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**LEGISLATING VIRTUE:
HOW SEGREGATIONISTS DISGUISED
RACIAL DISCRIMINATION AS
MORAL REFORM FOLLOWING
*BROWN V. BOARD OF EDUCATION***

ANDERS WALKER

INTRODUCTION

Shortly after the Supreme Court of the United States invalidated school segregation in *Brown v. Board of Education*,¹ Mississippi Circuit Judge Tom P. Brady² delivered a speech to a chapter of the Sons of the American Revolution on the decision's consequences. Brady's speech, later published and popularized throughout the South,³ declared that the ruling's ultimate goal was not educational equality, but racial amalgamation:⁴

Let's get one thing unmistakably clear, the leaders of the three million block-voting negroes of the North and East and of California, together with segments of the Communist-front organizations of our

1. 347 U.S. 483 (1954).

2. Educated at Yale, Tom P. Brady became the intellectual leader of the Citizens' Council movement, arguably the largest anti-integration movement in the South. See JOHN BARTLOW MARTIN, *THE DEEP SOUTH SAYS "NEVER"* 16 (1957); JAMES GRAHAM COOK, *THE SEGREGATIONISTS* 14, 16 (1962). The Citizens' Councils spread across the South and played a crucial role in orchestrating southern resistance to integration. Specializing in propaganda and legislative activism, the Councils were composed of members of the southern elite. The Councils were committed to resistance through legal means and shunned the violent methods employed by more populist resistance organizations like the Ku Klux Klan. See NEIL R. McMILLEN, *THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954-1964*, at 360 (1971); NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950's*, at 190-211 (1969).

3. See TOM P. BRADY, *BLACK MONDAY* ii (1955). Brady's piece was entitled "Black Monday" in reference to May 17th, 1954, the day the Supreme Court issued its opinion in *Brown*. See *id.* Once it was published, Brady's speech became an influential part of segregationist literature throughout the South. See MARTIN, *supra* note 2, at 16-21; COOK, *supra* note 2, at 14.

4. See BRADY, *supra* note 3, at 64-65.

population, have set as their goal the 'passing' of the negro in these United States These new deal, square deal, liberated, black qualified electors are determined to indoctrinate the Southern negro with this ideal, and arouse him to follow them in their social program for amalgamation of the two races.⁵

Racial amalgamation, Brady contended, would occur via interracial sexual relations, and in particular through intermarriage: "The American negro, like any intelligent white man, knows his weaknesses and shortcomings He furthermore realizes that he can ameliorate these inherent deficiencies by intermarriage, just as the strain of a long horn can be improved by being bred with a white-faced Hereford."⁶

Despite the alarmist tone of his claims, Brady was not alone in his contention that *Brown*, which invalidated the proposition that racially separate schools could be equal, would inspire intermarriage.⁷

5. *Id.* at 64.

6. *Id.* at 66-67.

7. David Lawrence, a columnist published in newspapers across the South, advanced a similar view:

Integration of races of all schools throughout the United States is a long way off—years and years, and maybe never. It is as far away or as near as the day when present advocates of integration are willing to face, possibly in their own families, the real issue—the intermarriage of white sons and daughters with Negroes.

David Lawrence, *Says 'Mixing' Far Away: Intermarriage Held to be Real Issue*, TIMES-PICAYUNE (New Orleans), Mar. 21, 1956, at 10. (The *Richmond News Leader*, the *Nashville Banner* and the New Orleans *Times-Picayune* are three of the papers that published Lawrence's columns.) Former Georgia Governor Herman E. Talmadge agreed: "The ultimate aim and goal of NAACP leaders in the present segregation fight is the complete intermingling of the races in housing, schools, churches, public parks, public swimming pools and even in marriage. It is so evident that even White apologists for this organization must now admit it." HERMAN E. TALMADGE, *YOU AND SEGREGATION* 42 (1955). Even pro-integrationists like Dean Gordon B. Hancock, a black columnist for the *Atlanta Daily World*, noted the extent to which intermarriage was linked to *Brown*: "Every argument against the Supreme Court's decision of May 17, 1954, and every argument against integration the white man has been able to propound, is the argument against interracial marriage." Dean Gordon B. Hancock, *Between the Lines: Interracial Marriage a False Alarm*, ATLANTA DAILY WORLD, Apr. 12, 1956, at 4. For a discussion of the significance of white southerners' fear of interracial marriage after *Brown*, see MCMILLEN, *supra* note 2, at 184-86.

Fears of intermarriage persisted despite the existence of antimiscegenation statutes in every southern state. In 1955, the Supreme Court of the United States delayed ruling on whether a Virginia antimiscegenation statute was constitutionally valid. *See Naim v. Naim*, 350 U.S. 891, 891 (1955). Specifically, the Court said that the record of the case was inadequate and would not allow a "clean cut" consideration of the constitutionality of antimiscegenation laws. *See id.* Some interpreted the Court's reluctance to rule on the constitutionality of these laws as an attempt to stall for time, and to postpone the inevitable demise of antimiscegenation laws. Referring to *Naim*, popular newspaper columnist David Lawrence wrote:

Similar fears emerged throughout the South, and reflected a general fear on the part of segregationists that if desegregation occurred, it would affect not only the education, but the psychological development of their children.⁸ As Judge Brady stated in his Black Monday speech:

You cannot place little white and negro children in classrooms and not have integration. They will sing together, dance together, eat together and play together. They will grow up together and the sensitivity of the white children will be dulled. Constantly the negro will be endeavoring to usurp every right and privilege which will lead to intermarriage.⁹

The claim that African-American¹⁰ children would be the agents of intermarriage served an important goal of segregationists. It enabled them to claim that black people, and not themselves, were the agents of wrongdoing. It also enabled them to play on Darwinian fears that African-Americans secretly wanted to intermix with whites in order to raise themselves up, and bring whites down, on the great ladder of racial superiority.¹¹ This explained segregationist tendencies to couch integration as a communist plot.¹² Because intermarriage would end all racial distinctions, not only in terms of color but also in terms of intelligence, segregationists feared that it would lead to an egalitarian society where neither race nor class existed, much like the one envisioned by Karl Marx.¹³

The fear of intermarriage did more than raise the specter of communism;¹⁴ it resonated with and allowed segregationists to draw

The Supreme Court of the United States a few weeks ago sidestepped a decision on the issue of racial intermarriage. For technical reasons, it refused to decide whether a Virginia State law prohibiting intermarriage of races was constitutional. . . . Another case is certain to come before the highest court soon. If it is decided that state laws prohibiting intermarriage are unconstitutional, the issue will bring even more friction than the question of school integration.

Lawrence, *supra*, at 10.

8. See MCMILLEN, *supra* note 2, at 184.

9. BRADY, *supra* note 3, at 65.

10. I shall use "African-American" and "black" interchangeably. See Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 103, 119 n.2 (Kimberle Crenshaw et al. eds., 1995) [hereinafter CRITICAL RACE THEORY].

