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## Brown, the Civil Rights Movement, and the Silent Litigation Revolution

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## ***Brown*, the Civil Rights Movement, and the Silent Litigation Revolution**

*Stephen C. Yeazell\**

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### I. INTRODUCTION

One doubts that Robert Carter, Thurgood Marshall, Spottswood Robinson, Jack Greenberg and the rest of the legal team that argued *Brown v. Board of Education*<sup>1</sup> spent much time thinking about mass torts. Nonetheless, it is entirely appropriate that a commemoration of their achievements include not only that topic but also international human rights and health care, as well as the more expected ones of education and social welfare. *Brown* was part of a revolution, and revolutions often have collateral effects as important as their immediate consequences. The civil rights movement followed the same pattern.

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\* David G. Price & Dallas P. Price Professor of Law, UCLA School of Law. I am grateful both for the opportunity afforded by the VANDERBILT LAW REVIEW to think about these themes and for the comments by the symposium participants and by my colleagues, Richard Abel, Stuart Banner, Kenneth L. Karst, William Rubenstein, and Clyde Spillenger.

1. 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955) (*Brown II*).

As an immediate consequence, that movement brought us school desegregation. Follow-on effects included desegregation of public facilities. These were important milestones in U.S. society. They achieved specific changes, but they also made possible the second civil rights revolution—the legislative actions that have, in the last four decades, transformed U.S. society. Beyond race and civil rights, *Brown* created several ripples, two of which provide the focus for this Essay.

First, *Brown* and the civil rights litigation movement helped create a renewed belief, not just in the law, but more specifically in litigation as a noble calling and as an avenue for social change. That belief lies open to challenge, and it can leave students and lawyers frustrated at the distance between the aspirations that brought them to law school and the world of practice as they perceive it. But whether or not it is well-founded, this belief, with roots traceable to *Brown* and civil rights litigation, has endured for several generations. Thus, *Brown* reshaped the aspirations of lawyers in ways that are still important.

Second, *Brown* constituted an important step in the restructuring of the U.S. bar. One of *Brown*'s progeny, *NAACP v. Button*,<sup>2</sup> marked a first step in the relaxation of bans on solicitation and the marketing of lawyers. In the wake of *Button* came greater changes. Collectively those changes remade the world of practice, particularly on the plaintiffs' side of the bar. We now have political candidates who regularly campaign for or against the "trial lawyers," by which they mean the plaintiffs' bar.<sup>3</sup> To put this in perspective, it is unthinkable that any national political candidate in 1954 would have even thought it plausible to have a position on the plaintiffs' bar. While *Brown* did not create this world, it constituted a very powerful symbol of litigation as a transformative force, and the power of that image helps explain the fact that the plaintiffs' bar regularly depicts itself as the defender of constitutional rights. *Brown* and its sequels made that slogan both plausible and attractive. It gave to the plaintiffs' bar, which was starting to reshape its finances and practice setting, an image that involved more than vehicular accidents:

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2. 371 U.S. 415, 439-40 (1963) (holding that a state bar's solicitation ban violated the NAACP's First Amendment right to assist parties in civil rights litigation).

3. In 2003 President George W. Bush made twelve speeches or public statements in which he identified "trial lawyers" as a significant issue of public policy. Most of these came in assertions that "trial lawyers" had created a substantial problem in the availability of medical care by filing frivolous lawsuits for medical malpractice, with the result that malpractice insurance premiums had increased so much that good doctors were either leaving practice, leaving the state, or restricting their area of practice. 39 WKLY. COMPILATION PRESIDENTIAL DOCS. 73, 109, 117, 289, 321, 776, 1142, 1253, 1361, 1459, 1523, 1767 (2003).

plaintiffs represented by this bar were, like the plaintiffs in *Brown*, vindicating rights suppressed by the defendants.

## II. *BROWN* AND THE CULTURE OF LAWYERS

*Brown* gave us a model for social change through litigation, a model in which civil litigators of sufficient dedication and creativity could bring about deep, important social changes. That belief itself marked a new vision of legal change.

