistics into the *Congressional Record*, documenting expenditures on illegitimate

¹⁰³ Anders Walker, *Blackboard Jungle: Delinquency, Desegregation, and the Cultural Politics of Brown* 110 COLUM. L. REV. 1927-1936 (2010).

¹⁰⁴ James Jackson Kilpatrick to Edward E. Lane, Jan. 7, 1960, Folder: L 1960, Box 31, Acc. No. 6626-b, James Jackson Kilpatrick Papers, Special Collections, University of Virginia, Charlottesville, Virginia.

¹⁰⁵ Statement by S. Emory Rogers, reprinted in CHARLESTON NEWS & COURIER, August 23, 1955.

¹⁰⁶ James O. Eastland, CONGRESSIONAL RECORD – Senate, July 23, 1954, 11523.

¹⁰⁷ James O. Eastland, CONGRESSIONAL RECORD – Senate, July 23, 1954, 11523.

¹⁰⁸ James O. Eastland, CONGRESSIONAL RECORD – Senate, July 23, 1954, 11523.

¹⁰⁹ Herman Talmadge, CONGRESSIONAL RECORD – Senate Sept. 1, 1959, 17475.

¹¹⁰ Herman Talmadge, CONGRESSIONAL RECORD – Senate Sept. 1, 1959, 17475.

children by the federal government nationwide, including breakdowns of those expenditures by race.¹¹¹

Even as Talmadge and Eastland 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.¹¹² In January of that year, Williams entered into the *Congressional Record* evidence indicating that African Americans committed five times as many murders as whites in Washington DC and seven times as many rapes.¹¹³ Though such numbers may have been inflated due to demographic shifts like white flight, not to mention 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.”¹¹⁴ 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, in 1955.¹¹⁵

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 house subcommittee dedicated to investigating delinquency in DC schools, Williams enlisted the support of three white southern congressmen to generate a report that grossly exaggerated problems related to integration.¹¹⁶ 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.¹¹⁷ Among these

¹¹¹ Herman Talmadge, CONGRESSIONAL RECORD – Senate Sept. 1, 1959, 17475.

¹¹² *Congressional Record*, January 19, 1956, A568.

¹¹³ “The Sordid Picture of Integration in the Nation’s Capital, Part I, *Congressional Record*, January 19, 1956, A568.

¹¹⁴ *Id.*

¹¹⁵ *Mississippi Jury Acquits 2 Accused in Youth’s Killing: Mississippi Jury Frees 2 in Killing*, N.Y. TIMES, Sept. 24, 1955, 1.

¹¹⁶ “Investigation of Public School Conditions,” Report of the Subcommittee to Investigate Public School Standards and Conditions and Juvenile Delinquency in the District of Columbia of the Committee on the District of Columbia, House of Representatives, 84th Congress, Second Session, (Washington: United States Government Printing Office, 1957), 45. Call number: H1388.

¹¹⁷ “Investigation of Public School Conditions,” Report of the Subcommittee to Investigate Public School Standards and Conditions and Juvenile Delinquency in the District of Columbia of the Committee on the District of Columbia, House of

conditions were dubiously documented spikes in “fighting, lying, stealing,” and “vandalism,” as well as factors that appeared to have little to do with whether schools were integrated or segregated, like black illegitimacy.¹¹⁸ 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 the number of cases of venereal disease among Negroes of school age has been found to be astounding and tragic.”¹¹⁹ 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 explained “the exodus of the white residents of the District of Columbia.”¹²⁰ 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.”¹²¹

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.¹²² “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.”¹²³ 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.”¹²⁴

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.¹²⁵ A Tennessee Senator who claimed to support civil rights, Kefauver nevertheless became deeply interested in the

Representatives, 84th Congress, Second Session, (Washington: United States Government Printing Office, 1957), 45. Call number: H1388 at 24.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 45.

¹²¹ *Id.* at 47.

¹²² *Id.* at 48.

¹²³ *Id.* at 48.

¹²⁴ *Id.*

¹²⁵ JAMES GILBERT, *A CYCLE OF OUTRAGE: AMERICA’S REACTION TO THE JUVENILE DELINQUENT IN THE 1950S* 153 (1986).

degeneration of children, a subject that he pursued while heading the Senate Subcommittee on Juvenile Delinquency from 1955 to 1957.¹²⁶ 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.”¹²⁷

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.”¹²⁸ Such influences included poor family background, particularly parents who suffered from “financial lack, health, or emotional handicaps.”¹²⁹ 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 remained “second only to the family in being responsible for preparing the child for life.”¹³⁰

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.”¹³¹ Citing problems with funding and staff training, Kefauver

¹²⁶ *Civil Rights Issue in Rivalry of Stevenson and Kefauver*, N.Y. TIMES, Feb. 6, 1956, 1; JAMES GILBERT, A CYCLE OF OUTRAGE: AMERICA’S REACTION TO THE JUVENILE DELINQUENT IN THE 1950S 143 (1986); *Study of Juvenile Delinquency in the United States*, 102 CONGRESSIONAL RECORD, No. 48, March 19, 1956, Series I: Subject Matter Files, Box 171, Folder: Juvenile Delinquency 2, General Correspondence, Estes Kefauver Papers, Modern Political Archive, Baker Center, University of Tennessee, Knoxville, Tennessee.

Jason Barnosky, *The Violent Years: Responses to Juvenile Delinquency in the 1950s* 38 POLITY 335 (2006).

¹²⁷ Estes Kefauver, *The Mass Media* (1960) Series I: Subject Matter Files, Box 171, Folder: Juvenile Delinquency, General Correspondence, Estes Kefauver Papers, Modern Political Archive, Baker Center, University of Tennessee, Knoxville, Tennessee; *Study of Juvenile Delinquency in the United States*, 102 CONGRESSIONAL RECORD, No. 48, March 19, 1956.

¹²⁸ Estes Kefauver, Statement of Senator Estes Kefauver on S. 728 before the Senate Labor and Public Welfare Committee’s Subcommittee on Juvenile Delinquency, Ser. V: Political Files, Box 916, Folder: Juvenile Delinquency, Estes Kefauver Papers, Modern Political Archive, Baker Center, University of Tennessee, Knoxville, Tennessee 3.

¹²⁹ Estes Kefauver, Statement of Senator Estes Kefauver on S. 728 before the Senate Labor and Public Welfare Committee’s Subcommittee on Juvenile Delinquency, Ser. V: Political Files, Box 916, Folder: Juvenile Delinquency, Estes Kefauver Papers, Modern Political Archive, Baker Center, University of Tennessee, Knoxville, Tennessee 3.

