

JIM CROW'S LONG GOODBYE

*Gabriel J. Chin**

I. INTRODUCTION

Most judicial discussions of affirmative action and racial justice are unsatisfying because they omit a fundamental category of evidence: Information which would provide a basis for evaluating the scope of Jim Crow and its systematic consequences. Some assessment of the entirety of the institution is necessary to have an informed view of whether Jim Crow has been eliminated. While there is much scholarship, legislative history and jurisprudence about particular issues such as school segregation or racial disenfranchisement, especially at specific times and places, there is apparently no source which makes it possible to analyze the scope of racial discrimination through law and custom over time on a national level. There is no source, for example, identifying all of the school systems in the United States that were segregated by law or custom, no reference listing even the largest governmental agencies and corporations known to have practiced formal racial discrimination in employment.

The absence of systematic factual information and the consequent necessity of over-reliance on intuition are significant because the Supreme Court and its justices often explore the question of whether it is time to declare that they have put America's race problem behind them. In exploring these questions, the jus-

* Chester H. Smith Professor of Law & Co-Director, Law, Criminal Justice and Security Program, University of Arizona James E. Rogers College of Law. LL.M., Yale Law School, J.D., Michigan Law School, B.A., Wesleyan University. Co-counsel, Brief of the Society of American Law Teachers as Amicus Curiae in Support of Respondents in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241). I am very grateful to Guy Uriel-Charles and Luis Fuentes-Rowher for organizing this symposium, to Wendy Parker for her advice on this essay, to Charles Ares, Jim Gardner, Suja Thomas and Ted Stock, and particularly to my fellow members of the Jim Crow Study Group, Professor Roger Hartley of the University of Arizona School of Public Administration and Policy, Salmon Shomade, Esq., (Ph.D. candidate); Kevin Bates (M.P.A. candidate 2005), Rona Nichols (J.D. candidate 2005), and Ira Shiflett (J.D. candidate 2005).

tices seem to believe that a level playing field is both important and legally significant.

In *Grutter v. Bollinger*,¹ a majority of the Court concluded that the promised land had not yet been reached. The majority approved an affirmative action program at the University of Michigan Law School; in a series of opinions, every member of the Court addressed the question of when affirmative action would be unnecessary. Justice O'Connor's opinion for the majority noted that:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.²

Whatever the actual underlying rationale for this forecast,³ the Court's prediction rests on the idea that within 25 years, a sufficiently racially diverse student body will be achieved through ordinary sorting and application processes. When that happens, the decades of debate about the permissibility of affirmative action and the rationales for it will become moot; affirmative action will not be justified as a means of remedying past discrimination, because it will have been remedied, and it will not be justified as a means of achieving diversity because diversity will result automatically, just as it does, for example, with respect to Asian Americans, Italian Americans, and those of the Jewish faith.

Although the perspectives of the concurring and dissenting opinions were quite different, they shared with the majority the explicit or implicit premises that race-neutrality is desirable, that the nation is moving towards racial fairness and that judges can

1. 539 U.S. 306 (2003).

2. *Id.* at 343 (citation omitted).

3. As Dean Kevin Johnson cogently observed, the timetable is surprising in the context of a decision upholding diversity as a compelling state interest. "If a diverse student body is the justification for affirmative action, it is uncertain why the law would require a time limit." Kevin Johnson, *The Last Twenty Five Years of Affirmative Action?* 21 CONST. COMMENT. 150 (2004). That is, there is no reason to assume that diversity will not be as desirable in a century or millennium as it is now. If diversity is the true rationale for the Court's decision, then the time limit does not at first blush make an enormous amount of sense, and Dean Johnson is right that the Court's language contains the possibility of sympathy to the idea that the real justification for the program, and a legitimate one, is remedying past discrimination.

tell when (or that) the nation has achieved equal opportunity. Justice Thomas's dissent quoted Frederick Douglass, who argued for nothing more or less than equitable treatment: "What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*."⁴

Justice Ginsburg argued that the legacy of past discrimination was too weighty either to declare victory now, or even to establish any particular time limit:

As lower school education in minority communities improves, an increase [in minority students with high grades and test scores] may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.⁵

The opinions rest on the core value of equal opportunity, which seems to be the "justice" desired by Justice Thomas, as well as the engine of the increased grades and test scores predicted in Justice O'Connor's opinion, and hoped for in Justice Ginsburg's.

Judicial evaluation of the development of African Americans in the context of the larger society is part of a long judicial tradition. In 1883, in the *Civil Rights Cases*,⁶ the Court held that the Fourteenth Amendment applied only to state action, and thus that Congress had no power to prohibit private discrimination. They were also exasperated with undue congressional concern for special rights for African American:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected by the ordinary modes by which other men's rights are protected.⁷

4. *Id.* at 350 (Thomas, J., concurring and dissenting) (quoting Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865*, reprinted in 4 *THE FREDERICK DOUGLASS PAPERS* 59, 68 (J. Blassingame & J. McKivigan eds., 1991)) (emphasis in original).

5. *Id.* at 346 (Ginsburg, J., concurring).

6. 109 U.S. 3 (1883).

7. *Id.* at 25. Justice Harlan proposed that it was "scarcely just to say that the colored race has been the special favorite of the laws." *Id.* at 61 (Harlan, J., dissenting).

In *Regents of the University of California v. Bakke*⁸ Justice Blackmun voted for affirmative action with simultaneous conviction and regret:

I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown v. Board of Education*, 347 U.S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one.⁹

Again, although the conclusions differed, a century apart, both opinions reflected confidence that the "stage" of African American progress could be reliably determined. However, they support their conclusions primarily with judicial decisions, which, even if not quite random, cannot be assembled to create an accurate picture of the world.

Judges could not base their decisions on systematic analyses of Jim Crow because there are no systematic analyses of Jim Crow. For example, we know there was segregation in the schools, but there is no single source identifying the school districts in this country practicing unconstitutional racial segregation and what happened in those school districts after *Brown v. Board of Education*. We know African Americans used to be excluded from all jobs or good jobs at some institutions, but there is no catalog of the major corporate and governmental employers who refused to hire African Americans and when those policies ended. We know African Americans and others used to be denied the right to purchase property in particular areas through racially restrictive covenants in real estate documents, but there is no national calculation of the prevalence of restrictive covenants and their effects on African American housing patterns and African American wealth creation. We know African Americans used to be denied the right to serve on juries in criminal and civil cases, but there is no estimate of the number of verdicts that might have been affected by this discrimination, or their economic and other consequences. We know that laws were passed to harm members of particular races, but there has been no effort to identify the laws still on the books designed to promote racial separation or deny African Americans equal opportunity.

8. 438 U.S. 265 (1978).

9. *Id.* at 403 (Blackmun, J.).

There are two major implications of the absence of this type of evidence. First, there has never been a formal national project to eliminate the structure and effects of racial discrimination the way there has been, for example, to eliminate polio or provide a national highway system. Such a project would be impossible without reliable information about the scope of racial discrimination. In the absence of a conscious, systematic effort to eliminate the vestiges of past discrimination it is much less likely that it will happen. Second, there has been no calculation of the national effects of racial discrimination, how society at any point differs from how it would have looked in the absence of discrimination. Again, such a calculation is impossible in the absence of systematic information about the scope of racial discrimination.