11. See BRADY, *supra* note 3, at 66; MCMILLEN, *supra* note 2, at 185-86.

12. See BARTLEY, *supra* note 2, at 187-88.

13. See MCMILLEN, *supra* note 2, at 196.

14. Although fears of intermarriage were rampant within the segregationist South, they were not the only criticisms of *Brown*. The primary legal argument that segregationists used to

from a series of mythological stereotypes regarding African-American sexual behavior.¹⁵ These stereotypes, many of which dated back to slavery, enabled segregationists to resurrect the great gendered allegory of sexual racism: the cult of southern womanhood.¹⁶ In this allegory, the southern white girl, helpless and vulnerable, risks being violated by the black male, who is invariably portrayed as being overtly sexual and predatory.¹⁷ The southern white girl, of course, represents all that is virtuous about the South.¹⁸ The black male, on the other hand, represents all that is threatening.¹⁹ Like segregation-

challenge *Brown* was the claim that the Supreme Court had overstepped its constitutional bounds, and had violated states' rights. For a description of the centrality of states' rights arguments see BARTLEY, *supra* note 2, at 126-28, 241. An indication that legal arguments did not hold the same sway over southern whites as fears of intermarriage did, however, emerged in Robert Penn Warren's documentary work *Segregation, The Inner Conflict in the South*. While interviewing a segregationist organizer in 1955, for example, Warren asked if states' rights was the main issue behind resistance to the ruling. "Yes," the organizer answered, "in a way, . . . but you got to fight on something you can rouse people up about, on segregation. There's the constitutional argument, but your basic feeling, that's what you've got to trust—what you feel, not your reasons for it." The segregationist then offered Warren handbills showing pictures of a black man and a white woman in bed together under the heading "Harlem Negro and White Wife." On the back of the handbill was a crudely drawn valentine-like heart, and in it the head of a white woman about to be kissed by a black man. Two vultures perched on the heart. Beneath it read the caption, "The Kiss of Death." See ROBERT PENN WARREN, *SEGREGATION: THE INNER CONFLICT IN THE SOUTH* 24-25 (1956).

15. For discussions of these types of stereotypes, see HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925*, at 535-36 (1976); GEORGE M. FREDERICKSON, *THE BLACK IMAGE IN THE WHITE MIND* 256-82 (1971); JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 111-51 (1984). "Of all the theories purporting to explain the role of sex in race relations," race theorist Charles H. Stember writes, for example, "none has received such widespread acceptance or has seen as many variations as the theme of black sexuality. . . . [T]he underlying theme that blacks are more passionate sexually, courses through all of them." CHARLES HERBERT STEMBER, *SEXUAL RACISM: THE EMOTIONAL BARRIER TO AN INTEGRATED SOCIETY* 54-55 (1976). "The notion of black sexuality has centered largely on the black male although the theory, in its pristine form, included both sexes." *Id.* at 55.

16. For a discussion of the cult of southern womanhood, see MCMILLEN, *supra* note 2, at 184-85.

17. See WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812*, at 473 (1968) (discussing the punishments, including castration, of black men who had or had attempted to have sexual liaisons with white women); WILLIAMSON, *supra* note 15, at 307-09. Expressing the threat of intermarriage in terms of white womanhood enabled segregationists to skirt the uncomfortable truth that white men had, prior to emancipation, taken advantage of black women with relative impunity. See *id.* at 307.

18. Tom Brady claimed in his Black Monday speech, for example, that "[t]he loveliest and the purest of God's creatures, the nearest thing to an angelic being that treads this terrestrial ball is a well-bred, cultured Southern white woman or her blue-eyed, golden-haired little girl." BRADY, *supra* note 3, at 45.

19. Frantz Fanon writes that throughout history, not only sexuality but also immorality and sinfulness in general came to be associated, in the white mind, with black men:

ists around the South began to do after *Brown*, Brady resurrected this allegory in his Black Monday Speech:

If trouble is to come, we can predict how it will rise. . . . The fulminate which will discharge the blast will be the young negro school-boy, or veteran, who has no conception of the difference between a mark and a fathom. The supercilious, glib young negro . . . will perform an obscene act, or make an obscene remark, or a vile overture or assault upon some white girl.²⁰

Although segregationists encountered little difficulty finding allegorical stereotypes of black moral and sexual behavior in southern racial mythology, they confronted a challenge to these assertions lodged in the very ruling they sought to reject. In footnote eleven of the *Brown* opinion, the Supreme Court cited specific scientific evidence showing that black children were not agents of destruction but victims of southern white oppression.²¹ Because it drove against some of the more powerful justifications for southern resistance to integration, this footnote became a significant thorn in the segregationists' side.²²

Stung by the Supreme Court's faith in what they believed was sociological trickery, and at the same time determined to show that their assertions regarding the nature of African-Americans were true,

[T]he black man is the symbol of Evil. . . . The torturer is the black man, Satan is black, one talks of shadows, when one is dirty one is black—whether one is thinking of physical dirtiness or moral dirtiness. It would be astonishing, if the trouble were taken to bring them all together, to see the vast number of expressions that make the black man the equivalent of sin.

FRANTZ FANON, *BLACK SKINS, WHITE MASKS* 188-89 (Charles Lam Markman trans., Grove Press 1967) (1952). As Dorothy E. Roberts shows, it was not only males who were implicated in the construction of myths that equated blackness to immorality. "One of the most prevalent images of slave women," she writes, "was the character of Jezebel, a woman governed by her sexual desires." Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, in *CRITICAL RACE THEORY*, *supra* note 10, at 384, 390.

20. BRADY, *supra* note 3, at 63-64.

21. See *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 n.11 (1954) (citing studies conducted by well-known social scientists like Kenneth B. Clark, Franklin B. Frazier and Gunnar Myrdal).

22. See James Reston, *A Sociological Decision*, N.Y. TIMES, May 18, 1954, at L14; RICHARD KLUGER, *SIMPLE JUSTICE* 711 (1975). One of the best analyses of the segregationist response to footnote eleven can be found in JAMES JACKSON KILPATRICK, *THE SOUTHERN CASE FOR SCHOOL SEGREGATION* 176 (1962) (contextualizing the footnote within an in-depth segregationist critique of the scientific evidence relied upon in *Brown*). Kilpatrick's editorials contributed significantly to segregationist resistance to *Brown*. See BARTLEY, *supra* note 2, at 129-30.

segregationists carried their resistance to a previously unexamined level. This Note demonstrates how segregationists proceeded to use social science evidence themselves as a tool for resistance to integration.²³ This maneuver was designed to support segregationists' rhetorical claims about black behavior. Part I discusses how segregationists used social science evidence, and particularly statistics on marriage and illegitimacy, as indicia of black immorality in order to scientifically verify otherwise mythological stereotypes of African-Americans.²⁴ Part II shows how a series of opaque laws on marriage licenses and birth certificates were passed after *Brown* to actually manipulate these statistics in order to bolster segregationist claims.²⁵ Specifically, it shows how these regulations lowered the statistical evidence of marriages and raised the statistical evidence of illegitimacy among blacks, thereby creating a statistical backdrop of immorality that resonated with and reinforced segregationist propaganda. Part III discusses how these laws not only created a segregationist justification for resistance to integration, but laid the foundation for new strategies of racial discrimination in the post-*Brown* South. It specifically illustrates how these laws created a coded discourse that enabled segregationists to further white supremacy by substituting supposedly neutral principles for overt classifications of race.