¹³⁰ Memorandum, Senate Subcommittee to Investigate Juvenile Delinquency, July 6, 1959, Series V: Political Files, Box 916, Folder: 6 Juvenile Delinquency, Estes Kefauver Papers, Modern Political Archive, University of Tennessee, Knoxville, Tennessee.

¹³¹ Estes Kefauver, Opening Statement, United States Senate Judiciary Subcommittee to Investigate Juvenile Delinquency, March 4, 1958, Series I: Subject Matter File, Box 171,

articulated a federal role in juvenile justice, one that might be helpful in “fortifying and strengthening” delinquency “institutions.”¹³² 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 DC schools.¹³³

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 1948.¹³⁴ Another related possibility is that Kefauver, like Texas Senator Lyndon Johnson, harbored aspirations of even higher office.¹³⁵ Hoping for the White House, Kefauver may have deliberately avoided open discussions of race to secure not only black votes, but white votes in the North and West.¹³⁶ 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 on Juvenile Delinquency, Kefauver developed a committed interest in fighting the evils of pornography. In 1955, Kefauver’s Committee made “an investigation of pornography and the sale of pornographic literature to juvenile delinquents.”¹³⁷ The Committee then recommended that “the shipment of indecent literature in interstate commerce be banned.”¹³⁸ One year later, Kefauver returned to the question of obscenity, this time issuing a report entitled “Obscene and Pornographic Literature and Juvenile

Folder 3: General Correspondence, Estes Kefauver Papers, Modern Political Archive, Baker Center, University of Tennessee, Knoxville, Tennessee.

¹³² Estes Kefauver, Opening Statement, United States Senate Judiciary Subcommittee to Investigate Juvenile Delinquency, March 4, 1958, Series I: Subject Matter File, Box 171, Folder 3: General Correspondence, Estes Kefauver Papers, Modern Political Archive, Baker Center, University of Tennessee, Knoxville, Tennessee.

¹³³ Anders Walker, *Blackboard Jungle: Delinquency, Desegregation, and the Cultural Politics of Brown* 110 COLUM. L. REV. 1936-1944 (2010).

¹³⁴ Whitney Strub, *Black and White and Banned All Over: Race, Censorship, and Obscenity in Postwar Memphis* 40 JOURNAL OF SOCIAL HISTORY 685, 693 (2007).

¹³⁵ JAMES GILBERT, A CYCLE OF OUTRAGE: AMERICA’S REACTION TO THE JUVENILE DELINQUENT IN THE 1950S 144 (1986); *See generally*, JOSEPH BRUCE GORMAN, KEFAUVER: A POLITICAL BIOGRAPHY (1971).

¹³⁶ JAMES GILBERT, A CYCLE OF OUTRAGE: AMERICA’S REACTION TO THE JUVENILE DELINQUENT IN THE 1950S 144 (1986); *See generally*, JOSEPH BRUCE GORMAN, KEFAUVER: A POLITICAL BIOGRAPHY (1971).

¹³⁷ Estes Kefauver, *Study of Juvenile Delinquency in the United States*, CONGRESSIONAL RECORD, March 19, 1956, Vol. 102, no. 48.

¹³⁸ Estes Kefauver, *Study of Juvenile Delinquency in the United States*, CONGRESSIONAL RECORD, March 19, 1956, Vol. 102, no. 48.

Delinquency.”¹³⁹ In his conclusions, Kefauver called for “more stringent penalties for violations of laws concerning pornography,” partly because “the adolescent age group was the most susceptible to sexual deviations.”¹⁴⁰

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.¹⁴¹ To take just a few examples, Binford declared *Island in the Sun*, a film starring Harry Belafonte and featuring an interracial romance, obscene in 1957.¹⁴² 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*, about a “young pregnant white woman” who enjoys “unexpected intimacy” with a “lonely [N]egro musician.”¹⁴³

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 James O. Eastland and Herman Talmadge, both avid segregationists, in proposing an amendment to the United States Constitution.¹⁴⁴ Modeled after Eastland’s earlier amendment removing power from the Court over questions of education, order, and health, the new amendment proved more subtle, declaring

¹³⁹ Memorandum, Senate Subcommittee to Investigate Juvenile Delinquency, July 6, 1959, Series V: Political Files, Box 916, Folder: 6 Juvenile Delinquency, Estes Kefauver Papers, Modern Political Archive, University of Tennessee, Knoxville, Tennessee.

¹⁴⁰ Memorandum, Senate Subcommittee to Investigate Juvenile Delinquency, July 6, 1959, Series V: Political Files, Box 916, Folder: 6 Juvenile Delinquency, Estes Kefauver Papers, Modern Political Archive, University of Tennessee, Knoxville, Tennessee.

¹⁴¹ Whitney Strub, *Black and White and Banned All Over: Race, Censorship, and Obscenity in Postwar Memphis* 40 JOURNAL OF SOCIAL HISTORY 695 (2007). For more on southern censorship boards and interracial film, see Brian O’Leary, *Local Government Regulation of the Movies: The Dallas System, 1966-93* 48 JOURNAL OF FILM AND VIDEO 46-57 (1996); Pat Murdock, *The Lone “Lady Censor”: Christine Smith Gilliam and the Demise of Film Censorship in Atlanta*, 43 ATLANTA HISTORY 68-92 (1999); Gregory Lisby, “Trying to Define What may be Indefinable”: *The Georgia Literature Commission, 1953-1973* 84 GEORGIA HISTORICAL QUARTERLY 72-97 (2000); R. Bruce Brassell, “A Dangerous Experiment to Try”: *Film Censorship During the Twentieth Century in Mobile, Alabama* 15 FILM HISTORY 81-102 (2003).

¹⁴² Whitney Strub, *Black and White and Banned All Over: Race, Censorship, and Obscenity in Postwar Memphis* 40 JOURNAL OF SOCIAL HISTORY 697 (2007).

¹⁴³ Whitney Strub, *Black and White and Banned All Over: Race, Censorship, and Obscenity in Postwar Memphis* 40 JOURNAL OF SOCIAL HISTORY 699 (2007).