Part II of this essay examines one of the most heavily studied and litigated aspects of Jim Crow, the state legislative response to *Brown v. Board of Education*, and shows that much of the statutory effort to evade *Brown* in the former Confederate states remains on the books, some of it in ways that could be used to discriminate on the basis of race now.¹⁰ Part III explores some of the implications of the fact that large portions of the states' efforts to defy the Constitution remain on the books.¹¹ The essay concludes by proposing a comprehensive study of racially discriminatory laws and policies in the United States in order to make it possible for policymakers and the public to analyze the legacy of racial discrimination or lack thereof.¹²

II. JIM CROW LAWS ON THE BOOKS TODAY

Perusal of the codes of laws¹³ of the States of the Union shows that fifty years after *Brown*, Jim Crow has not gone away. Various Jim Crow measures, and in particular a significant fraction of the statutes enacted to derail integration, remain in the statutes or constitutions of Alabama, Georgia, Louisiana, Missis-

10. See notes 13-74, *infra*, and accompanying text.

11. See notes 75-118, *infra*, and accompanying text.

12. See notes 119-126, *infra*, and accompanying text.

13. The information in this section is drawn from the report of the Jim Crow Study Group at the University of Arizona. See *Still on the Books: Jim Crow and Segregation Laws Fifty Years After Brown v. Board of Education*, 6 RUTGERS RACE & L. REV. (forthcoming 2004). As this article was going to press, some of the statutes cited in this section were in the process of repeal as a result of the information presented in the report.

issippi, Missouri, South Carolina, Tennessee, Virginia, and West Virginia.¹⁴

A. MASSIVE RESISTANCE TO INTEGRATION

Brown v. Board of Education's declaration that segregation in public schools was unconstitutional stunned many white communities in states practicing racial segregation.¹⁵ One technique states used to avoid integration was simply to refuse to do it,¹⁶ or even violently resist it.¹⁷ This effort was supported by various kinds of state statutes.

A significant example of this remains on the books in Louisiana. Sub-Part G-2 of the Louisiana Statutes governing public schools is titled "OPERATION OF SEPARATE SCHOOLS FOR WHITE AND COLORED."¹⁸ Section 335 governs "Salaries and emoluments of school officials during federal integra-

14. A number of sources explore various aspects of the southern legal response to *Brown*. See NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S* (1969); THOMAS EMERSON, ET AL., *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1252-99* (1967); HARRELL RODGERS & CHARLES BULLOCK, *COERCION TO COMPLIANCE* (1976); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (1991); Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964); Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92 (1994); Helen Hershkoff & Adam S. Cohen, *School Choice and the Lessons of Choctaw County*, 10 YALE L. & POL'Y REV. 1 (1992); Wendy Parker, *The Future Of School Desegregation*, 94 NW. U. L. REV. 1157 (2000); Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973) [hereinafter "*Segregation Academies*"]; Note, *The Federal Courts and Integration of the Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 COLUM. L. REV. 1448 (1962).

15. A statement suggesting the importance of racial segregation to some is contained in a unanimous decision of the Mississippi Supreme Court affirming the convictions of a group of freedom riders:

Segregation in schools and in all means of public transportation has been declared at an end by judicial fiat. The cry by certain groups for conformity to their beliefs rings out endlessly over the land through the various media of communications. Large numbers of people, in this broad land, are steeped in their customs, practices, mores and traditions. In many instances, their beliefs go as deep or deeper than religion itself. If, in the lapse of time, these principles, sacred to them, shall be disproved, then it may be accepted that truth will prevail. But, until those principles have been tested in the crucible of time, no abject surrender should be expected, much less demanded.

Knight v. State, 161 So. 2d 521, 523 (Miss. 1964).

16. See EMERSON, *supra* note 14, at 1264-68 (discussing violent resistance to *Brown* and legal doctrines of "nullification" and "interposition" used to justify non-compliance with federal constitutional principles deemed objectionable by particular states).

17. For an excellent account of physical governmental resistance to federal court orders, see WILLIAM DOYLE, *AN AMERICAN INSURRECTION: JAMES MEREDITH AND THE BATTLE OF OXFORD, MISSISSIPPI* (2001).

18. LA. REV. STAT. T. 17, Ch. 1, Pt. III, Subpt. G-2.

tion action," and provides that salaries shall continue to be paid "during time necessarily spent by such person away from his normal duties as a consequence of federal action relating to integration of the races in the public schools of Louisiana."¹⁹

Louisiana teachers would be paid not only when they were away from their duties to participate "in a proceeding before a federal court, board, commission or officer," but also when absence resulted because the teacher's support of segregated schools led to their being "imprisoned or confined pursuant to an order or judgment of a federal court."²⁰ Thus, teachers could count on state support if held in contempt for disobeying federal injunctions or even if indicted, convicted and sentenced for criminal participation in violent resistance.

B. CLOSING PUBLIC SCHOOLS

Another method of finessing *Brown* was to close the public schools.²¹ The statutes of Louisiana²² grant the governor the discretion to close the schools temporarily. If the governor invokes this authority, "and after a reasonable time determines that all the schools may not be reopened and operated on a racially segregated basis, he may declare the schools permanently closed."²³ This statute is in Louisiana's code even though it was declared unconstitutional over 40 years ago by a three judge U.S. District Court in a decision affirmed by the Supreme Court.²⁴ Another statutory system providing for closing the schools following a referendum was only partially repealed even though it was held unconstitutional in 1961.²⁵ The school closings of Arkansas²⁶ and

19. LA. REV. STAT. § 17:335(a).

20. *Id.*

21. See EMERSON, *supra* note 14, at 1273-74 (discussing school closing as a means of resisting *Brown*); *School Closing Plans*, 4 RACE REL. L. REP. 807 (1958).

22. LA. REV. STAT. § 17:171 (governor's authority to close schools); LA. REV. STAT. § 17:349.1-5 (governor's authority to take over and temporarily or permanently close schools); see also LA. REV. STAT. § 17:172 (prohibiting operation of school other than in accordance with state policy); LA. REV. STAT. § 17:173 (denying promotion and graduation to any students attending class "where the class has been made subject to any order not consistent with the Constitution and laws of the state"); LA. REV. STAT. § 17:429; LA. REV. STAT. § 17:430 (providing for revocation of teaching certificates for teaching a class "in violation of the Constitution or laws of this state").

23. LA. REV. STAT. § 17:349.2(D).

24. *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 930 (E.D. La. 1960) (three judge court) ("this court . . . declares [inter alia] Act . . . 12, 14, 23, 24 . . . of the First Extraordinary Session of 1960 unconstitutional. This court will prepare the decree enjoining their enforcement"), *aff'd mem. per curiam*, 365 U.S. 569 (1961).

25. LA. REV. STAT. §§ 350.2-350.14 (held unconstitutional in *Hall v. St. Helena Parish Sch. Bd.*, 197 F. Supp. 649 (E.D. La. 1961) (three judge court), *aff'd mem. per curiam*,

Virginia²⁷ were also invalidated.²⁸ Nevertheless, Georgia²⁹ and Mississippi,³⁰ like Louisiana, also still have laws on the books dating to the era of massive resistance authorizing the governor to close educational institutions. There is no apparent reason these statutes could not be used today.

C. REPEALING COMPULSORY ATTENDANCE LAWS.

Closing schools created difficulty because state law required school attendance of children of a certain age.³² Many segregated states changed their laws to relax or eliminate this requirement to facilitate school closing. In February, 1959, Governor Almond of Virginia gave a speech addressing his proposed responses to the "unholy alliance of a conspiracy to destroy the Constitution" represented by *Brown*,³³ he noted that "no parent or guardian is under any legal compulsion from any source to send a child to a racially mixed school,"³⁴ and as one of 11 ideas for preventing race-mixing proposed to "take a more thorough look at the statutes of our compulsory attendance laws."³⁵ He closed his speech by reminding the legislature that he "pledged

368 U.S. 515 (1962)).

26. *Aaron v. McKinley*, 173 F. Supp. 944 (E.D. Ark. 1959) (three judge court) (*per curiam*), *aff'd mem. per curiam sub nom. Faubus v. Aaron*, 361 U.S. 197 (1959).