A central assumption of this Note is that the segregationist employment of social science, and particularly segregationist attempts to use statistics to devise new strategies of racial discrimination, were distinctly different from previously studied aspects of southern resistance. Scholars of the period, for example, have focused almost ex-

23. That segregationists would turn to social science to aid them in resistance to *Brown* is not a total surprise. After all, the intellectual leader of massive resistance, Judge Tom P. Brady, taught sociology at the University of Mississippi before becoming a lawyer. See COOK, *supra* note 2, at 15, 23.

24. Other indicia of immorality within black communities were also used, but to a lesser degree. These included rates of venereal disease, bigamy and fornication. See KILPATRICK, *supra* note 22, at 64.

25. This Note investigates these laws for the first time. Until now, attention has been focused primarily on laws designed to combat *Brown* directly, by impairing black political and economic power and generally obstructing attempts at desegregation. See generally BARTLEY, *supra* note 2, at 200-36 (outlining white southerners' concerted efforts at white solidarity and societal hegemony in the wake of *Brown*). The Bartley work is currently the definitive text on southern resistance to *Brown*. See also Michael Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, J. AM. HIST., June 1994, at 81, 101-18 (emphasizing *Brown's* role in crystallizing white southerners' desire to maintain educational and social segregation).

clusively on overt segregationist defiance to *Brown*.²⁶ They have concentrated specifically on segregationist attempts to thwart integration by engaging in relatively public strategies like closing schools, founding pupil placement programs, passing interposition resolutions and disenfranchising blacks.²⁷

The strategies that are examined in this Note represent a distinctly different mode of exercising power. Rather than relatively simplistic attempts to thwart integration, this Note shows that segregationists also engaged in highly discursive strategies of resistance that facilitated continued discrimination by recreating the way in which the law defined African-Americans. These strategies, partly because of their subtlety, were surprisingly modern in scope. By substituting abstract classifications of morality for race, they mimicked similar strategies employed, as Stanley Fish notes, by racists today:

The response of former and present bigots . . . is to figure out a way of appropriating . . . new vocabulary so that it transmits the same old messages. The favorite strategy is find a word or concept that seems invulnerable to challenge—law, equality, merit, neutrality—and then to give it a definition that generates the desired outcome.²⁸

By focusing on strategies imposed by segregationists after *Brown* that were discursive in nature, that tended to manipulate statistics and rhetoric, and that introduced new referents for race in both statutory and social practice, this Note provides a new perspective on the southern response to *Brown*.

26. See Klarman, *supra* note 25, at 97 (arguing that *Brown* drove the South into a state of racial fanaticism marked by the violent suppression of Civil Rights demonstrations in the 1960's and that *Brown* unleashed a "wave of racism that reached hysterical proportions" (internal quotation marks omitted)); see also BARTLEY, *supra* note 2, at 344 (summarizing southern resistance to *Brown* as culminating in "chicanery," "suppression," and "extralegal vigilante activities").

27. For discussion of segregationist strategies to close schools, and for discussion of the creation of pupil placement programs, see BARTLEY, *supra* note 2, at 275; for discussion of interposition resolutions, see *id.* at 126; for discussion of the disenfranchisement of African-Americans, see *id.* at 200-01.

28. STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH* 91 (1994).

I. SEGREGATIONIST EMPHASIS ON ILLEGITIMACY AND MARRIAGE RATES AS INDICIA OF IMMORALITY IN AFRICAN-AMERICAN COMMUNITIES FOLLOWING *BROWN*

In his work *The Southern Case for School Segregation*,²⁹ renowned Virginia journalist and segregationist James Jackson Kilpatrick³⁰ presented a case for continued segregation based on statistical measurements of a variety of African-American behaviors. This work, published in 1962—almost a decade after *Brown*—dramatizes the extent to which segregationists had turned away from mythological allusions and towards social science evidence to support their racist claims. Kilpatrick's work, which is laid out in the form of a legal brief, differs significantly from Judge Tom Brady's widely popular, flamboyant and at times even delusional Black Monday speech.

In support of his study, Kilpatrick cites, *inter alia*, statistics on levels of violent crime, incarceration, and scholastic test scores. He also refers to a variety of "moral signifiers," among them rates of premarital pregnancy and illegitimacy.³¹ Similar signifiers were used throughout the South beginning almost immediately after *Brown* to validate segregationist claims of the low moral level of African-Americans. Foremost among these were marriage and illegitimacy rates.

A. *The Use of Marriage Rates as Indicia of Immorality among Blacks*

After *Brown*, segregationists touted disparities between white and black marriage rates³² as statistical evidence that African-Americans were less moral than whites.³³ Charleston, South Carolina's *News and Courier* reported, for example, that:

29. See KILPATRICK, *supra* note 22.

30. Not only did Kilpatrick fight *Brown* via books like *The Southern Case For School Segregation* and through his editorial column in the *Richmond News Leader*, but he also played a significant role in segregationist politics. He was instrumental, for example, in the revival of interposition resolutions across the South. See BARTLEY, *supra* note 2, at 183.

31. See KILPATRICK, *supra* note 22, at 60-63.

32. On June 10, 1955, The Charleston *News and Courier* published an article entitled *Negro Marriages, Illegitimacy Up*, which noted that "[t]he U.S. Supreme Court's decision on public schools has opened a field of conversational topics regarding the social habits of the white and Negro races in the South. One of these concerns the proportion of white and Negro marriages, births and illegitimacy." *Negro Marriages, Illegitimacy Up*, THE NEWS AND COURIER (Charleston), June 10, 1955, at 12-A [hereinafter *Negro Marriages*].

33. See *id.* Segregationists were not the first to employ marriage as an indicator of morality. Similar comparisons were made by whites before the *Brown* decision. See GUTMAN, *supra* note 15, at 539.