¹⁴⁴ Proposed Amendment to Constitution Relating to Enactment of Decency and Morality Laws by State, 1959 CONGRESSIONAL RECORD – SENATE 12547.

simply that the rights of states to “decide on the basis of [their] own public policy questions of decency and morality” be not “abridged.”¹⁴⁵

The impetus for the law, according to Talmadge, was not *Brown v. Board of Education* but another Supreme Court decision, *Kingsley International Picture Corp. v. Regents* that declared states could not ban films deemed “immoral.”¹⁴⁶ The immoral movie in question was *Lady Chatterly’s Lover*, a rendition of the novel by D.H. Lawrence that recounted the tale of an English woman committing adultery with a gardener.¹⁴⁷ 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.”¹⁴⁸ 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 re-cast themselves in the role of fervent champions of decency, a position that segregationists had worked to occupy since *Brown* was decided in 1954. For example, Eastland appropriated the same rhetoric that Kefauver did, declaring *Kingsley* a boon for pornography even though the decision restricted itself to questions of morality.¹⁴⁹ “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.”¹⁵⁰ 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.”¹⁵¹

Talmadge reiterated this point, positing that the amendment removing moral regulations from the Court was necessary to combat other

¹⁴⁵ Proposed Amendment to Constitution Relating to Enactment of Decency and Morality Laws by State, 1959 CONGRESSIONAL RECORD – SENATE 12547.

¹⁴⁶ *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684 (1959).

¹⁴⁷ *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684 (1959).

¹⁴⁸ *Standards of Decency and Morality in Motion Pictures*, CONGRESSIONAL RECORD – Senate, July 22, 1959, 13964.

¹⁴⁹ James O. Eastland, *Obscenity in the Mails*, CONGRESSIONAL RECORD – Senate, August 18, 1959, 16972-73.

¹⁵⁰ James O. Eastland, *Obscenity in the Mails*, CONGRESSIONAL RECORD – Senate, August 18, 1959, 16972-73.

¹⁵¹ James O. Eastland, *Obscenity in the Mails*, CONGRESSIONAL RECORD – Senate, August 18, 1959, 16972-73.

opinions as well. “The Supreme Court is famous 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 Kruschew and all his henchmen. History proves what happens to a Nation that loses its moral standards.”¹⁵² 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 serve on Virginia’s state commission to rewrite its obscenity law. 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* which explicitly mentioned segregation or race comprised little more than a “sitting duck for the guns of Federal judges.”¹⁵³ 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.”¹⁵⁴ 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 of constitutional law that had nothing, expressly, to do with race.¹⁵⁵ 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

¹⁵² Herman Talmadge to Estes Kefauver, September 8, 1959, reprinted in *Control of Obscene Material, Hearings Before [the] Subcommittee on Constitutional Amendments, Eighty-Sixth Congress* (1960).

¹⁵³ James Jackson Kilpatrick to Allen Taylor, March 12, 1959, Box 28, Folder: T-U-V Correspondence, Acc. No. 6626-b, Special Collections, University of Virginia, Charlottesville, Virginia.

¹⁵⁴ James Jackson Kilpatrick to Allen Taylor, March 12, 1959, Box 28, Folder: T-U-V Correspondence, Acc. No. 6626-b, Special Collections, University of Virginia, Charlottesville, Virginia.

¹⁵⁵ INTERPOSITION: EDITORIALS AND EDITORIAL PAGE PRESENTATIONS, THE RICHMOND NEWS LEADER, 1955-1956, James Jackson Kilpatrick, ed. (1956).

remained a painful memory, the Supreme Court had reaffirmed its judicial supremacy, and massive resistance had entered a “thermidorean reaction.”¹⁵⁶ 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, turning back the federal tide.¹⁵⁷ 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.”¹⁵⁸ 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.”¹⁵⁹ Citing one of Kefauver’s committee reports on juvenile delinquency, Kilpatrick noted that the officials questioned by the committee tended to agree “that lewd photographs and magazines stimulate latent sexual desires among adolescents and tend to trigger serious sex crimes.”¹⁶⁰ 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 percent while the under-seventeen population [increased] by only 27 percent.”¹⁶¹ Then, Kilpatrick referred to the Kefauver hearings, particularly testimony of Professor of Clinical Psychiatry at Cornell Dr. George W. Henry, who agreed that children could “be sexually perverted by looking at, by studying, and by dwelling upon photos” that were pornographic.¹⁶²

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

¹⁵⁶ BARTLEY, *RISE OF MASSIVE RESISTANCE*, 320.

¹⁵⁷ 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,” he wrote, “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.” James J. Kilpatrick to Marie E. Jamison, August 1957, Folder: “J”, Box 14, Acc. No. 6626-b, James Jackson Kilpatrick Papers, Special Collections, University of Virginia, Charlottesville, Virginia.

¹⁵⁸ James Jackson Kilpatrick to Pyke Johnson, Jr., Sept. 11, 1959, Folder: Smut Peddlers, Box 68, Acc. No. #6626-b, James Jackson Kilpatrick Papers, Special Collections, University of Virginia, Charlottesville, Virginia.

¹⁵⁹ JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 5 (1960).

¹⁶⁰ JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 8 (1960).

¹⁶¹ JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 235 (1960).

¹⁶² JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 236 (1960).

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*. Citing Justice Harlan’s dissenting opinion in *Alberts v. California*, he noted that “Congress has no substantive power over matters of sexual morality” a nod to the myriad moral regulations rapidly spreading through the South.¹⁶³ 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.”¹⁶⁴ To Kilpatrick’s mind, none of these were particularly relevant to obscenity, meaning that “federal authority” was relatively “attenuated,” and that “the dangers of federal censorship in this field are far greater than anything the states may do.”¹⁶⁵ 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 treatment of social problems.”¹⁶⁶ 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.”¹⁶⁷ 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.”¹⁶⁸ 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 was 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 in *The Smut Peddlers*, “that has caused me so much trouble.”¹⁶⁹ “The same unreasoning logic that alphabetizes *Tortilla Flat* and *Turbulent Daughters* side by side in an NODL list,” he lamented, “sees a work of

¹⁶³ JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 290 (1960).

¹⁶⁴ JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 290 (1960).

¹⁶⁵ JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 290 (1960).

¹⁶⁶ JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 290 (1960).

¹⁶⁷ JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 291 (1960).

¹⁶⁸ James Jackson Kilpatrick to Editor, *Publisher’s Weekly*, march 14, 1960,

¹⁶⁹ KILPATRICK, *SMUT PEDDLERS*, 288.