27. *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964). See R.C. SMITH, *THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA 1951-1964* (1965).

28. *But see Palmer v. Thompson*, 403 U.S. 217 (1971) (allowing city to close recreational facilities based on claim that they could not be operated on profitably on an integrated basis).

29. GA. CODE ANN. § 20-3-70 (governor may close school when "continued operation of any such school or institution or any branch or department thereof is likely to result in or cause violence or public disorder in the community in which such school is situated or that it is necessary to preserve the good order, peace, and dignity of the state or any subdivision thereof"). Georgia successfully used this statute to delay integration; Judge Hooper refused to enforce his earlier desegregation order for fear that "such Order of the Court could have no effect except to close the Atlanta schools and risk the danger of all of Georgia's schools being closed." *Calhoun v. Latimer*, 188 F. Supp. 412, 413 (N.D. Ga. 1960).

30. MISS. STAT. ANN. § 37-65-1 (governor may close schools when it is in "the best interest of a majority of the educable children of any public school district" or when "such closure will promote or preserve the public peace, order, or tranquility of such district or districts").

32. Charles K. Woltz, *Compulsory Attendance at School*, 20 L. & CONTEMP. PROBS. 3 (1955).

33. Address of Governor J. Lindsay Almond Jr. to a Special Session of the Virginia General Assembly on January 28, 1959, *reprinted in* 4 RACE REL. L. REP. 183, 183 (1959).

34. *Id.* at 186.

35. *Id.* at 187.

to the people of Virginia that I would resist with every resource at my command that which I know to be wrong and would destroy every rational semblance of effective public education in Virginia."³⁶

On March 31, 1959, the Commission on Education appointed by the Governor issued its report.³⁷ As to *Brown*, they explained: "Never before had the court rendered a decision so drastically invading the right of the states to manage their internal affairs."³⁸ One of the measures proposed was to provide that "any child may, with consent of his parent or guardian, be excused from school either on recommendation of school authorities and the juvenile judge or on recommendation of the Superintendent of Public Instruction."³⁹ It became law and remains on the books.⁴⁰ This statute allowed the authorities to excuse white students from attending integrated schools, and to encourage African American students to opt out of school entirely.

Georgia law also provides that the Governor may suspend compulsory education laws "over the entire state or in any portion thereof" based on "any riot, insurrection, public disorder, disturbance of the peace, natural calamity, or disaster."⁴¹ Thus, if a mob attacked African Americans attempting to enter a formerly all white school, it could be closed.

D. FINANCIAL AID TO SEGREGATED "PRIVATE" SCHOOLS

Closing schools for white children based on actual or attempted integration would defeat integration, but at the cost of leaving those white children without educational opportunities. Accordingly, southern states closing public schools, or wishing to provide white citizens an alternative to integrated public schools, offered "massive financial aid to private segregated schools."⁴² One court explained that the laws created "a means by which

36. *Id.* at 188.

37. Education in Virginia: Report of the Commission on Education (Mar. 31 1959), reprinted in 4 RACE REL. L. REP. 392 (1959).

38. *Id.* at 392.

39. *Id.* at 400.

40. 1959 Va. Laws Ch. 72, § 4, codified as amended at VA. STAT. § 22.1-254(C)(1) ("A school board may excuse from attendance at school: On recommendation of the principal and the division superintendent and with the written consent of the parent or guardian, any pupil who the school board determines, in accordance with regulations of the Board of Education, cannot benefit from education at such school.").

41. GA. CODE ANN. § 20-2-702.

42. *Segregation Academies*, *supra* note 14, at 1438; see also Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 568 & n.15 (2001).

public schools under desegregation orders may be changed to 'private' schools operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as the public schools."⁴³

The Supreme Court prohibited this assistance in various forms,⁴⁴ but these decisions were neither self-enforcing nor so clear that they could not be evaded—perhaps the most telling feature of these decisions is that they unfolded over decades, so many years of support occurred before particular programs or forms of support were halted.⁴⁵ Laws passed to support private schools remain on the books. The Virginia Supreme Court invalidated Virginia's tuition grant program in 1955 because it violated the state constitutional prohibition on public support of private schools;⁴⁶ the constitution was then amended to allow grants to private schools, and it continues to do so.⁴⁷ South Carolina retains its grant-in-aid statute in its current code, compiled in 1976,⁴⁸ even though the state had been permanently enjoined from enforcing the statute in 1968 in a decision affirmed by the Supreme Court.⁴⁹

43. *Hall v. St. Helena Parish Sch. Bd.*, 197 F. Supp. 649, 651 (E.D. La. 1961) (three judge court), *aff'd mem. per curiam*, 368 U.S. 515 (1962).

44. *See Gilmore v. Montgomery*, 417 U.S. 556 (1974) (invalidating program allowing use of recreational facilities by segregated private schools); *Norwood v. Harrison*, 413 U.S. 455 (1973) (invalidating Mississippi text book loan program); *Poindexter v. Louisiana Fin. Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967) (three judge court) (invalidating tuition grant program), *aff'd mem per curiam*, 389 U.S. 571 (1968); *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458, 475-78 (M.D. Ala.) (three judge court) (invalidating tuition grant program), *aff'd mem per curiam sub nom. Wallace v. United States*, 389 U.S. 215 (1967); *see also Griffin v. Bd. of Supervisors*, 339 F.2d 486 (4th Cir. 1964); *Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389 (S.D. Miss. 1969) (three judge court); *Griffin v. Bd. of Educ.*, 239 F. Supp. 560 (E.D. Va. 1965) (three judge court).

45. *Compare Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding discriminatory private secondary schools and universities are not entitled to tax exempt status) *with Allen v. Wright*, 468 U.S. 737 (1984) (individuals lack standing to challenge IRS non-enforcement of *Bob Jones* holding).

46. *Almond v. Day*, 89 S.E.2d 851 (Va. 1955).

47. *See VA. CONST. ART. VIII, § 10* ("No appropriation of public funds shall be made to any school . . . not owned or exclusively controlled by the State . . . ; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may . . . appropriate funds . . . which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning. . .").

48. *See S.C. CODE ANN. § 59-41-20* ("Subject to the terms and provisions of this chapter every school child in the State who has not yet finished or graduated from high school and who desires to attend a private school located within the State shall be eligible for and entitled to receive a State scholarship grant in an amount equal to the per pupil cost to the State of public education as certified by the Governor.").

49. *Brown v. South Carolina State Bd. of Ed.*, 296 F. Supp. 199 (D.S.C.) (three-

In 1960, the Committee on Schools of the Georgia General Assembly recommended establishing a program of tuition grants "for the benefit of any child whose parent chooses to withdraw said child from an integrated school."⁵⁰ The Georgia legislature followed this recommendation, passing a law, still in the Code, authorizing tuition payments to private schools.⁵¹ Georgia also authorizes lease of school property to private institutions.⁵² This law remains on the books, and in principle is entirely valid and enforceable, even though in several instances Georgia school districts were enjoined from selling public schools for use as private, segregated schools.⁵³

After *Brown*, many states authorized private school teachers to join the pension program for public school teachers. Arkansas⁵⁴ and Virginia⁵⁵ repealed their statutes in the 1980s, but those of Alabama⁵⁶ and Georgia⁵⁷ remain in effect.

judge court) (permanently enjoining section), *aff'd mem. per curiam*, 393 U.S. 222 (1968).