While legal marriages (those where licenses are obtained and used) are on the increase among Negroes, the statistics show they still have a long way to go to catch up with white people. With an almost evenly divided population, in 1954 only 1,132 Negro couples obtained marriage licenses in [Charleston] county as compared with 2,104 whites.³⁴

Disparities in official marriage rates became more than a mere subject of segregationist interest; they ultimately evolved into indictments of black behavior. For example, a Mississippi newspaper reported 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.”³⁵ Assuming a posture common among whites in the South, Reverend Louis E. Dailey of North Carolina claimed that the rest of the country could not understand the supposedly true level of immorality among African-Americans. He asserted, for example, that “[s]outhern whites are the only people in America who can testify to . . . the low moral level of the Colored in marriage relationships”³⁶

Segregationists argued that the disparities in marriage rates between the races were a sign of moral inferiority. In reality, these disparities reflected the influence of slavery on the evolution of the black familial structure, which created significant differences between black and white families. It was common, for example, for slaves to have their own marriage ceremonies.³⁷ Additionally, frequent sales influenced the development of black families as extended kinship networks rather than as nuclear units.³⁸ These factors, particularly the tendency towards extended families, proved useful survival mechanisms for blacks facing the poverty and discrimination inherent in post-slavery America.³⁹ In deep South states like Mississippi, these mechanisms manifested themselves statistically in terms of high rates of common law marriage.⁴⁰

34. *Negro Marriages*, *supra* note 32, at 12-A.

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

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

37. *See* GUTMAN, *supra* note 15 at 347-48.

38. *See id.* at 342, 468.

39. *See* CAROL B. STACK, *ALL OUR KIN* 124 (1974).

40. *See* HORTENSE POWDERMAKER, *AFTER FREEDOM: A CULTURAL STUDY IN THE DEEP SOUTH* 143-49 (Atheneum 1969) (1939).

A long recognized tradition in black communities in the South,⁴¹ common law marriage shared the basic characteristics of state authorized marriage, but lacked the legal rights and obligations that accompanied it.⁴² Nevertheless, some states tolerated it and even counted common law relationships as legitimate.⁴³ To mention this fact, and to describe the historical realities that lay behind its evolution, however, would have greatly undermined the segregationists' goal of proving their assertions about the immorality of African-Americans. Consequently, segregationists ignored historical reality and concentrated instead on developing statistics to bolster racial stereotypes.

B. The Use of Illegitimacy Rates as Indicia of Immorality among Blacks

While segregationists commonly referred to low marriage rates as scientific evidence of black immorality, they placed even greater weight on a direct consequence of these rates: illegitimacy. In fact, illegitimacy became perhaps the greatest statistically measurable sign of supposed immorality within black communities. Citing a study completed in 1944 by Guy B. Johnson⁴⁴ which documented popular stereotypes about African-Americans, James Jackson Kilpatrick wrote:

Let us go back, for a moment, to Dr. Johnson's "stereotype." Manifestly, many of the characteristics he finds most widely attributed to the Negro are incapable of statistical measurement But one characteristic found to be more typical of the Negro than of the white is "high sexual indulgence, larger sphere of permissive sexual relations, . . . and high rate of illegitimacy." The illegitimacy, at least, can be statistically tabulated, and the appalling facts can be

41. See *id.* at 149 (describing the frequency of common law marriage within lower and middle class African-American communities).

42. See *id.* at 152-53 (describing the differences between common law and licensed marriage such as the legally enforceable property rights that accompanied licensed marriage). For a definition of common law marriage as understood by segregationists, see 1957 Op. Ga. Att'y Gen. 93 (noting that to establish a common law marriage, both parties must be able to make a contract, must actually make an agreement to live together as if they had a licensed marriage, and must consummate that agreement by cohabitation).

43. See Daniel E. Murray, *Domestic Relations*, 12 U. MIAMI L. REV. 428, 429 (1958) (noting the failure of a bill in Florida that would have abolished common law marriages).

44. See Guy B. Johnson, *The Stereotype of the American Negro*, in CHARACTERISTICS OF THE AMERICAN NEGRO 1-23 (Otto Klineburg ed., 1944).

faced . . . [T]he illegitimacy rate among Negroes in this country is roughly *ten times* the illegitimacy rate among whites.⁴⁵

Kilpatrick was not the only segregationist to focus on illegitimacy rates among blacks. *The Citizens' Council*, the official newspaper of the Citizens' Council movement, published an article on desegregation in Washington, D.C. in February 1957, which discussed differences in moral standards between the races, noting: "Racial differences in matters of health and moral standards are of acute concern to white parents. Official records on the incidence of venereal disease and pregnancies show that there is a sound basis for this concern. Approximately one-fourth of the Negro school children themselves are illegitimate."⁴⁶ Popular South Carolina journalist William D. Workman, Jr., whose columns were read across the South, drew similar conclusions based on illegitimacy rates in Washington D.C.:

"There were 3,533 illegitimate births of all ages in Washington in 1955, of which 382 were white and 3,151 colored." . . . Is it any wonder, in the light of such disclosures, that proposals for the forcible mingling of Negro and white children should draw such intense resistance from the mothers and fathers of the white children?⁴⁷

As the above quotation suggests, illegitimacy rates, because they were loaded with moral connotations and perhaps even more significantly because they were statistically measurable, presented what segregationists characterized as compelling scientific evidence that African-Americans were immoral. By focusing on these "objective" rates, along with statistics on low frequencies of marriage within African-American communities, segregationists attempted to substantiate claims that segregation was morally justified. The use of these statistics lent established stereotypes a veneer of scientific authority. This was an important asset, for it suggested to the world that prejudice in the South was founded not on superstition, but on scientifically supportable fact.

45. KILPATRICK, *supra* note 22, at 59 (second omission in original).

46. *Reaping the Whirlwind—Integration in Washington Creating Ominous Unrest*, CITIZENS' COUNCIL, Feb. 1957, at 3.

47. WILLIAM D. WORKMAN, JR., *THE CASE FOR THE SOUTH* 173-74 (1960) (quoting a report from a Georgia congressman who cited the testimony of a D.C. Department of Public Health employee).

II. MANIPULATING INDICIA OF BLACK IMMORALITY: INCREASED REGULATION OF MARRIAGE LICENSES AND BIRTH CERTIFICATES

Segregationists' emphasis on marriage and illegitimacy rates as indicia of high levels of immorality among African-Americans coincided with the introduction of a series of laws that increased the regulation of marriage and the recordation of illegitimacy rates across the South. These laws intentionally manipulated the indicia of marriage and legitimacy rates in order to bolster segregationist claims of black immorality. This occurred in two ways. First, by increasing the regulation of marriage licenses, the laws made legitimate marriages harder to obtain. This difficulty consequently lowered marriage rates and increased illegitimacy rates among blacks.⁴⁸ Second, by increasing regulations on birth certificates, the laws insured that out-of-wedlock births would be recorded and tabulated, thereby raising reported black illegitimacy levels.

A. Increased Regulation of Marriage Licenses

Regulations on marriage licenses increased across the South after *Brown*. On July 1, 1958, for example, Louisiana passed a law that required individuals applying for a marriage license to present certified copies of their original birth certificates along with medical certificates dated within ten days of the license application.⁴⁹ Both requirements introduced administrative hurdles into the process of acquiring a licensed marriage. The medical certificate had to verify that the party was not carrying any venereal diseases, and had to be signed by a physician.⁵⁰ Although less emphasized than low rates of marriage and high rates of illegitimacy, rates of venereal disease within black communities were also used by segregationists to validate racist claims regarding the "moral character" of African-

48. It is important to note that these laws also affected whites. In other words, common law marriage and illegitimacy were by no means limited to African-American communities. As this Note shows, however, segregationists focused on marriage and illegitimacy rates among blacks in order to further their discriminating goals.