D.H. Lawrence, a dirty picture from Roy Oakley, and a contraceptive device all brought to bar under the same” obscenity law.¹⁷⁰ Such failures to discriminate, he complained, make “no sense to me.”¹⁷¹

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.¹⁷² Just as Kilpatrick had feared, a local white school board had embarrassed itself by banning Lee’s novel *To Kill a Mockingbird* for being “immoral,” the same charge leveled at *Lady Chatterly’s Lover* in *Kingsley v. Regents*.¹⁷³ Outraged, Lee sent Kilpatrick \$10 to enroll the Hanover County, Virginia school board “in any first grade of its choice.”¹⁷⁴ Rather than an “immoral” celebration of integration, lamented Lee, *Mockingbird* represented “a code of honor” that was “the heritage of all Southerners,” an odd formulation given that the book had come to be associated with the black struggle for civil rights, not southern honor or history.¹⁷⁵ 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.¹⁷⁶ 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 section 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., all 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

¹⁷⁰ KILPATRICK, SMUT PEDDLERS, 288.

¹⁷¹ KILPATRICK, SMUT PEDDLERS, 288.

¹⁷² *Harper Lee Twits School Board in Virginia for Ban on her Novel*, N.Y. TIMES, Jan. 16, 1966, 82.

¹⁷³ *Harper Lee Twits School Board in Virginia for Ban on her Novel*, N.Y. TIMES, Jan. 16, 1966, 82.

¹⁷⁴ *Harper Lee Twits School Board in Virginia for Ban on her Novel*, N.Y. TIMES, Jan. 16, 1966, 82.

¹⁷⁵ “Harper Lee Twits School Board in Virginia for Ban on Her Novel,” *New York Times*, Jan. 16, 1966, 82. *Mockingbird* had sold over 3,000,000 copies by May 1962. See “‘Bird’ in Hand: Producers Accent Authentic Southern Ways in Adapting Novel to Screen,” *New York Times*, May 6, 1962, 149.

¹⁷⁶ HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

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. As this section will illustrate, 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 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, targeting 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] ... meanwhile “[b]lack people will have to do something very hard, too, which is to allow the white citizen his first awkward steps toward maturity.”¹⁷⁷ – 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.”¹⁷⁸ 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.¹⁷⁹ 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.”¹⁸⁰ Indignant, Kilpatrick confessed to being “shocked” that Baldwin did not want to adopt “the white man's cultural, social, religious, or moral values,” Kilpatrick 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

¹⁷⁷ James Baldwin, “The White Problem,” in 100 YEARS OF EMANCIPATION 124 (Robert A. Goldwin, ed., 1964), 88.

¹⁷⁸ James Baldwin, “The White Problem,” in 100 YEARS OF EMANCIPATION 124 (Robert A. Goldwin, ed., 1964), 88.

¹⁷⁹ James Baldwin, “The White Problem,” in 100 YEARS OF EMANCIPATION 124 (Robert A. Goldwin, ed., 1964), 88.

¹⁸⁰ JAMES BALDWIN, *THE FIRE NEXT TIME* 96-7 (Vintage 1993) (1962).

slavery.¹⁸¹ Africa's "phallic sculptures," mocked Kilpatrick, "are truly very fine phallic sculptures. Doubtless they are. The mud huts were the strongest mud huts ever contrived ... but if true, what then? Is a mud hut a Monticello, a carved root a bust by Rodin?"¹⁸²

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, 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 them, making whites look backward and uncivilized. "Many a Virginian must have felt a tinge of wry regret," wrote Kilpatrick in 1960, "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."¹⁸³ 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 stockings and heels, while men should don coats and ties.¹⁸⁴ John Lewis, who also worked with Lawson, routinely handed out rules of engagement to student demonstrators that focused not only on dress, but

¹⁸¹ James Jackson Kilpatrick, *View from a Southern Exposure*, in 100 YEARS OF EMANCIPATION 124 (Robert A. Goldwin, ed., 1964).

¹⁸² James Jackson Kilpatrick, *View from a Southern Exposure*, in 100 YEARS OF EMANCIPATION 113 (Robert A. Goldwin, ed., 1964).

¹⁸³ James Jackson Kilpatrick, *The Sitdowns*, RICHMOND NEWS LEADER, Feb. 22, 1960.

¹⁸⁴ TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963, 274 (1988).

manners, including directives that students remain courteous, sit straight while at the counter, and refrain from cursing.¹⁸⁵

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 on Feb 27, 1960, “[t]hey 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.”¹⁸⁶ 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. “I know who will be blamed for it,” claimed Russell in reference to the violence that the sit-ins risked provoking from “sensitive” southern whites, “I know who will be denounced all over the country. It will be the white people of the South.”¹⁸⁷

To bolster whitelegitimacy, Russell turned to personal morality, underscoring the link between civil rights and sex. “Why do not the 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.”¹⁸⁸ Russell’s charge resonated with arguments made by other segregationists, including Citizens’ Council leader Tom Brady that “obscenity and depravity” permeated black culture and justified Jim Crow.¹⁸⁹ Of course, such malevolent portrayals of black life as obscene 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 a film entitled *Island in the Sun* about two interracial couples, one a black revolutionary on a Caribbean island played by Harry Belafonte who finds himself pursued by an elite white woman played by Joan

¹⁸⁵ TOWNSEND DAVIS, *WEARY FEET, RESTED SOULS: A GUIDED HISTORY OF THE CIVIL RIGHTS MOVEMENT* 356 (1998).

¹⁸⁶ Richard Russell, *Congressional Record*, Feb. 27, 1960, 3699-700. For more on Russell’s relationship with Lyndon Johnson, see ROBERT MANN, *THE WALLS OF JERICHO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS* (1996).

¹⁸⁷ Richard Russell, *Congressional Record*, Feb. 27, 1960, 3699-700.

¹⁸⁸ *Id.*

¹⁸⁹ TOM P. BRADY, *BLACK MONDAY* 47 (1955).

Fontaine, and the other a white suitor who declares his love for black actress Dorothy Dandridge.¹⁹⁰ Both 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.¹⁹¹ Of course, such outright declarations of interracial relations as obscene violated constitutional law, 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,” 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.¹⁹² “Why do the Negro preachers not do something,” queried Russell, “about unfortunate conditions such as I have mentioned?”¹⁹³

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. “When the white man argues that segregation should continue because of the Negro’s lagging standards,” argued Martin Luther King, Jr., in *Stride Toward Freedom*, his memoir of the Montgomery Bus Boycott, “he fails to see that standards lag because of segregation.”¹⁹⁴ “The ‘behavior deviants’ within the Negro community,” explained King, referring to illegitimacy and crime rates, “stem from the economic deprivation, emotional frustration, and social isolation which are the inevitable concomitants of segregation.”¹⁹⁵ Despite King’s awareness that differences 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,” wrote King, “we will go a long way toward

¹⁹⁰ ISLAND IN THE SUN (Twentieth Century Fox 1957).