50. Report of the Committee on Schools of the General Assembly of Georgia, *reprinted in* 5 RACE REL. L. REP. 509, 516 (1961). *See also* Board of Pub. Educ. for the City of Savannah and County of Chatham v. Georgia, 1992 WL 699499, *2 (S.D. Ga. Aug. 11, 1992) ("The repeal of these segregation laws did not signal the end of state resistance to desegregation efforts. In 1961, the General Assembly provided tuition grants for students who wished to attend private, segregated schools. Moreover, state officials offered to provide legal services to local school boards that defended against desegregation suits"); OP. GA. ATTY. GEN. No. U93-8, *1 (Sept. 20, 1993) ("This statute was passed at a time when the state legislature was enacting laws in an attempt to offset the impact of the United States Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny.").

51. GA. CODE ANN. § 20-2-642 provides:

Every child between the ages of six and 19 years residing in this state who has not finished or graduated from high school and who is otherwise eligible and qualified to attend the elementary and secondary public schools of the local school system wherein such child resides shall, in lieu of attending the public schools of such local school system, be eligible to receive an education grant to be expended for the purpose of paying or otherwise defraying the cost of tuition at a nonsectarian private school located in any state of the United States or a public school located outside this state but within some other state of the United States, in the amount and manner provided by and subject to this article.

The full statute is contained in Sections 640 to 650. *See also* Lowe v. State, 482 S.E.2d 344 (Ga. 1997) (affirming denial of mandamus petition seeking to compel funding of act).

52. GA. CODE ANN. § 20-2-553(a)(5).

53. *See, e.g.,* Wright v. Baker County Bd. of Educ., 501 F.2d 131 (5th Cir. 1974); Graves v. Walton County Bd. of Educ., 465 F.2d 887 (5th Cir. 1972).

54. 1959 Ark. Acts No. 55, §§ 1, 2, *codified at* ARK. CODE ANN. § 24-7-503 (1987), *repealed*, 1987 Ark. Acts No. 4, § 4.

55. 1956 Va. Laws Ch. 64, *codified at* VA. CODE § 22-188.3, VA. CODE § 51-111.38:1, *reprinted in* 1 RACE REL. L. REP. 1098-1100 (1956). Evidently, private school participation stopped in 1983. Bradley v. Baliles 639 F. Supp. 680, 684 (E.D. Va. 1986), *aff'd sub nom.* School Bd. of the City of Richmond v. Baliles, 829 F.2d 1308 (5th Cir. 1987).

56. ALA. STATS. ANN. § 16-25-1(2) (teacher means "Any teacher, principal, super-

E. "VOLUNTARY" SEGREGATION

The legal argument that the states had retained sovereignty to "interpose" their authority against Supreme Court decisions they disagreed with was popular in the Southern states but made no headway in federal court.⁵⁸ Another theory had slightly more respectability, namely, that perhaps *Brown* meant that enforced segregation was unconstitutional, but voluntary segregation was perfectly acceptable.⁵⁹

The Alabama Constitution contains a provision, adopted two years after *Brown*, authorizing "the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end." Needless to say, the governmental purpose was exclusively benign, "[t]o avoid confusion and disorder and to promote effective and economical planning for education."⁶⁰ Although the Supreme Court held a provision of this type unconstitutional in 1963,⁶¹ the amendment remains part of Alabama's fundamental law.

intendent, supervisor, college professor, administrative officer, or clerk employed in any public school or public college within the state or employed in any private nondenominational school operated nonprofit for the education of children of school age residing within a district where no public school is available for the children"). The expanded definition was added by 1957 Ala. Acts 747, § 1 (Act No. 532).

57. GA. CODE ANN. § 47-3-64 ("Any teacher or school employee who is employed in a public school, who is covered by laws relating to a retirement fund or pension system maintained by any county, city, or independent school district in this state or the board of education thereof, and who accepts employment in a nonsectarian private school in this state attended by students who are eligible for grants from the state shall continue to be subject to such retirement fund or pension system and shall be entitled to all of its benefits, provided that he makes or causes to be made to such retirement fund or pension system the contributions required of and for the benefit of such teacher or school employee had he continued employment in the public schools.").

58. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958).

59. See *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) ("Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation."). *Briggs* was one of the four cases consolidated in *Brown* itself; this was the decision on remand. Although quite influential in the late 1950s and early 1960s, the so-called "*Briggs dictum*" was definitively rejected. See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 200 n.11 (1973) (noting that *Briggs* approach was rejected in earlier Supreme Court cases).

60. ALA. CONST. amend. 111.

61. *Goss v. Bd. of Educ. of the City of Knoxville*, 373 U.S. 683 (1963).

F. PUPIL ASSIGNMENT LAWS.

The so-called "pupil assignment laws" were another method of frustrating integration.⁶² In 1962, the U.S. Commission on Civil Rights reported that "[t]he pupil assignment acts have been the principal obstacle to desegregation in the South. Essentially, these laws authorize either the State or local authorities to assign pupils individually to various schools."⁶³ As one federal judge explained, in upholding the state's right to assign pupils, they could be used for benign purposes:

Without purposely and intentionally discriminating between the races you may for any good cause or reason assign pupils to schools other than that nearest to them. Thus, to illustrate, if some pampered white boy, growing up without ever having been controlled or denied, enters an integrated school and by reason of his selfish propensities, pride or vanity or racial dislike creates disturbance he may be transferred to another school. Likewise, if an overgrown Negro boy in an integrated school should be by premature growth inclined to sex and should write verses on the blackboard of an obscene character designedly for the white girls to read or should make improper approaches to them so as to provoke trouble in the school, he should be assigned to a school where the situation is different.⁶⁴

Some states expressly repealed their pupil assignment statutes as they began to comply with *Brown*;⁶⁵ Louisiana's code substituted a non-discrimination provision for its pupil assignment statutes in 1970.⁶⁶ However, Mississippi⁶⁷ and Tennessee⁶⁸

62. See Gerald Nathan Daffner, Note, *The Effect of Pupil Placement Laws Upon Southern Education*, 23 ALB. L. REV. 376 (1959); Phillip J. Campanella, Note, 16 W. RES. L. REV. 800 (1965); Note, *State Efforts to Circumvent Desegregation, Private Schools, Pupil Placement and Geographic Segregation*, 54 NW. U. L. REV. 354 (1959); see also Daniel J. Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA. L. REV. 517 (1959).

63. U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS U.S.A. 2 (1962). "A major purpose in the utilization of these pupil placement laws apparently is to secure the advantage of the legal doctrine related to the requirement that a person must normally exhaust his administrative remedies before he goes into a federal court seeking relief against action taken by state officials." *Race Relations Law Survey, May, 1954-May, 1957*, 2 RACE REL. L. REP. 881, 889 (1957).

64. *Borders v. Rippey*, 184 F. Supp. 402, 420 (N.D. Tex. 1960).

65. ARK. CODE ANN. §§ 6-18-301-6-18-305 (found to have been used to promote segregation in *Norwood v. Tucker*, 287 F.2d 798 (8th Cir. 1961)), repealed by 1989 Ark. Acts No. 950, § 1; FLA. STAT. ANN. § 230.232 (found to have been used to promote segregation in *Augustus v. Board of Public Instruction of Escambia County, Fla.*, 306 F.2d 862 (5th Cir. 1962)), repealed by 1994 Fla. Laws c. 94-232, § 49.

66. LA. REV. STAT. § 17:111 (added by 1970 La. Acts, Ex.Sess., No. 1, §§ 1, 2).

retain pupil assignment statutes on the books. Federal courts have recognized that both statutes were passed to defend segregation. In a case involving the Jackson public schools, the Fifth Circuit rejected the defense argument for dismissal on the ground that any segregation in the school system was voluntary.