49. See 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).

50. See Act of July 1, 1958, 1958 La. Acts at 610.

Americans.⁵¹ Such claims suggest this law not only threw an added hurdle into the marriage license process, but directly targeted blacks through assumptions about their behavior.

In 1956, Georgia passed an act incorporating a series of requirements for obtaining a valid marriage license.⁵² The statute required, for example, that each license be directed to a judge, justice of the peace, or minister of the gospel to authorize the marriage.⁵³

Other requirements made it harder for day-laborers to obtain a license. For example, one provision declared that marriage licenses could be granted only by the registrar, or his clerk, at the county courthouse, between the hours of 8 A.M. and 12 P.M.⁵⁴ Of course, most people worked between these hours. As an accommodation to workers, the act declared that the clerk of court could also grant licenses at his personal residence. This provision, favoring those who either knew the clerk personally or felt comfortable approaching his private residence, may explain how whites got around the otherwise awkward time schedule.⁵⁵

In 1957, Georgia passed an act that may have imposed a more significant burden on many license applicants. The Georgia act declared that the dissolution of previous marriages would no longer be presumed when an individual applied for a marriage license.⁵⁶ Instead, the applicant carried the burden of proving that any prior marriages had been legitimately dissolved via divorce.⁵⁷ This law, like the Louisiana requirement that applicants for a license produce a medical certificate attesting to the absence of venereal disease, may also have targeted African-Americans in particular. Usually not in possession of a state authorized marriage license in the first place, Afri-

51. See W.E. DEBNAM, *THEN MY OLD KENTUCKY HOME, GOODNIGHT!* 97 (1955) (emphasizing the fact that reported cases of syphilis were 12 times higher among African-Americans in Virginia than among whites).

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

53. See *id.* This measure may have been passed not only to limit the number of people who could perform a marriage, thereby making a license harder to get, but may also have been passed in anticipation of the fall of antimiscegenation laws in the South. Supposing that the antimiscegenation statutes were struck down in Georgia, this act could make it very hard for interracial couples to find an individual to perform their marriage. For example, a 1954 attorney general opinion discusses a prohibition against African-American ministers performing marriages for anyone other than African-Americans. See 1954 Op. Ga. Att'y Gen. 155, 155.

54. See Act of Feb. 14, 1956, 1956 Ga. Laws at 43, 44.

55. See *id.*

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

57. See *id.*

can-Americans could rarely obtain an official divorce,⁵⁸ yet common law marriage could only be legally dissolved by an official divorce decree.⁵⁹

Although regulations on marriage were increased significantly in Georgia and Virginia, the most profound regulations on marriage were passed in Mississippi. This is no surprise; Mississippi, the heart of what was then known as the "black belt," contained counties with some of the highest percentages of black to white ratios in the nation, a situation that impressed upon segregationists the imperative of maintaining segregation and white supremacy.⁶⁰ Because Mississippi increased regulations on marriage more than any other state, it serves as a particularly good case study of how statistics of moral tendencies were not only increasingly emphasized after *Brown*, but were actually manipulated.

In 1956, the Mississippi legislature passed several bills that increased the regulation of marriage and marriage licenses in the state.⁶¹ Evidence that these bills were intended to become part of a larger scheme to fight integration emerged in the *Baton Rouge Morning Advocate* on April 1, 1956. "Moving swiftly through the final hours," the paper reported, "[Mississippi's] two houses passed: The governor-endorsed bill outlawing common-law marriages, the last of a block of bills designed to throw up a bulwark around the state's segregation laws. The theory of the bill was to set up unfavorable moral background as a basis for segregation."⁶²

58. See *infra* text accompanying note 70.

59. Common law marriages still require a formal divorce in order to be legally dissolved. See LESLIE J. HARRIS ET AL., *FAMILY LAW* 151 (1996).

60. For a discussion of the racial make-up of certain key counties in Mississippi, and why that influenced the level of segregationist resistance, see MCMILLEN, *supra* note 2, at 19-20; see also BARTLEY, *supra* note 2, at 84-86.

61. See *infra* notes 63-66 and accompanying text. The year 1956 marked the apex of segregationist resistance to *Brown*. Commenting on a Citizens' Council rally held in celebration of the denial of admission of African-American student Autherine Lucy to the University of Alabama, John Bartlow Martin wrote:

The date was February 11, 1956. It was, perhaps, high tide of the Council movement, its greatest hour. After that night there could be no doubt that the South, the only section of the United States which has ever gone through the excruciating experience of being enemy-occupied territory, had found in the Citizens' Councils a flag to rally round. The Deep South was solid once more.

MARTIN, *supra* note 2, at 41.

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

Mississippi's statute required all marriage applicants to obtain marriage licenses, it limited the group of individuals who could perform marriage ceremonies, and it declared marriages entered into without licenses or without authorization void.⁶³ This act, which did not operate retroactively, effectively ended recognition of common law marriage in the state.⁶⁴ Consequently, it struck at the heart of black familial relations and created a situation ripe for the statistical tabulation of immorality within black communities. Individuals engaged in common law relationships no longer had legally recognized marriages and children born out of common law relationships had no defense against allegations of illegitimacy. Senator W.B. Alexander, one of the ten Senators who opposed the bill, appealed to the hearts of the legislators and called "it 'a cruel thing' to illegitimize children and force them to live in adultery," particularly since "common-law marriages have been recognized among English speaking people for centuries."⁶⁵

In conjunction with its invalidation of common law marriage, Mississippi enhanced the mechanism through which this delegitimation could be captured statistically. Specifically, it required that forms showing detailed information about marriage license applicants, including their race, number of past marriages and how their last marriage (if any) was terminated, be attached to marriage licenses and later sent to the Bureau of Vital Statistics of the State Board of Health.⁶⁶ These statistics were sent to the National Bureau of Vital Statistics in Washington, D.C. A look at the national statistics reveals the effectiveness of the block of statutes described above.

63. See Act of Apr. 5, 1956, ch. 239, 1956 Miss. Laws 289. Hortense Powdermaker, in his cultural study of the deep South, noted that Mississippi had traditionally recognized common law marriage. See POWDERMAKER, *supra* note 40, at 149.