¹⁹¹ Whitney Strub, *Black and White and Banned All Over: Race, Censorship and Obscenity in Postwar Memphis*, 40 JOURNAL OF SOCIAL HISTORY 697 (2007).

¹⁹² Richard Russell, *Congressional Record*, Feb. 27, 1960, 3700.

¹⁹³ Richard Russell, *Congressional Record*, Feb. 27, 1960, 3700.

¹⁹⁴ MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 223 (1958).

¹⁹⁵ MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 223 (1958).

breaking down the arguments of the segregationist.”¹⁹⁶ “[W]e must work on two fronts,” asserted King in his Montgomery memoir, “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 alteration between attacking the causes and healing the effects.”¹⁹⁷

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.¹⁹⁸ Interested in launching a test case challenging Montgomery’s segregated transportation system, local civil rights leaders Edgar Daniel (E.D.) Nixon and Jo Ann Robinson considered using Colvin as a plaintiff, only to reject the idea once they discovered that she was pregnant and single, her own mother confessing that her daughter had “done took a tumble.”¹⁹⁹ Shortly thereafter, another African American woman – Mary Louise Smith – also refused to give up her seat to a white on a Montgomery bus, only to be rejected because of her “family background,” particularly her father’s alcoholism.²⁰⁰ As E.D. Nixon later put it, if reporters came out to interview the Smith family, “we wouldn’t have a leg to stand on.”²⁰¹

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.²⁰² Unlike Colvin and

¹⁹⁶ MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 223 (1958).

¹⁹⁷ MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 224 (1958).

¹⁹⁸ J. MILLS THORNTON, *DIVIDING LINES: MUNICIPAL POLITICS AND THE STRUGGLE FOR CIVIL RIGHTS IN MONTGOMERY, BIRMINGHAM, AND SELMA* 54-5 (2002).

¹⁹⁹ Quote drawn from DANIELLE 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 provides a detailed account of Colvin’s failed candidacy, placing responsibility for the removal of Colvin on both her parents and E.D. Nixon. See THORNTON, *DIVIDING LINES*, 54-5. Taylor Branch also describes E.D. Nixon’s role in rejecting Colvin due to her pregnancy. See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963* 122-23 (1988); David Garrow and Aldon Morris both argue that Nixon was aided in his decision by Jo Ann Robinson. See DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 15-16 (1988); ALDON M. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 53 (1984).

²⁰⁰ TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963*, 127 (1988).

²⁰¹ TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963*, 127 (1988).

²⁰² TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963*, 127 (1988).

Smith, Parks had no illegitimate children and no history of familial alcoholism, a quality that, as irrelevant as it should have been to basic citizenship, made her better suited, culturally, to bring a constitutional case.²⁰³ According to Jo Ann Robinson, “Mrs. Parks had the caliber of character we needed to get the city to rally behind us.”²⁰⁴

Just as Rosa Parks satisfied the invisible cultural requirements needed to claim constitutional rights, so too did the college students that participated in the sit-ins of 1960 challenge the cultural presumptions bolstering black repression and white supremacy. “Newspaper and television accounts of the sit-ins,” noted black activist James Farmer, “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.”²⁰⁵ That hair-styles, 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.”²⁰⁶ 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. “We are talking of manners,” he posited, “of civility, of sobriety, of restraints upon carnality.”²⁰⁷

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 second memoir, about the Birmingham protest, *Why We Can’t Wait*. “The work should be required reading in every police department in the nation,” fumed Kilpatrick, “Here Dr. King spells it out, with impersonal detachment, just how these things work: Committees must be organized,

²⁰³ TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963*, 127 (1988).

²⁰⁴ DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 16 (1988).

²⁰⁵ JAMES FARMER, *FREEDOM – WHEN?* 67-8 (1965).

²⁰⁶ James Jackson Kilpatrick, “in *100 YEARS OF EMANCIPATION* 124 (Robert A. Goldwin, ed., 1964), 127.

²⁰⁷ James Jackson Kilpatrick, “in *100 YEARS OF EMANCIPATION* 124 (Robert A. Goldwin, ed., 1964), 127.

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).²⁰⁸ Though appalled at the manner in which King had successfully manipulated white authorities, Kilpatrick expressed a begrudging admiration for the “reverend doctor.”²⁰⁹ “One does not have to admire the techniques of Martin Luther King,” he wrote, “to respect his mastery of them.”²¹⁰ To his mind, King possessed “a certain genius in timing, showmanship, publicity management, administrative leadership, and the ability to influence the opinions of others.”²¹¹ 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.”²¹²

Kilpatrick would concede ground again, 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 horse-whipped them back across the Alabama River.²¹³ One week later, northern activist Viola Liuzzo was shot by members of the Ku Klux Klan, prompting even Kilpatrick to express profound regret.²¹⁴ “Those of us who have lived all our lives in the South, and loved the South abidingly” lamented Kilpatrick, “must feel the stain of Alabama like a wound ... [t]he South has many needs,” he continued, “but perhaps the greatest of these is its need to recognize more clearly its membership in the American union ... They had moral rights and constitutional rights,” he wrote of Liuzzo and Reverend James Reeb, also killed by the Klan, “And Governor, it was the first duty of State and local government to make those rights secure.”²¹⁵

Chastened by philistines in Alabama, Kilpatrick stood by helplessly as Congress enacted a robust voting rights bill, a law that would ultimately empower the federal government to strike down unreasonable

²⁰⁸ *Blunders on the Left*, RICHMOND NEWS LEADER, March 30, 1965, p. 8.

²⁰⁹ *Blunders on the Left*, RICHMOND NEWS LEADER, March 30, 1965, p. 8.

²¹⁰ *Blunders on the Left*, RICHMOND NEWS LEADER, March 30, 1965, p. 8.

²¹¹ *Blunders on the Left*, RICHMOND NEWS LEADER, March 30, 1965, p. 8.

²¹² James Jackson Kilpatrick to Robert Goldwin, June 11, 1963, Folder Miscellaneous Speeches and Essays, Box No. 64, Accession No. 6626-b, James Jackson Kilpatrick Papers, Special Collections, University of Virginia, Charlottesville, Virginia.

²¹³ GARROW, CROSS, 398.