The premise for this theory is that any segregation in these school systems is purely voluntary in light of the Mississippi Pupil Assignment Statute, . . . Mississippi Laws 1954, Chapter 260; and that appellants cannot be heard to say to the contrary without at least applying for assignment to schools being attended by members of the white race. This is particularly so, the argument goes, in view of the absence of compulsory school attendance laws in Mississippi and the resulting necessity to apply for admission and assignment annually. This premise is buttressed by a line of authorities that require exhaustion of administrative remedies, and denial of constitutional rights to appellants individually before relief may be granted.⁶⁹

Given the state statutes requiring segregation, the court found this argument unpersuasive.⁷⁰ Federal courts in Tennessee also rejected the argument.⁷¹

G. OTHER ASPECTS OF SCHOOL SEGREGATION

Other state laws also contemplate segregation. The Mississippi Code provides for "a 4-H Club demonstration camp for Negro 4-H Club members;" "this facility may be rented to other Negro organizations for educational and recreational use only."⁷² West Virginia law limits the number of "negro" assistant

67. MISS. CODE ANN. §§ 37-15-13 et seq. (added by 1954 Miss. Laws Ch. 260, § 1).

68. TENN. CODE ANN. § 49-6-3102 et seq. (added by 1957 Tenn. Pub. Acts, c. 13).

69. *Evers v. Jackson Mun. Separate Sch. Dist.*, 328 F.2d 408, 409 (5th Cir. 1964).

70. *Id.* See also *Montgomery v. Starkville Mun. Separate Sch. Dist.*, 665 F. Supp. 487, 490 & n.2 (N.D. Miss. 1987) (noting that many communities "refused to desegregate their schools in any meaningful way"; in Mississippi, this was initially accomplished through a "freedom of choice" plan in the form of the "Mississippi Pupil Assignment Statute"), *aff'd*, 854 F.2d 127 (5th Cir. 1988).

71. See, e.g., *Monroe v. Bd. of Com'rs of the City of Jackson*, 391 U.S. 450, 453 (1968) (noting that Tennessee's pupil placement act had been held to be an inadequate means of complying with *Brown* (citing *Northcross v. Bd. of Educ. of City of Memphis*, 302 F.2d 818, 821 (6th Cir. 1962)); *Kelly v. Bd. of Ed. of City of Nashville*, 159 F. Supp. 272, 275 (M.D. Tenn. 1958) (denying motion to dismiss desegregation action "based upon the provisions of the Pupil Assignment Act").

72. MISS. CODE ANN. § 37-113-31. See generally *Wade v. Miss. Co-Operative Extension*, 372 F. Supp. 126 (N.D. Miss.), *supplemented*, 378 F. Supp. 1751 (N.D. Miss. 1974), *aff'd in part, reversed in part*, 528 F.2d 508 (5th Cir. 1976).

school superintendents to one per county, and only in counties where "fifty or more negro teachers are employed."⁷³ A Missouri statute regulates the supervision of persons paroled from the "State Training School for Negro Girls."⁷⁴

III. IMPLICATIONS

A. JIM CROW'S BREADTH

The continued existence of these fragments of Jim Crow reveals the breadth and depth of segregation. Although some of them betray their motives in their text, others are known to be part of Jim Crow only because of history provided by court decisions or other sources. The facially neutral nature of these statutes aimed at promoting racial discrimination raises the possibility that other facially neutral laws were passed to disadvantage African Americans. The surviving Jim Crow statutes are also remarkable for their wide scope—not only schools were segregated, but also 4-H Clubs, and even prisons.

B. WHEN DID JIM CROW END?

Unlike some legal regimes, Jim Crow did not end with a disjuncture; there was no single moment of structural change, even as a matter of constitutional doctrine. A state adopting the Uniform Commercial Code, for example, must consciously and deliberately account for the fact that many other parts of the state's common law and statutory code will have to be amended, altered or repealed to accommodate the new legal structure.⁷⁵ The decades-long struggle for precision about the nature of the states' obligations to desegregate schools, and the decades-long success of the states' shifting legal response, illustrates that there was never a revelation explicitly declaring Jim Crow illegal in all its forms and advising state actors what to do about it going forward. Instead, Jim Crow trailed off, fading away over a period of decades as the courts and Congress defined the obligations of the law, case by case, detail by detail.

To be sure, *Brown* itself was a landmark. It has been called "the most important political, social and legal event in America's

73. W. VA. CODE § 18-5-32.

74. MO. REV. STAT. § 205.900(1).

75. See Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002).

twentieth-century history.”⁷⁶ But as a matter of legal doctrine, its centrality is far more apparent in retrospect than it was at the time. *Brown* gave rise to a series of decisions striking down various aspects of Jim Crow, but many were per curiam summary dispositions without opinion, and the line took a full decade to ripen into a general principle against racial discrimination.⁷⁷ As late as 1965, a unanimous Oklahoma Supreme Court upheld an anti-miscegenation law; it reported: “The great weight of authority from both federal and state courts is that they are constitutional.”⁷⁸ In 1971, the Supreme Court held that Jackson, Mississippi could choose to close its public swimming facilities rather than operate them on an integrated basis.⁷⁹ Even now, it is not clear that the Supreme Court understands the Constitution to require, say that “all branches and all levels of government must exercise their powers to eliminate the vestiges of unlawful racial discrimination to the maximum possible extent with the maximum possible speed.”⁸⁰ For example, unless they were set aside at the time, criminal convictions rendered by juries from which African Americans were unconstitutionally excluded are perfectly valid, and can be used to justify incarceration or enhanced punishment today.⁸¹

Indeed, as *Brown* marked the commencement of a new epoch in constitutional law, it also gave rise to the classic example of the consequences of ambiguous exposition of law, namely the Supreme Court’s 1955 pronouncement that desegregation was to be pursued “with all deliberate speed.”⁸² Fourteen years later,

76. J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954-1978 at 6 (1979).

77. *Goss v. Bd. of Ed. of the City of Knoxville*, 373 U.S. 683, 687 (1963) (“The cases of this Court reflect a variety of instances in which racial classifications have been held to be invalid”); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 247 (1991) (“*Brown*’s narrow rationale left unresolved the constitutionality of segregation in contexts less fundamental than education—that is, most areas of life.”). In 1957, the *Race Relations Law Reporter* explained that “No other court decision in this century has had comparable repercussions,” but “[w]hether the principle will be considered broad enough to invalidate as unconstitutional any racial distinction based on law or supported by government authority remains to be determined.” *Race Relations Law Survey, May, 1954-May, 1957*, 2 RACE REL. L. REP. 881, 881 (1957).

78. *Jones v. Lorenzen*, 441 P.2d 986, 989 (Okla. 1965).

79. *Palmer v. Thompson*, 403 U.S. 217 (1971).

80. Professors Canon and Johnson offer a valuable model for understanding the implementation of judicial decisions. See BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (2d ed. 1998). They note that “whether a higher court decision or policy goal is clearly and consistently articulated will have a substantial effect on lower court interpretations.” *Id.* at 49.

81. See *Allen v. Hardy*, 478 U.S. 255 (1986).

82. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

some jurisdictions had not begun to comply.⁸³ Although there is no excuse for the delay, caused by recalcitrance rather than the difficulty of good faith efforts to obey the law, desegregation of public education was a genuinely large and complex problem. Yet, even with respect to far more discrete legal issues, the course of reform has resulted in clear rules only over long periods of time.