64. See Act of Apr. 5, 1956, 1956 Miss. Laws at 289.

65. *Coleman Secures Passage of Bill to Aid Segregation*, CLARION-LEDGER (Jackson, Miss.), Mar. 31, 1956, at 1. The actual vote in the Senate was 29 to 10 in favor of the bill. See *id.*

66. See Act of Mar. 22, 1956, ch. 302, 1956 Miss. Laws 399. The Bureau of Vital Statistics, in Mississippi and other southern states, was the agency that tabulated statistics on race and morality. J. David Smith wrote of W.A. Plecker, Virginia's Registrar of Vital Statistics, that "[a]s State Registrar of Vital Statistics, Plecker was in a strategic and powerful position relative to race issues. For years he . . . pursued with vengeful enthusiasm individuals and groups he felt were violating the race integrity laws of Virginia or what he perceived to be the natural laws of racial separation." J. DAVID SMITH, *THE EUGENIC ASSAULT ON AMERICA* 60 (1993).

FIGURE 1
MARRIAGE RATES IN MISSISSIPPI (WHITE AND BLACK)
1955-1959

The overall marriage rate in Mississippi, as the above figure shows, declined significantly following the increased regulations on marriage in the state.⁶⁷ How did this breakdown work for African-Americans in particular? Although no evidence on marriage rates is available prior to 1957, evidence is available on illegitimacy rates.

Prior to the enactment of the laws, the illegitimacy rate among African-Americans in Mississippi was fairly stable. In 1955, the rate was 212.4 per 1000;⁶⁸ it remained close this level in 1956, at 212.3 per 1000.⁶⁹ By 1957, however, after the passage of the laws, the rate jumped to 221.2 per 1000.⁷⁰ This rate leveled off to 220.5 in 1958 but then rose significantly to 238 per 1000 in 1959.⁷¹

In contrast to the increase in black rates of illegitimacy between 1955 and 1959, white rates remained virtually the same. In 1955, for example, white rates of illegitimacy were at 10.3 per 1000.⁷² By 1956, this rate, like the black rate, had changed little, resting at 11.2 per

67. See U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, I VITAL STATISTICS OF THE UNITED STATES 1959, at 3-29 [hereinafter 1959 VITAL STATISTICS].

68. See U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, I VITAL STATISTICS OF THE UNITED STATES 1957, at LXXXIV [hereinafter 1957 VITAL STATISTICS]; 1959 VITAL STATISTICS OF THE UNITED STATES, *supra* note 67, at 3-29.

69. See 1957 VITAL STATISTICS, *supra* note 68, at LXXXIV; 1959 VITAL STATISTICS, *supra* note 67, at 3-29.

70. See 1957 VITAL STATISTICS, *supra* note 68, at LXXXIV; 1959 VITAL STATISTICS, *supra* note 67, at 3-29.

71. See 1957 VITAL STATISTICS, *supra* note 68, at LXXXIV; 1959 VITAL STATISTICS, *supra* note 67, at 3-29.

72. U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, I VITAL STATISTICS OF THE UNITED STATES 1955, at LXXV.

1000.⁷³ In 1957, however, while black rates rose dramatically from 212.3 to 221.1, white rates remained virtually unchanged at 11.1 per 1000.⁷⁴ In 1958 and 1959, the white rate again remained nearly unchanged at 12.2 and 12.8 respectively.⁷⁵ A graph charting the differential in rates of change between illegitimacy levels of the two races reveals the extent to which the legislation passed in 1956 enhanced statistics on illegitimacy among blacks.

FIGURE 2

THE DISPARITY IN RATE OF GROWTH BETWEEN BLACK AND WHITE
ILLEGITIMACY RATES IN MISSISSIPPI, 1955-1959

While the rise in black illegitimacy rates in Mississippi can be attributed to drastic changes in marriage laws, this does not mean that marriage laws alone contributed to the increase reflected in these statistics. Even prior to the enactment of these laws, illegitimacy rates among African-Americans were significantly higher than the rates among whites. At the very least, however, Mississippi's laws reveal a sudden segregationist interest in tabulating rates of illegitimacy in the state. Laws passed in other southern states reveal a similar interest by the states in statistically measuring the racial distribution of illegitimacy within their borders.

73. See 1959 VITAL STATISTICS, *supra* note 67, at 3-29.

74. See *id.*

75. See *id.*

B. Increased Regulation of Illegitimacy

In 1957, North Carolina passed a broad-reaching act that reorganized the public health laws of the state.⁷⁶ This act 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.⁷⁷ Information regarding the parentage of the child was to be included on the birth certificate.⁷⁸ Illegitimate children could only be given the father's last name with the father's written consent,⁷⁹ and without such consent, the child received the mother's surname.⁸⁰ Consequently, it became apparent from the birth certificate whether or not the child was illegitimate. This data went directly to the state registrar.⁸¹

Although the increased regulation of birth certificates in North Carolina is significant, other states' regulations were even more dramatic. In 1954, for example, Louisiana passed an act that stated: "[A]ll children, upon entering the first grade of any school in the State of Louisiana shall be required to present a copy of their official birth record to the school principal."⁸² Arkansas passed a similar rule: "From and after the passage of this Act no child shall be 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."⁸³ These laws created a means of tabulating illegitimacy rates for children who were already born, widening the statistical net for indicia of immorality in both states.

The increased reach of statistical measurement, evident in laws on birth certificates like the ones in Arkansas, Louisiana, and North Carolina, as well as the increased regulation of marriage licenses in Georgia, Louisiana and Mississippi, embodied different manifestations of the same basic strategy. By reconfiguring the law in a way that discredited traditional modes of black family formation,⁸⁴ these

76. See Act of June 12, 1957, ch. 1357, 1957 N.C. Sess. Laws 1458.

77. See *id.*, 1957 N.C. Sess. Laws at 1478.

78. See *id.*, 1957 N.C. Sess. Laws at 1479.

79. See *id.*

80. See *id.*

81. See *id.*

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

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

84. Traditional modes of black family formation included not only common law marriage but in particular extended families. Often, these families were not marked by direct ties of kin-

regulations enhanced the statistical perception that African-Americans were immoral, and that segregationists were therefore ethically justified in denying them equal rights.

III. SHIFTING THE GROUNDS OF RACIAL DISCRIMINATION FROM COLOR TO CHARACTER

While legislation on marriage and illegitimacy enabled segregationists to bolster the moral argument against integration, it also laid a foundation for new strategies of racial discrimination in the South. Not only did the laws enhance the perceived immorality of African-Americans, but they also facilitated the use of moral character rather than color as an overt basis for racial discrimination. Laws in Georgia, Mississippi and Louisiana all provide examples of how this strategy worked.

In 1958, Georgia passed a voter registration act that enabled voters to register in two different ways.⁸⁵ Voters could either read and write intelligibly a section of the Georgia or U.S. Constitution, or they could exhibit good character and an understanding of the duties of citizenship by responding to a set of questions.⁸⁶ Due to the relatively high rate of illiteracy among poor people of both races in the state, most black applicants chose to answer the questions despite the fact that the majority of them were disqualified based on their answers.⁸⁷ Southern writer Stetson Kennedy commented on this use of moral character as a criteria for purging black voters from registration lists in Georgia:⁸⁸

The purge procedure as evolved by Georgia is simplicity itself. You receive a legal summons to appear before the county board of registrars at a specified time (invariably during work hours) to 'show cause' why your name should not be dropped because of 'bad character', 'criminal record', etc. If you fail to appear, your name is

ship, and therefore were viewed by whites as immoral. Rather than signs of immorality, however, these modes developed as a natural response to unique historical conditions faced by black people, the most profound of these conditions being slavery. For example, slaves were not allowed to obtain licensed marriages. Further, the pressures of slave life, and in particular the division of families through sale, contributed to less formal family structures. See GUTMAN, *supra* note 15, at 222-29.