²¹⁴ GARROW, CROSS, 413.

²¹⁵ James Jackson Kilpatrick, Draft editorial for *A Conservative View*, April 1, 1965, James Jackson Kilpatrick Papers, Special Collections, University of Virginia, Charlottesville, Virginia.

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.”²¹⁶ 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. On August 12, 1965, one week after Lyndon Johnson signed the Voting Rights Act into law, the *Los Angeles Times* reported an altercation between an African American male and a Los Angeles police officer in the heavily black L.A. neighborhood of Watts.²¹⁷ The officer, while trying to arrest twenty-one year old Marquette Frye for drunk driving, also subdued Frye’s mother, triggering sporadic rock-throwing and violence.²¹⁸ 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.²¹⁹ 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.²²⁰ According to one account, “the 150-block section of Los Angeles last night took on the appearance 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.”²²¹ Six days, thirty-four deaths, and 4,000

²¹⁶ James Jackson Kilpatrick, “A Conservative View,” March 20/21, 1965, Special Collections, University of Virginia, Charlottesville, Virginia.

²¹⁷ *Arrest Causes Near Riot in Negro Area of Coast*, NEW YORK TIMES, Aug. 12, 1965, 15.

²¹⁸ *Arrest Causes Near Riot in Negro Area of Coast*, NEW YORK TIMES, Aug. 12, 1965, 15.

²¹⁹ *7,000 In New Rioting; Troops Alerted*, LOS ANGELES TIMES, Aug. 13, 1965, 1.

²²⁰ *Eight Men Slain: Guard Moves In*, LOS ANGELES TIMES, August 14, 1965, 1.

²²¹ *Youths Run Wild in Negro Section: Smash Cars, Set Fires and Attack Passers-by – Their Victims are of Both Races*, NEW YORK TIMES, August 14, 1965, 8.

arrests after it began, one of the largest riots in American history drew to a close.²²²

Stunned, President Johnson appointed former Central Intelligence Agency director John McCone to investigate the causes of the unrest.²²³ Before McCone had time to issue a report, however, critics pounced. On August 14, 1965, three days after the arrest of Marquette Fry 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.”²²⁴ The report to which the *Los Angeles Times* referred was an in-house memo drafted by Daniel Patrick Moynihan, the Director of the Department of Labor’s Office of Policy Planning and Research.²²⁵ Apparently unaware of the extensive debate over illegitimacy that had simmered in the 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 – but causes of economic inequality.²²⁶ “As the result of family disorganization,” asserted Moynihan, “a large proportion of Negro children and youth have not undergone the socialization which only the family can provide ... family disorganization has been particularly 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.²²⁷ 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, 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.”²²⁸

²²² IRVING BERNSTEIN, *GUNS OR BUTTER: THE PRESIDENCY OF LYNDON JOHNSON* 386 (1996).

²²³ IRVING BERNSTEIN, *GUNS OR BUTTER: THE PRESIDENCY OF LYNDON JOHNSON* 386 (1996).

²²⁴ Thomas Foley, *Racial Unrest Laid to Negro Family Failure*, *LOS ANGELES TIMES*, Aug. 14, 1965, 1.

²²⁵ DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (Office of Policy Planning and Research, United States Department of Labor), March 1965, 48.

²²⁶ E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (1948).

²²⁷ DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (Office of Policy Planning and Research, United States Department of Labor), March 1965, 48.

²²⁸ DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (Office of Policy Planning and Research, United States Department of Labor), March 1965, 48.

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, declaring the Moynihan report to be an explanation for the Watts riot. "Behind the past week's orgy of Negro rioting," extolled the *Journal*, "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."²²⁹ According to the *Journal*, "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."²³⁰ The *Journal's* emphasis on broken homes led directly to the citation of black illegitimacy rates. "The breakdown of family life," continued the *Journal*, "can be glimpsed in nearly any set of Negro social statistics nationwide ... 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."²³¹

The *Journal's* turn to black illegitimacy rates as a cause of rioting proved a haunting parallel to southern discourses on black moral shortcomings work-shopped across the South since the 1950s. Indeed, James Jackson Kilpatrick himself had focused on such rates in the aftermath of Birmingham in 1963.²³² Now, he reentered the debate, this time writing for a nationally syndicated column called "A Conservative View." "Say what you will about the South," proclaimed Kilpatrick, "the American Negro has had two generations of reasonable opportunity in the un-segregated North and West. How has he developed the opportunities put before him? In squalor, in apathy, in crime, in cadging off 'the

²²⁹ *Behind the Riots: Family Life Breakdown in Negro Slums Sows Seeds of Racial Violence: Husbandless Homes Spawn Young Hoodlums, Impede Reforms, Sociologists Say*, THE WALL STREET JOURNAL, Aug. 16, 1965.

²³⁰ *Behind the Riots: Family Life Breakdown in Negro Slums Sows Seeds of Racial Violence: Husbandless Homes Spawn Young Hoodlums, Impede Reforms, Sociologists Say*, THE WALL STREET JOURNAL, Aug. 16, 1965.

²³¹ *Behind the Riots: Family Life Breakdown in Negro Slums Sows Seeds of Racial Violence: Husbandless Homes Spawn Young Hoodlums, Impede Reforms, Sociologists Say*, THE WALL STREET JOURNAL, Aug. 16, 1965.

²³² James Jackson Kilpatrick, "in 100 YEARS OF EMANCIPATION 124 (Robert A. Goldwin, ed., 1964), 127.

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"²³³ Once ashamed of white delinquents acting out at lunch counters, Kilpatrick rejoiced over blacks rioting in Watts. "Outside the South," wrote Kilpatrick in September 1965, "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."²³⁴

Kilpatrick's mention of a changing mood belied a larger discursive convergence, at least within conservative circles, between segregationist 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 for the *New York Times*, "intense debate over how to handle such racial powder kegs was under way deep inside the Johnson administration."²³⁵ The "pivot" of this debate, they continued, was the Moynihan Report, "a much suppressed, much leaked Labor Department document that strips away usual equivocations and exposes the ugly truth about the big-city Negro's plight."²³⁶ Evans and Novak framed the report as something that the Johnson administration was reluctant to openly endorse. "[W]hen Moynihan wanted to release the report," they asserted, "he was stopped by his boss, Secretary of Labor W. Willard Wirtz. In private conversation, Wirtz expressed the fear that evidence of Negro illegitimacy would be grist for racist propaganda mills."²³⁷

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. Special assistant and counsel to the president Harry McPherson 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, "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!'"²³⁸

²³³ James Jackson Kilpatrick, *Negro War Results From Blaming Others for his Failings*, SHREVEPORT TIMES, Aug. 19, 1965.