Racially restrictive property covenants illustrate the ambiguous development of legal doctrine. Perhaps the first federal case involving a restrictive covenant struck it down; in *Gandolfo v. Hartman*, an 1892 decision, the Circuit Court held the covenant judicially unenforceable in an opinion implying that it was entirely invalid.⁸⁴ In *Corrigan v. Buckley*, decided in 1926, the Supreme Court seemed to hold that restrictive covenants were enforceable in equity as mere "contracts entered into by private individuals."⁸⁵ In 1948, in *Shelley v. Kraemer*,⁸⁶ the Court denied that it reached the merits in *Corrigan*,⁸⁷ and concluded that equitable enforcement of a restrictive covenant would violate equal protection. However, they explained, "[s]o long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the [Fourteenth] Amendment have not been violated."⁸⁸ Five years later, in *Barrows v. Jackson*,⁸⁹ the Court held unconstitutional the award of money damages for violation of a covenant; Chief Justice Vinson, *Shelley's* author, dissented.

83. See *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 1218 (1969) (Black, Circuit Justice) (denying stay).

84. *Gandolfo v. Hartman*, 49 F. 181, 182 (C.C.S.D. Cal. 1892) ("Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other.").

85. *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926).

86. 334 U.S. 1 (1948).

87. *Id.* at 7 ("Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider."). *But see, e.g., Mays v. Burgess*, 147 F.2d 869, 870 (D.C. Cir. 1945) (after discussing circuit and Supreme Court affirmance in *Corrigan*, concluding "in view of the consistent adjudications by this court that a covenant against Negro ownership or occupation is valid and enforceable in equity by way of injunction, it must now be conceded to be the settled law in this jurisdiction."); *Doherty v. Rice*, 3 N.W.2d 734, 737 (Wis. 1942) (rejecting challenge to judicial enforcement of racially restrictive covenants; *Corrigan* "must be taken as finally settling that question").

88. 334 U.S. at 13.

89. 346 U.S. 249 (1953).

In the 1950s and 1960s, the mainstream legal profession apparently regarded racially restrictive covenants as perfectly permissible. In 1966, the West Publishing Company published the volume of *Modern Legal Forms* covering deeds,⁹⁰ edited by Edmund O. Belsheim, a distinguished educator who received his legal education at Oxford and Chicago, and among other highlights of a long legal career held regular appointments at the law schools of Virginia, Tennessee, Nebraska (where he served as dean), and Lewis and Clark (where a chair is named in his honor).⁹¹ All evidence suggests that he was a respecter of constitutional rights as a general matter.⁹²

Nevertheless, the model covenants included those designed to exclude nonwhites from use or occupancy of land. Deeds section 3342 provided that "This property shall not be used or occupied by any person or persons except those of the Caucasian race."⁹³ The next section prohibited sale or lease to "negroes," and provided for "injunction, mandatory or other," and damages.⁹⁴ The text acknowledged that the covenants were unenforceable, but pointed out that "so long as the covenants are effectuated by voluntary adherence to their terms the provisions of the Fourteenth Amendment have not been violated."⁹⁵

The ironic last chapter is that restrictive covenants had been illegal the whole time. In 1968, in *Jones v. Alfred H. Mayer Co.*, the Court held that even private discrimination in the sale or rental of property violated 42 U.S.C. § 1982,⁹⁶ and that the Congress had the authority to enact the law.⁹⁷ Section 1982 had been in effect for a century, starting life as part of the Civil Rights Act of 1866; *Gandolfo v. Hartman* had been rightly decided in 1892.

90. EDMUND O. BELSHEIM, *MODERN LEGAL FORMS* (1966).

91. See ASSOCIATION OF AMERICAN LAW SCHOOLS, 1994-95 *DIRECTORY OF LAW TEACHERS* 216 (1994).

92. Dean Belsheim represented one of the defendants in the murders made famous in Truman Capote's *In Cold Blood*. See *Fugate v. Ronin*, 91 N.W.2d 240, 241 (Neb. 1958). He also signed an amicus brief in support of abortion rights. See 11 *WOMEN'S RIGHTS*, L. REP. 213, 232 (1989). See generally Douglas K. Newell, *Dedication Edmund O. Belsheim: Teacher*, 25 *ENVTL. L.* xi (1995).

93. *MODERN LEGAL FORMS*, *supra* note 90, at 88.

94. *Id.* at 88-89.

95. *Id.* at 88 n.77.

96. "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

97. 392 U.S. 409 (1968). See also *Runyon v. McCrary*, 427 U.S. 160 (1976) (section 1982 applies to racially discriminatory private schools).

Even with respect to this focused problem, the courts failed to offer a clear message. Five decades of Supreme Court decisions left the status of restrictive covenants far murkier than would have been ideal. If 18 years after *Shelley* and 14 years after *Barrows* Dean Belsheim could suggest to lawyers that they draft racial covenants purporting to be enforceable by injunction and damages, even after *Jones*, non-lawyers could hardly be expected to intuit that they were invalid. Accordingly, as recently as 1998, Ohio passed a statute attempting to prevent unlawful restrictive covenants from being included in deeds when they are transferred;⁹⁸ five sections of the current Code of Federal Regulations are designed to ensure that veterans and others involved in land transactions are reminded that restrictive covenants cannot be honored.⁹⁹

The full doctrinal implications of *Brown* may yet be unrealized. If there is one area where the Court's contemporary jurisprudence may remain in the middle of a false start, it is in the area of criminal justice, where it has not understood the Constitution as requiring automatic invalidation of convictions resting in part on racial factors. In 1987, the Court held that substantial evidence of racial impact on the death penalty as a whole was legally irrelevant in the absence of evidence that a particular case was affected by the discrimination affecting the system.¹⁰⁰ In 1996, the Court held that stops and searches motivated by racial animus did not violate the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" guaranteed by the Fourth Amendment.¹⁰¹ The Court has recognized a theoretical right to challenge governmental actions under the Fourteenth Amendment on the ground that they are racially selective, but they have set the bar so high¹⁰² that it is not clear that any litigant has ever satisfied it;

98. See 1998 Ohio Laws 83 (adding, e.g., OHIO REV. CODE ANN. § 3953.29, prohibiting the inclusion of prohibited restrictive covenant).

99. 38 C.F.R. § 36.4514(g)(2) (2003) ("The applicant recognizes that any restrictive covenant on the property relating to race, color, religion, sex, handicap, familial status, or national origin is illegal and void and any such covenant is specifically disclaimed"); 38 C.F.R. § 36.4402(a)(5)(ii) (2003); 38 C.F.R. § 36.4363(d)(2) (2003); 38 C.F.R. § 36.4206(d)(2)(ii) (2003); 24 C.F.R. § 203.30(b) (2003).

100. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

101. *Whren v. United States*, 517 U.S. 806, 813 (1996). See Anthony C. Thompson, *Stopping The Usual Suspects: Race And The Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

102. *United States v. Armstrong*, 517 U.S. 456 (1996). See generally Gabriel J. Chin, *Race, the War on Drugs and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253, 266-67 (2002).

there are apparently no reported decisions dismissing a prosecution as racially selective.

Even if none of this changes in the future, it is still the case that the Court's criminal justice doctrine has not been consistent in the post-*Brown* era. Once before, the Court revisited a decision failing to apply sufficient scrutiny to convictions employing the "corrosive category of race is a factor in decisionmaking."¹⁰³ In 1965, the Court upheld the right of prosecutors to challenge prospective jurors on the basis of race; this decision was overruled after twenty years of trials and convictions by segregated juries.¹⁰⁴ If well into the 1980s, intentional racial discrimination was allowed in this central area of public life, it is not clear when in the 1950s, 1960s, or 1970s, any legislature should have thought the time had come to bury Jim Crow. By the 1980s and beyond, legislators might have incorrectly but reasonably assumed that Jim Crow had been purged by an earlier generation.