85. See Voters' Registration Act, No. 321, 1958 Ga. Laws 269, 278.

86. See *id.*, 1958 Ga. Laws at 278-82.

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

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

automatically stricken; if you do appear, it is usually stricken just the same.⁸⁹

Mississippi, like Georgia, also began to consider bad moral character as grounds for rejecting applications to vote. Mississippi state Representative Thompson McClellan introduced a resolution requiring that voters be "of good moral character" in order to register.⁹⁰ This resolution, which made the county registrar the judge of each applicant's character,⁹¹ was adopted by the Senate on April 28, 1960, and by the House a few days later.⁹² It was written into the constitution on May 23, 1962.⁹³

Shortly after the resolution requiring good moral character was introduced, Mississippi state Representatives Russell Fox and Thomas McClellan introduced a qualification to the bill that would have tightened voter qualifications to exclude parents of illegitimate children and persons living together in common law marriages.⁹⁴ Although the resolution never passed,⁹⁵ it suggests a link in the minds of certain legislators between moral character, illegitimacy and common law marriage.

Louisiana provides a more compelling example of how far and in just how many ways racial discrimination could be furthered through the creation of a coded discourse for race. In 1960, the Louisiana legislature submitted two constitutional amendments to a statewide referendum to limit voting rights to those who had not committed a moral crime or misdemeanor and who could otherwise establish good moral character. 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,"⁹⁶ and those who had "given birth to an illegitimate child within the five years immediately prior to the date of making application for registration as an elector did not possess good character."⁹⁷ The amendments, which were passed on November 8, 1960, empowered county registrars to deter-

89. *Id.*

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

91. *See Work Rights Vote Okayed*, CLARION-LEDGER (Jackson, Miss.), Apr. 20, 1960, at 1.

92. *See Act of May 5, 1960, Concurrent Resolution, 1960 Miss. Laws 886, 886.*

93. *See Act of May 23, 1962, 1962 Miss. Laws 1011, 1012.*

94. *See Plan to Limit Negro Voters in Mississippi*, *supra* note 89, at 11-A.

95. *See Act of May 23, 1962, 1962 Miss. Laws at 1012.*

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

97. *Id.*

mine whether individuals were either in common law marriages or had illegitimate children.⁹⁸

While the amendments were under consideration, certain legislators expressed concern that registrars, as the only judges of moral character, would abuse their privileges. One such legislator, state Senator Adrian Duplantier of New Orleans, in jest, “pleaded unsuccessfully for amendments to assure that a man won’t be deprived of the vote because a hostile registrar decides his ears resemble those of an illegitimate child.”⁹⁹ In explaining this statement, Duplantier referred to a newspaper article “saying a Little Rock, Ark., judge decided paternity cases by comparing ears of male children with ears of purported fathers.”¹⁰⁰ Duplantier continued, “this is what worries me about letting the registrar decide about me and you being the fathers of illegitimate children If he thinks you look like an illegitimate child he saw recently, he can strike you from the rolls for siring an illegitimate child.”¹⁰¹

Duplantier’s fear of the power of state registrars to strike potential voters suspected of parenting illegitimate children was probably not completely sincere. Given the political context of the time, it is more likely that he was concerned that the broad language of the legislation, in striking anyone with a misdemeanor, would prevent not blacks, but whites from voting. Senator Charles Deichmann, who later co-authored an amendment to the bill with Duplantier, focused on Duplantier’s real fear. As the *Morning Advocate* reported, “Deichmann complained the bill to allow voters to be challenged if the registrar determines they are of bad character made no provision ‘to take care of the city boys who get into trouble from time to time.’”¹⁰² Although not explicitly acknowledged by Deichmann, the “the city boys” undoubtedly referred to whites in his electoral district of New Orleans, whites who might be prevented from registering under the overinclusive misdemeanor bill. Deichmann hinted at this when he offered amendments that would have deleted the provisions regarding misdemeanors from the bill, stating, “[m]y amendments are politically motivated I feel an obligation to protect the people

98. See *id.*, 1960 La. Acts at 28.

99. *Senate Passes Segregation, Withhold Bills*, MORNING ADVOC. (Baton Rouge), July 1, 1960, at 1-A.

100. *Id.*

101. *Id.*

102. *Id.*

who elected me I want to protect the interests of the people I represent who may be confronted by hostile registrars."¹⁰³

Additional evidence that Deichmann was referring to whites and not blacks emerges from the content of the amendments he proposed to substitute for the misdemeanor provision. These amendments, submitted by both Deichmann and Duplantier, requested specifically "that provisions be written into the voter qualification bill to allow a person to be disqualified only if he has been convicted of the newly legislated crimes of common law marriage and having an illegitimate child."¹⁰⁴ Such crimes, incidentally, were submitted as part of a Joint Resolution to amend the state constitution along with amendments that retained the disqualification of voters based on prior misdemeanors.¹⁰⁵ Approved on November 8, 1960, the amendments were followed by the language, "[t]he above enumerated acts denoting bad character shall not be deemed exclusive hereunder but said bad character may be established by any competent evidence."¹⁰⁶ As the debate over voter disqualification in Louisiana suggests, after *Brown*, moral character began to emerge as a coded way of speaking about race. Rather than discriminate against African-Americans based on their color, in other words, segregationists began to discriminate against them based on preconceptions regarding their character.

Perhaps the best example of how moral classifications replaced overt references to color emerged in Louisiana in the form of statutes regulating welfare. In 1960, Louisiana 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."¹⁰⁷ In conjunction with this act, Louisiana passed another law 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, unless and until proof . . . has been presented showing that the mother has ceased illicit relationships and is maintaining a suitable home for the child or children.¹⁰⁸

103. *Id.*

104. *Id.*

105. See Act No. 613, Joint Resolution, 1960 La. Acts 24, 25-26 (Constitutional Amendment).

106. *Id.*, 1960 La. Acts at 26.