²³⁴ James Jackson Kilpatrick, *A Conservative View*, WASHINGTON STAR SYNDICATE, September. 4, 1965.

²³⁵ Rowland Evans and Robert Novak, *Inside Report – The Moynihan Report*, NEW YORK TIMES, Aug. 18, 1965, A19.

²³⁶ Rowland Evans and Robert Novak, *Inside Report – The Moynihan Report*, NEW YORK TIMES, Aug. 18, 1965, A19.

²³⁷ Rowland Evans and Robert Novak, *Inside Report – The Moynihan Report*, NEW YORK TIMES, Aug. 18, 1965, A19.

²³⁸ Transcript, Harry McPherson Oral History Interview IV, March 24, 1969, by T.H. Baker, Lyndon Baines Johnson Library, Austin, Texas.

Despite McPherson's warnings, Moynihan continued to push his report, and the White House went along. President Lyndon Johnson himself referenced black illegitimacy rates during a speech at Howard University on June 5, 1965 – penned by Moynihan.²³⁹ “Perhaps most important,” pronounced Johnson, “is the breakdown of the Negro family structure ... [o]nly 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, tonight, little less than two-thirds are at home with both of their parents. Probably a majority of all Negro children receive federally-aided public assistance sometime during their childhood.”²⁴⁰ Though Johnson claimed that “white America” was partly to blame for the disintegration of the black family, some saw a more strategic motive behind his reference to illegitimacy rates.²⁴¹ As Lee Rainwater put it, 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.²⁴²

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. “Dear Citizens,” began a letter introduced by South Carolina Senator Strom Thurmond into the *Congressional Record* in the wake of the L.A. riots, “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.”²⁴³ West Virginia Senator Robert C. Byrd agreed.

²³⁹ LEE RAINWATER AND WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY: A TRANS-ACTION AND SOCIAL SCIENCE POLICY REPORT* 125 (1967).

²⁴⁰ Lyndon B. Johnson, Commencement Address at Howard University: “To Fulfill These Rights,” June 4, 1965, reprinted in LEE RAINWATER AND WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY: A TRANS-ACTION AND SOCIAL SCIENCE POLICY REPORT* 125 (1967)..

²⁴¹ Lyndon B. Johnson, Commencement Address at Howard University: “To Fulfill These Rights,” June 4, 1965, reprinted in LEE RAINWATER AND WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY: A TRANS-ACTION AND SOCIAL SCIENCE POLICY REPORT* 125 (1967)..

²⁴² LEE RAINWATER AND WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY: A TRANS-ACTION AND SOCIAL SCIENCE POLICY REPORT* 14, 274, 284, 291-93 (1967).

²⁴³ Letter from Lillie Schuster to Strom Thurmond, Aug. 8, 1965, entered into the Congressional Record by Strom Thurmond, *A Strong Home is a Strong Nation*, CONGRESSIONAL RECORD, Aug. 24, 1965, A4720.

Lamenting the “5-day orgy of rioting, murder, racial battling, setting fires, looting, and wanton destruction of property” in Los Angeles, Byrd stood before Congress and called for family planning.²⁴⁴ “[F]amily planning is imperative,” he announced, “and civil rights organizations should make intensive efforts to promote such. The high birth rate among low-income Negro families simply cannot be overlooked.”²⁴⁵ “Additionally,” continued Byrd, “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.”²⁴⁶

Though 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. “From the wild Irish slums of the nineteenth century European seaboard to the riot-torn suburbs of Los Angeles,” wrote Moynihan on September 18, three weeks after Byrd’s statement before the Senate, “there is one unmistakable lesson in American history; a community that allows a large number of 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 inevitable. And it is richly deserved.”²⁴⁷ 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 Johnson officials like Moynihan joined segregationists in targeting illegitimacy as an explanation for urban unrest – more sympathetic voices responded, arguing that illegitimates should be protected from the “disabilities and moral prejudices” facing them.²⁴⁸ 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.²⁴⁹ In 1966, Krause joined Jack Greenberg of the NAACP Legal Defense Fund in a challenge to an illegitimacy rule in Louisiana. The case, styled *Levy v. Louisiana*, dealt with a claim by five illegitimate children demanding compensation for the wrongful death of their unwed mother.²⁵⁰ In their brief, NAACP attorneys Greenberg and Leroy Clark posited that “classification by the criterion of illegitimacy, which appears

²⁴⁴ Senator Byrd of West Virginia, CONGRESSIONAL RECORD, Aug. 23, 1965, 21374.

²⁴⁵ Senator Byrd of West Virginia, CONGRESSIONAL RECORD, Aug. 23, 1965, 21374.

²⁴⁶ Senator Byrd of West Virginia, CONGRESSIONAL RECORD, Aug. 23, 1965, 21374.

²⁴⁷ Daniel Patrick Moynihan, *A Family Policy for the Nation*, AMERICA, Sept. 18, 1965, 283.

²⁴⁸ Harry D. Krause, *Bringing the Bastard into the Great Society – A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 858, 859 (1966).

²⁴⁹ Harry D. Krause, *Bringing the Bastard into the Great Society – A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 858, 859 (1966).

²⁵⁰ *Levy v. Louisiana*, 391 U.S. 468 (1968).

to be racially neutral on its face,” was in fact “covert racial discrimination.”²⁵¹ 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.”²⁵² Consequently “95.8 percent of all persons affected by discrimination against illegitimates under the statute are Negroes.”²⁵³ 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 “[c]onceiving 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.²⁵⁴

The Supreme Court, led by Justice William O. Douglas, sided with the NAACP.²⁵⁵ To deny illegitimates the same benefits that went to those with married parents, held the Court, violated equal protection.²⁵⁶ 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.²⁵⁷ 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*.²⁵⁸ Here, southern recalcitrance backfired, pushing the Supreme Court to create “new doctrine,” particularly in the realm of equal protection.²⁵⁹

The Court took equal protection even farther in an Alabama case, also 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.²⁶⁰ At the time, “state welfare policies had to be approved by what

²⁵¹ Motion for Leave to File Brief Amicus Curiae and Accompanying Brief, *Levy v. Louisiana* 391 U.S. 468 (1968) 2.

²⁵² Brief Amicus Curiae for the NAACP Legal Defense Fund, *Levy v. Louisiana* 391 U.S. 468 (1968) 2.