C. PURGING JIM CROW, ROOT AND BRANCH

In large part because of Jim Crow's gradual rather than abrupt decline, even at the level of formal, written law there was never a systematic, sustained effort to identify the scope of racial discrimination and eliminate all of its manifestations. In *Green v. County School Bd. of New Kent County, Virginia*, the Court explained that school boards in charge of segregated schools, and, by extension, other responsible governmental officials, were required to ensure that "racial discrimination would be eliminated root and branch."¹⁰⁵ With respect to the law itself, that never happened.

To be sure, there have been landmark decisions and statutes which had a great deal of impact, including *Brown*, the Civil Rights Act of 1964 and the Voting Rights Act of 1965. But the cases are brought by particular litigants raising specific legal claims. Some meritorious cases are never brought or are mishandled. The cases present a partial picture of the scope of discrimination. Not every act of discrimination or law aimed at disadvantaging members of a particular race is matched by a judicial decision invalidating it. Decisions establishing broad le-

103. *Grutter v. Bollinger*, 539 U.S. 306, 394 (2003) (Kennedy J., dissenting).

104. *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

105. 391 U.S. 430, 438 (1968).

gal principles will not necessarily be complied with by every person and institution in the nation.

With respect to restrictive covenants, for example, the *Jones* decision in 1968 hardly put African Americans on a level playing field. The approval given by many courts before *Shelley*, and the suggestion in *Shelley* and *Barrows* that privately enforced covenants were acceptable, affected decades of transactions in a country where ownership of real property is a primary avenue of acquiring wealth. The covenants also remained in countless documents which would affect future transactions. These covenants did not disappear simply because the Court declared them illegal in 1968; lawyers but especially non-lawyers reading the *in terrorem* language of *Modern Legal Forms* might well feel constrained to honor them.¹⁰⁶

Legislation, no matter how broad, is restricted to a few discrete areas at most. Even the Civil Rights Act of 1964 and the Voting Rights Act of 1965, like most legislation, was prospective, attempting to level the playing field with respect to transactions in the future, but otherwise leaving the past as it is.¹⁰⁷

There have also been important reports and studies—the Kerner Commission report,¹⁰⁸ Pauli Murray's *State's Laws on Race and Color*,¹⁰⁹ the U.S. Commission on Civil Rights' *50 States Report*.¹¹⁰ But these have been limited in time, geography or in other ways.

106. See Richard Brooks, *Covenants and Conventions* (work in progress 2002), available at http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=353723 (noting continuing economic effects of unenforceable restrictive covenants). Thus the decision in *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc) (per curiam), holding under the Fair Housing Act that deeds with restrictive covenants should not be recorded or copied without a disclaimer noting the invalidity of the restriction. But see *Woodward v. Bowers*, 630 F. Supp. 1205 (M.D. Pa. 1986). There were also a string of actions after *Shelley* seeking declarations that covenants were void. See, e.g., *Capitol Fed. Sav & Loan, v. Smith*, 316 P.2d 252 (Colo. 1957) (granting declaration); *Erickson v. Sunset Mem'l Park Ass'n*, 108 N.W.2d 434 (Minn. 1961) (granting declaration); *Gast v. Gorek*, 211 N.Y.S.2d 112 (N.Y. Sup. Ct. 1961) (denying declaration).

107. See, e.g., *International Broth. of Teamsters v. United States*, 431 U.S. 324, 355 (1977) ("Congress in 1964 made clear that a seniority system is not unlawful because it honors employees' existing rights, even where the employer has engaged in pre-Act discriminatory hiring or promotion practices."); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 761 (1976) (noting that a provision of Title VII of the Civil Rights Act of 1964 insulates employment seniority systems from challenge "as perpetuating the effects of discrimination occurring prior to the effective date of the Act.").

108. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

109. PAULI MURRAY, *STATE'S LAWS ON RACE AND COLOR* (1950) (Davison Douglas ed. 1997).

110. U.S. COMM'N ON CIVIL RIGHTS, *50 STATES REPORT* (1961) (reprinting reports of the state advisory committee's reports on local conditions.)

Conceivably, some discrete forms of discrimination—a statute segregating public transportation, say—can be effectively ended in isolation; once seating, service and routes are equalized, it may be that the discrimination is entirely a thing of the past. With respect to a nation afflicted with decades of racial discrimination in many different forms, it is impossible to say with confidence that racial discrimination has been remedied without understanding its full scope. Take, for example, state support of segregated private schools, which clearly violates the Constitution.¹¹¹ Amendment 111 to the Alabama Constitution authorized state creation and support of private schools:

The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state.

There are cases enjoining payments by Alabama to segregated private schools.¹¹² In 1974, the Supreme Court upheld an injunction against Montgomery's support of private schools by allowing them access to public recreation facilities.¹¹³ However, a Westlaw search reveals no cases challenging Amendment 111 itself, and none of the cases purport to calculate the entire amount used to disadvantage African Americans. Perhaps the cases reflect that all of the support was discovered and squelched. On the other hand, perhaps the cases represent the tip of the iceberg, and additional millions of funds or real property were put into the hands of private schools for purposes of segregation, but no one discovered it or had the wherewithal to initiate a lawsuit. In any event, the laws and cases span three decades, therefore holding out the possibility that a great deal of support was given over a long period of time.

111. See *supra* note 44.

112. *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458, 475-78 (M.D. Ala.) (three judge court) (invalidating 1965-66 tuition grant laws), *aff'd mem per curiam sub nom. Wallace v. United States*, 389 U.S. 215 (1967); *Lee v. Macon County Bd. of Educ.*, 231 F. Supp. 743 (M.D. Ala. 1964) (three judge court) (invalidating 1957 tuition grant laws).

113. *Gilmore v. Montgomery*, 417 U.S. 556 (1974).

Apart from concern about the magnitude and effect of past transactions, there is reason to be skeptical that equal opportunity can be achieved by reforming individual features of the present system without addressing the situation as a whole. Among the major areas of life where systematic governmental racial discrimination affected the prospects of individuals were employment, education, the criminal justice system, and housing. Because of their interdependence, even a fairly high level of non-discrimination against a particular group with respect to three out of the four may well not result in equal opportunities as a whole for that group. An open door to the school house, fair treatment in the criminal justice system and access to all housing at market prices, for example, will not lead to fairness if there is substantial employment discrimination. Discrimination in education can be debilitating even if there is non-discriminatory access to housing and jobs.

A handful of Supreme Court decisions recognize the interdependence of discrimination, and imply that it has constitutional significance. In *Gaston County, North Carolina v. United States*,¹¹⁴ a jurisdiction covered by the Voting Rights Act sought to reinstate its literacy test, arguing that it did not discriminate against prospective voters on the basis of race. The Court refused, because even neutral application of the literacy test would perpetuate the effects of discrimination in other areas.

It is only reasonable to infer that among black children compelled to endure a segregated and inferior education, fewer will achieve any given degree of literacy than will their better-educated white contemporaries. . . . Affording today's Negro youth equal educational opportunities will doubtless prepare them to meet, on equal terms, whatever standards of literacy are required when they reach voting age. It does nothing for their parents, however. From this record, we cannot escape the sad truth that throughout the years Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. "Impartial" administration of the literacy test today would serve only to perpetuate these inequities in a different form.¹¹⁵

Similarly, in *Griggs v. Duke Power Company*,¹¹⁶ the Court invalidated under Title VII of the Civil Rights Act of 1964 an intel-

114. 395 U.S. 285 (1969).

115. *Id.* at 295-97.