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

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

Couched in neutral language as a drive to improve morality, the law affected some 6000 women, 95 percent of whom were African-American; it derivatively affected 23,000 African-American children.¹⁰⁹

Louisiana's bill denying welfare benefits on grounds of illegitimacy coincided with an increased tendency to disguise discrimination as moral reform. Louisiana state Senate nominee Wendell P. Harris, representing the East Baton Rouge Parish, described Louisiana's bill to deny welfare benefits to families with illegitimate children in terms that suggested the bill was designed to promote admirable qualities, completely masking the statute's true intent. During a breakfast held before the Louisiana Chamber of Commerce's governmental affairs committee, he stated, "I fear that our welfare program has gone too far," and continued, "I am afraid that through our generosity we are breaking the will of initiative and ambition for our citizens to work for themselves."¹¹⁰ A member of the Welfare Board echoed Harris's neutral statement by noting that there had been "considerable public bitterness about the question of tax support for single women who don't care how many illegitimate offspring they have."¹¹¹

Despite the tendency of politicians like Harris to disguise racially motivated statutes as moral reform, the transition to completely neutral language was not immediate. Some legislators, in other words, did not catch on. Another member of the Welfare Board, for example, stated outright that:

Negroes in the South don't look upon illegitimacy as anything wrong. Even their ministers, I understand, sort of have their own traditions about this. We should try to get the Negro leaders to change this pattern of illegitimacy, by working through the many

109. See Editorial, *Suffer Little Children*, NATION, Sept. 24, 1960, at 171, 171. *The Nation* described the bill and stated,

It provides that relief funds (mostly federal money, but distributed by the state) shall be withheld from any woman who has an illegitimate child after she is registered on the welfare rolls. As of today, that affects some 6,000 women, 95 percent of whom are Negro, the mothers of some 23,000 children. The private agencies have been completely overwhelmed by this disaster

Id.

110. Harris, *McGehee Talk on Legislative Plans*, MORNING ADVOC. (Baton Rouge), Apr. 6, 1960, at 5-B.

111. *Board Stiffens Welfare Aid Policy in Illegitimacy Cases*, MORNING ADVOC. (Baton Rouge), Apr. 9, 1960, at 7-B.

Negro organizations They'll listen to their own leaders more than they will to us.¹¹²

This rise of moral rhetoric as an opaque means of referring to race relied, in many cases, on rates of illegitimacy and common law marriage, many of which had been artificially generated only a few years previously. Tom Ethridge, a columnist for the (Jackson) *Clarion-Ledger*, stated in 1960 that "Mississippi is in second place [in the Union] with 126 illegitimate births among every 1,000 babies. Figures show the great majority of these are colored."¹¹³ He continued:

Throughout the South there is strong sentiment for restricting welfare aid where unwed mothers have more than one illegitimate offspring, but federal regulations have been a major obstacle to state restrictions. Washington puts up matching funds for much of the state welfare benefits and Uncle Sam appears to be rather broad-minded about promiscuity, especially where his "chosen people" are concerned.¹¹⁴

A veiled allusion to African-Americans, Ethridge's reference to the federal government's "chosen people," shows not only that "illegitimacy" had become a code for "black," but that it had also become an indictment. Segregationists like Ethridge found ways not only to discriminate against blacks via neutral language, but to recast them as a cause, rather than a victim, of injustice. Ethridge mentions, for example, that the high cost of illegitimacy in the state resulted in the denial of benefits to those who truly deserved them. Citing Louisiana Governor Jimmie Davis, he writes, "Davis has said the high cost of illegitimacy 'is unfair to the children, unfair to taxpayers and to the old, sick people who have led upright lives. If it were not for this situation, we could take better care of our deserving needy and still have money left.'"¹¹⁵ Subtly transforming blacks from targets into perpetrators of injustice, Ethridge wrote, "White newspapers are often plain-spoken in discussing this problem. The nation's Negro press, however, generally softpedals the subject, undoubtedly because Negroes figure so prominently in what has been called 'tax-

112. *Id.*

113. Tom Ethridge, *Mississippi Notebook*, CLARION-LEDGER (Jackson, Miss.), May 3, 1960, at 11.

114. *Id.*

115. *Id.*

subsidized bastardy.’ (In protests against ‘second class citizenship’, illegitimacy is never mentioned.)”¹¹⁶

By focusing on illegitimacy rates among African-Americans, rates that had been artificially increased by covert legislative means, segregationists achieved two important political goals. Not only did they develop a new mechanism for furthering racial discrimination based on facially-neutral language, but by substituting the quality of blackness for the characteristic of immorality, they transformed blacks from the victims of wrong, to the agents of it. Segregationists, in other words, developed a language that enabled them to disguise racial discrimination as moral reform.

CONCLUSION

The technique of employing neutral terms like moral character and illegitimacy as code words for race was particularly effective in promoting racial discrimination in the post-*Brown* South. It provided segregationists with a strategy for perpetuating racial discrimination without the complications of appearing racist. This was an art that, thanks to the overt nature of Jim Crow, the South had enjoyed the luxury of not having to perfect prior to *Brown*. Following *Brown*, however, the South learned quickly to employ more sophisticated techniques of furthering white supremacy. These techniques, to borrow from a critique leveled by Stanley Fish against right-wing rhetoric today, employed words as “stand-ins for prejudicial attitudes that could no longer be openly displayed but could be displayed under cover of a sanitized vocabulary that proclaimed the ideological innocence of its users.”¹¹⁷

Not only did segregationists find a new vocabulary for referring to race following *Brown*, but through an increased regulation of marriage and illegitimacy they were able to clothe that vocabulary in a garment of fact. Social science, in other words, became an important tool that segregationists manipulated to promote racist ends. This

116. *Id.*

117. FISH, *supra* note 28, at 92. Although it is beyond the scope of this Note, the evolution of segregationist rhetoric following *Brown* helps contextualize prevailing trends in conservative rhetoric today. See, e.g., CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 65 (Ed Gillespie and Bob Schellhas eds., 1994) (stating that “[t]o reverse skyrocketing out-of-wedlock births that are ripping apart our nation’s social fabric, we provide no welfare to teenage parents and we require that paternity and responsibility be established in all illegitimate births where welfare is sought.”).

use of social science emerged as a reaction to the Supreme Court's reliance on sociology in deciding *Brown* that has so far gone unnoticed by scholars of the period.¹¹⁸

Finally, the combined strategies that segregationists employed not only created a neutral language for race that was substantiated by scientific evidence, but enabled segregationists to recast racial discrimination as moral reform. It enabled them to claim that African-Americans, and not themselves, were the purveyors of wrongdoing and that by discriminating against blacks in opaque rather than overt ways, they were in fact upholding virtue. In a reference to modern racism that could have referred to the 1950s just as easily as the present, Stanley Fish wrote "[i]t's like alchemy or magic, now you see white supremacy, but, presto chango, it is given a new description, and now you see 'equality for everyone' with no change whatsoever in the practice or the outcome."¹¹⁹ Fish goes on to refer to the perversions of Martin Luther King's teachings by modern day racists. Long before King proclaimed "I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character,"¹²⁰ segregationists in the South were building the framework for a system that would do just that, and maintain white supremacy in the process.

118. For a discussion of the role that social science evidence played in the Supreme Court's ruling in *Brown*, see KLUGER, *supra* note 22, at 315-45.

119. FISH, *supra* note 28, at 91.

120. Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), in THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 217, 219 (James M. Washington ed., 1986).