²⁵³ Brief Amicus Curiae for the NAACP Legal Defense Fund, *Levy v. Louisiana* 391 U.S. 468 (1968) 6.

²⁵⁴ Brief Amicus Curiae for the NAACP Legal Defense Fund, *Levy v. Louisiana* 391 U.S. 468 (1968), 12.

²⁵⁵ LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* 448 (2000).

²⁵⁶ *Glon v. American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 468 (1968).

²⁵⁷ JOHN LANGBEIN, *A HISTORY OF THE COMMON LAW* 632 (2009).

²⁵⁸ Brief Amicus Curiae for the NAACP Legal Defense Fund, *Levy v. Louisiana* 391 U.S. 468 (1968), 9; LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* 449 (2000).

²⁵⁹ LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* 449 (2000).

²⁶⁰ *King v. Smith*, 392 U.S. 309 (1968).

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).²⁶¹ Though eight of nine Justices argued that the “applicable statute” prevented denials of funds, Douglas rounded out the unanimous vote against the rules, pronouncing them a violation of equal protection.²⁶²

One year later, 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.²⁶³ 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.²⁶⁴ In *Stanley*, Marshall took the question of pornography head-on, holding that “the mere private possession of obscene matter cannot constitutionally be made a crime.”²⁶⁵ Though obscenity had clearly been divorced from First Amendment protections in earlier rulings, 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 a one’s own home.”²⁶⁶

Though 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.”²⁶⁷ Now, he struck directly at the ability 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, the case 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 Nixon to investigate the matter, prompting him to assign a Commission to study the problem of obscenity. In 1970 the President’s “Commission on Obscenity and Pornography,” concluded that the Court’s three part test for obscenity, including whether material “appears to the ‘prurient’ interest of the average person,” “is ‘patently offensive’ in light of ‘community standards,’” and “lacks redeeming social value,” did not actually “provide

²⁶¹ LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* 450 (2000).

²⁶² LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* 450 (2000).

²⁶³ *Stanley v. Georgia*, 394 U.S. 557 (1969).

²⁶⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961).

²⁶⁵ *Stanley v. Georgia*, 394 U.S. 559.

²⁶⁶ *Stanley v. Georgia*, 394 U.S. 565.

²⁶⁷ *Masonic Chiefs, Atlantans Hear Marshall Hit Integration Foes*, ATLANTA DAILY WORLD, May 4, 1955, 1.

meaningful guidance for law enforcement officials, juries or courts.”²⁶⁸ Consequently, “distinctions” between “prohibited and permissible materials” had become hopelessly confused, leading to “interference with the communication of constitutionally protected materials.”²⁶⁹

Not quite the repudiation of *Stanley* that conservatives had hoped, Nixon achieved more success by replacing liberals 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 Powell and Rehnquist on board, the Court took a quick right turn, particularly on questions of obscenity. For example, in a 1973 case styled *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. “We emphasize,” opined the Court, “that it is not our function to propose regulatory schemes for the States.”²⁷⁰ Rather, “community standards” should determine whether literature, and for that matter speech, was obscene; independent of “national” norms.²⁷¹

While *Miller* did not overturn *Levy* or *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. Styled *Regents v. Bakke*, the case vindicated a white plaintiff who complained that the University of California Davis had rejected his application to medical school in lieu of less qualified black applicants who were perceived to be “disadvantaged.”²⁷² Holding that “[t]he concept of discrimination is susceptible of varying interpretations,” Justice Lewis F. Powell, Jr. – 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.²⁷³ Indeed, whites themselves constituted a conglomeration of “various minority groups,” argued 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.”²⁷⁴

At first glance absurd, Powell’s re-characterization of whites as an assemblage of suffering minorities actually echoed claims that white southerners – of whom Powell was one – had long made.²⁷⁵ Indeed, white suffering became, as we have seen, the crux of segregationist arguments

²⁶⁸ REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 53 (1970).

²⁶⁹ REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 53 (1970).

²⁷⁰ *Miller v. California*, 413 U.S. 15 (1973).

²⁷¹ *Miller v. California*, 413 U.S. 32 (1973).

²⁷² *Regents v. Bakke*, 438 U.S. 265 (1978).

²⁷³ 438 U.S. at 294, 310.

²⁷⁴ 438 U.S. at 292, 295-96.

²⁷⁵ See Anders Walker, *Diversity’s Strange Career: Recovering the Racial Pluralism of Lewis F. Powell, Jr.*, 50 SANTA CLARA L. REV. 647 (2010).

about integration and culture.²⁷⁶ In a manner that dovetailed nicely with these arguments, 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.²⁷⁷ Here, Powell scored points with liberals even as he revived long-standing segregationist claims that blacks and whites were fundamentally, culturally, different.²⁷⁸ Not only did blacks possess different “ideas,” posited Powell, but they also possessed different “mores” a clear allusion to the types of cultural arguments that segregationists like James Jackson Kilpatrick had made since the 1950s.²⁷⁹ Though Powell had disagreed with Kilpatrick’s endorsement of interposition in 1956, he canonized the discourse of race and culture in 1978, a move that was not lost on veterans of civil rights like Thurgood Marshall.²⁸⁰ “[I]t is more than a little ironic,” argued 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.”²⁸¹ Equating Powell’s opinion in *Bakke* to *Plessy v. Ferguson*, Marshall lamented that “I fear we have come full circle. After the Civil War ... this Court, in ... *Plessy v. Ferguson*, destroyed the movement toward complete equality ... Now, we have this Court again stepping in, this time to stop affirmative action programs.”²⁸²

CONCLUSION

As Marshall’s dissent in *Bakke* implies, 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, even pornography. State regulations of such constructs followed, as public officials struggled to perpetuate Jim Crow in facially neutral ways, meanwhile 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, forcing concessions from architects of interposition like James Jackson Kilpatrick – who abandoned massive resistance in favor of tacit endorsements of black rights.

²⁷⁶ See *supra* pp. 5-10, 28-37.

²⁷⁷ 438 U.S. at 294, 310.

²⁷⁸ 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).

²⁷⁹ 438 U.S. at 313.

²⁸⁰ Lewis F. Powell, “Interposition” – A Twentieth Century Revival of “Nullification,” 2 (Mar. 29, 1956).

²⁸¹ 438 U.S. at 395,

²⁸² 438 U.S. at 402 (Marshall, J., dissenting).

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 which, 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, dependant on variables that have little to do with legal precedent, litigation strategies, or courts.