116. 401 U.S. 424 (1971)

ligence test which had a disproportionate impact against African Americans. It explained: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."¹¹⁷ The Court relied in part on the fact that "petitioners have long received inferior education in segregated schools."¹¹⁸

CONCLUSION

Race consciousness was so deeply ingrained in many segments of American society that even judges felt comfortable using racial references in court. Favorite remarks included the phrase "n**** in the woodpile,"¹¹⁹ replaced in a more enlightened era by "negro in the woodpile."¹²⁰ Those with untenable legal positions were said not even to have a "chinaman's chance",¹²¹ sneaky litigants were sometimes compared to the "heathen chinee"¹²² of Bret Harte's poem.¹²³ There is no reason

117. *Id.* at 431.

118. *Id.* at 430. See also *United States v. Texas Ed. Agency*, 600 F.2d 518 (5th Cir. 1979); *McNeal v. Tate County Sch. Dist.*, 508 F.2d 1017 (5th Cir. 1975).

119. See, e.g., *White v. Bd. of Adjustment of the City of Birmingham*, 15 So. 2d 585, 589 (Ala. 1943) (Brown J., dissenting) ("There is, however, a 'n**** in the wood pile,' as appears from the evidence in this case—appellant has on her property a servant's house in which negroes, who serve people in this residence, live.") (asterisks added); *Baker v. J.C. Watson Co.*, 134 P.2d 613, 624 (Idaho 1943); *Dillard v. State*, 73 So. 799, 799 (Miss. 1917); see also *In re Agresta*, 476 N.E.2d 285 (N.Y. 1985) (upholding discipline of judge for using phrase).

120. See, e.g., *Yellow Cab Operating Co. v. Taxicab Drivers Local Union No. 889*, 35 F. Supp. 403, 408 (W.D. Okla. 1940) (noting that one subject of labor dispute was "a colored boy, James Criss" "while he may not be considered exactly 'the negro in the woodpile', is the 'fly in the ointment.'"), *rev'd*, 123 F.2d 262 (10th Cir. 1941); *Johnson v. State*, 182 P.2d 777, 783 (Okla. Crim. App. 1947); see also *State v. Whittaker*, 94 So. 144, 145 (La. 1922) ("The judge a quo, instead of being impressed in this case with the suggestion that there was 'a n**** in the woods,' evidently accepted, as a fact, that there was 'a negro in the woodpile.'") (asterisks added).

121. See, e.g., *Belsler v. CIR*, 174 F.2d 386, 390 (4th Cir. 1947) (noting that there was "no likelihood (not even a modicum of a Chinaman's chance) that he would ever realize anything on these loans"); *Commonwealth v. Savor*, 119 A.2d 849, 854 (Pa. Super.) (Ross J., dissenting) ("From the moment the jury learned that he had a penitentiary record, he—guilty or innocent—didn't have a 'CHINAMAN'S CHANCE' OF ESCAPING CONVICTION. In other words he, in my judgment, did not have a fair trial."), *aff'd*, 120 A.2d 444 (Pa. 1956); *State v. Hensley*, 1991 WL 207840, *2 (Tenn. Crim. App. 1991), *rev'd sub nom.* *State v. Hargrove*, 1993 WL 300759 (Tenn. 1993); *State v. Rhodes*, 543 N.W.2d 867 (1995) (counsel "decided not to pursue the suppression motion because there was not 'a Chinaman's chance that the statement would be suppressed.' Counsel was correct."). See also *Chun Kock Quon v. Proctor*, 92 F.2d 326, 329 (9th Cir. 1937) ("When federal officers mete out such treatment to a man previously established to be an American citizen, we can well understand the bitter irony of the current phrase 'A Chinaman's Chance'").

122. See, e.g., *Farm Credit Admin. v. Burleigh*, 26 F. Supp. 938, 939 (D. Or. 1938)

to assume that a cultural feature this systematically entrenched will disappear on its own, particularly from written law that can only be changed through affirmative action.¹²⁴

Every state has a state university with professional historians, economists, and political scientists. Every state has a judicial

(“Bret Harte’s ‘Heathen Chinee’ could have taken a lesson” from conduct of litigant), *rev’d*, 110 F.2d 793 (9th Cir. 1940); Board of Supervisors of Monroe County v. State, 63 Miss. 135, 1885 WL 4886, *2 (Miss. 1885) (“When asked to pay out money, they must answer like the ‘heathen Chinee’ to the drowning man, who cried to him to throw him a rope: ‘No have got—how can do?’”); Cook v. Newby, 112 S.W. 272, 278 (Mo. 1908); Owens v. Reserve Loan Life Ins. Co., 175 S.E. 203, 207 (N.C. 1934) (Clarkson J. dissenting); Ling v. Richfield Oil Co., 16 P.2d 643, 644 (Or. 1932) (“Bret Harte’s ‘heathen chinee’ had nothing in ‘ways that are dark, and tricks that are vain’ on the devious method by which the contractual relations between respondent and appellant were established.”); Pendar v. Kelley, 48 Vt. 27, 1875 WL 6622 (1875).

123. The poem is long, but the critical stanza is:

Which is why I remark,
And my language is plain,
That for ways that are dark
And for tricks that are vain,
The heathen Chinee is peculiar, —
Which the same I am free to maintain.

Bret Harte, *Plain Language from Truthful James*, The Overland Monthly Magazine, Sept., 1870, reprinted in BRET HARTE, THE HEATHEN CHINEE (1870), available at <http://etext.lib.virginia.edu/railton/roughingit/map/chiharte.html>.

124. The analysis of Justice Thomas in *United States v. Fordice* about the persistence of bad intent is particularly trenchant:

It is safe to assume that a policy adopted during the *de jure* era, if it produces segregative effects, reflects a discriminatory intent. As long as that intent remains, of course, such a policy cannot continue. And given an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time, both because the State has created the dispute through its own prior unlawful conduct, *see, e.g.*, [Keyes v. School Dist. No. 1 of Denver, 413 U.S. 189, 209-210 (1973).] and because discriminatory intent does tend to persist through time, *see, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299, 309-310, n.15 (1977). Although we do not formulate our standard in terms of a burden shift with respect to intent, the factors we do consider—the historical background of the policy, the degree of its adverse impact, and the plausibility of any justification asserted in its defense—are precisely those factors that go into determining intent under *Washington v. Davis*, 426 U.S. 229 (1976). *See, e.g.*, *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-267 (1977). Thus, if a policy remains in force, without adequate justification and despite tainted roots and segregative effect, it appears clear—clear enough to presume conclusively—that the State has failed to disprove discriminatory intent.

505 U.S. 717, 746-47 (1992) (Thomas J., concurring). *See also, e.g.*, Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 958 (2003) (describing experiment testing the results of job applications showing that “even whites with criminal records received more favorable treatment than blacks without criminal records.”) (emphasis in original); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, MIT Dept. of Econ. Working Paper 03-22 (May 27, 2003) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=422902.

system and most have law schools,¹²⁵ so legal experts will not be hard to find. There are State Advisory Committees to the U.S. Commission on Civil Rights in every state in the Union.¹²⁶ The State Advisory Committees institutionally have decades of experience generating information about local conditions and experiences and writing reports about them.

All of these resources should be called upon to study the structure of Jim Crow since the Civil War. Every state should know whether, when and to what extent African Americans and members of other races were excluded from public and private housing, jobs, and education through the actions of the state, and other ways in which race discrimination shaped the laws and activities of the government. Every state should know what was done about that discrimination, through litigation, voluntary changes in policy, or otherwise. Every state should attempt to identify the laws and governmental structures shaped by racial discrimination. Finally, every state should estimate the present consequences of historical discrimination. Systematic and responsible generation of facts and information would allow discussion and legislation about race and justice in ways that are now impossible.

125. *Grutter v. Bollinger*, 539 U.S. 306, 357-58 (2003) (Thomas, J., dissenting) (noting that all but five states have public law schools).

126. 42 U.S.C. § 1975(a); 45 C.F.R. §§ 703.1-703.10.