Although several earlier generations of crusaders had sought social change, *Brown's* successful use of litigation as an agent of social change marked a departure. In the previous century, abolitionists had tried to use the law to free slaves, but their struggle used legislation and direct action. Courts entered the scene as the instruments of the slaveholders, enforcing the Fugitive Slave laws and, in *Dred Scott*, holding unconstitutional one of the abolitionists' legislative victories.<sup>4</sup> Perhaps not surprisingly, abolitionists saw the ballot box and the bullet as much more likely weapons in the struggle against our "peculiar institution."

Even after the Civil War and the Reconstruction, the courts did not look like a hospitable forum for those seeking social change. On one hand, courts "cast themselves in the role of protectors of individual employees from coercion by unions"<sup>5</sup> and enjoined strikes as unlawful combinations. They played a similar role in "protecting" workers from early wage and hour legislation, striking it down as an infringement of freedom of contract.<sup>6</sup> The labor injunction of the late nineteenth and early twentieth centuries was actively deployed to preserve existing relationships of social power.<sup>7</sup> But when legally free former slaves sought to invoke this apparently deep commitment to individualism by challenging segregation in interstate transportation, they found that the Fourteenth Amendment permitted a society that was racially separate (though theoretically equal).<sup>8</sup> One cannot blame those who sought what they would describe as "progressive" social change for not thinking first of litigation as the instrument of that change.

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4. *Dred Scott v. Sandford*, 60 U.S. 393, 449-50 (1857).

5. CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* 48 (Louis Galambos & Robert E. Gallman, eds., 1985).

6. *Lochner v. New York*, 198 U.S. 45, 64-65 (1905).

7. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 1-3 (1978).

8. *Plessy v. Ferguson*, 165 U.S. 537, 544 (1896).

That perception persisted through the 1920s and 1930s. In the era of the New Deal, idealistic young lawyers<sup>9</sup> went to work in administrative agencies and the executive branch, or perhaps in Congress. But they did not in the courts and not by using litigation as an agent of social change. Their faith was perhaps best captured in James Landis's "Storrs Lectures" in 1938, published as *The Administrative Process*.<sup>10</sup> Landis, who had just assumed the deanship at Harvard Law School, well represented contemporary legal thought: "The administrative process is, in essence, our generation's answer to the inadequacy of judicial and legislative processes."<sup>11</sup> When litigation was on the agenda of these New Deal reformers, it chiefly served to defend legislative and executive initiatives against hostile judicial review. Few would have thought of the courts or civil litigation as an agent of social change.

One can see this administrative and executive focus even in one of the pathbreaking exceptions. At the very end of the New Deal, there appeared an article about a then-obscure procedural device, the class action. In *The Contemporary Function of the Class Suit*,<sup>12</sup> Harry Kalven and Maurice Rosenfield sought to revitalize this somewhat exotic device and to create a role for litigation as a tool of social reform. Basic to their conception was the idea that such suits would magnify and supplement the efforts of the administrative state:

This power of administrative bodies [to redress small harms visited on large numbers of people] is still in the tentative stage, and there are, of course, many fields in which administrative bodies have not made an appearance. As a consequence, whether it is desirable or not, private litigation must still police large areas of modern law and provide the exclusive remedy for many large-scale group injuries. It is the primary concern of this article to explore the possibilities of revitalizing private litigation to fashion an effective means of group redress.<sup>13</sup>

For Kalven and Rosenfield, then, social reform litigation was still primarily a function of the legislature and executive; litigation could supplement but not supplant such efforts.

In the first half of the twentieth century, one could see litigation as an agent of social change only in two areas, but it was on

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9. One is sorry to report that the more accurate phrase would be idealistic young *men*. And that gender-specificity remained largely true in the civil rights litigation. Constance Baker Mottley is the most notable of the relatively few women lawyers who worked with the NAACP Legal Defense and Education Fund, Inc. See generally JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994) (chronicling the history of the NAACP Legal Defense Fund).

10. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

11. *Id.* at 46.

12. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

13. *Id.* at 687.

the side of the forces against whom the Progressives and New Dealers were working. The first arena lay in the legislation of the New Deal. A number of its programs, especially in the early years, raised constitutional issues. A few were struck down.<sup>14</sup> More were threatened. In either case, the task of these lawyers at the leading edge of social change was to *defend* legislative and administrative programs against judicial invalidation. Such innovations as the “Brandeis brief,” which sought to bring to judicial notice facts drawn from social science and legislative hearings, aimed at supporting with nondoctrinal arguments legislation and administrative actions that might otherwise succumb to judicial review.<sup>15</sup> In this area, then, litigation played an important, but defensive, role. The second area involved collective bargaining and the then-growing labor union movement. As they had for decades, employers sought to use courts and the injunction as a weapon against organizing and strikes. For those on the union side, the question was not how to use the courts to help the movement, but how to prevent them from harming it.<sup>16</sup> This point emerges most clearly in the work of Felix Frankfurter and Nathan Greene, whose study of the labor injunction concluded that courts should be stripped of jurisdiction to issue injunctive relief in labor disputes.<sup>17</sup> Legislation followed.<sup>18</sup> For those who thought of themselves as social progressives, the best one could hope for from the courts was to stay out of society’s way. From the perspective of one looking back on *Brown*, this recommendation is striking in its utter rejection of the courts as a tool of social change.<sup>19</sup>

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14. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act §§ 3-10, 15 U.S.C. §§703-710 (1935)); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (same).

15. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 419 (1908) (brief submitted by Louis D. Brandeis examining “the course of legislation as well as expressions of opinion from other than judicial sources” on the sources of hour laws affecting female laborers); *Bunting v. Oregon*, 243 U.S. 426 (1917) (One thousand page brief defending a working-hour restriction); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (brief submitted by Alfered Bettman, leader of National Conference on City Planning, focusing on social need for urban planning, *discussed in* Richard Chused, *Euclid’s Historical Imagery*, 51 CASE W. RES. L. REV. 597, 610 (2001)).

16. See TOMLINS, *supra* note 5, at 61-67.

17. FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 205-26 (P. Smith 1963) (1930).

18. The Norris-Laguardia Act stripped federal courts of jurisdiction to issue labor injunctions. Act of March 23, 1932, ch. 90, 47 Stat. 70 (codified at 29 U.S.C. §§101-15 (2004)).

19. In a wonderful reminder of the malleability of history, the civil rights era saw regular efforts by those opposed to integration to adopt the labor model to civil rights, proposing various jurisdiction-stripping legislation that would prevent federal courts from using injunctive relief in the aid of integration. See, e.g., NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950’S* 291 (1969) (describing how in the aftermath of *Brown*, “[t]he result was the rise of a formidable anti-Court congressional bloc. . . . None [of

It was in this climate that the NAACP began its long campaign to challenge national racial segregation. Starting in the second decade of the twentieth century, the Association sought and financed test cases designed to attack various aspects of racial segregation.<sup>20</sup> Several have told the story of the line of cases that culminated in *Brown*.<sup>21</sup> Two principal versions of the campaign have emerged. In one, there is a master plan. In this version, funded by a grant of \$100,000,<sup>22</sup> the Association's efforts began with a self-consciously designed litigation strategy, written by Nathan Margold and approved by the Association's leadership. The plan chose not to attack what looked like the obvious target — the rampant inequality of educational expenditure between black and white schools. Such a plan, challenging the nation to live up to the "equal" part of the "separate but equal" ruling in *Plessy v. Ferguson*,<sup>23</sup> was favored by some segments of black leadership, including W.E.B. DuBois.<sup>24</sup> Instead, the designated strategy took direct aim at the constitutionality of racial segregation, with schools as the focus of the efforts.<sup>25</sup> In part, this strategy flowed from the Association's choice of *litigation* as a strategy of social change. Margold, looking at limited resources to fund a litigation effort, wrote, "[i]t would be a great mistake to fritter away our limited funds on sporadic efforts to force the making of equal

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their proposed legislation] referred directly to segregation, but all concerned the prestige of the Court and challenged the whole philosophy of judicial activism from which the *Brown* decision had in part emerged.").

20. Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 LAW & HIST. REV. 97, 122-28 (2002).

21. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (Gryphon 1994) (1976); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961* 150-216 (1994) (examining the factual, legal, and political antecedents leading to the *Brown* decision); ARYEH NEIER, *ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE* 46-57 (1982); GREENBERG, *supra* note 9, at 85-177; see also Susan D. Carle, *From Buchanan to Button: Legal Ethics and the NAACP*, 8 U. CHI. L. SCH. ROUNDTABLE 281, 283-84 (2001) (describing the legal ethics challenges to two civil rights test cases).

22. TUSHNET, *supra* note 21, at 12-13 (pointing out as well that only part of the promised funds materialized); Carle, *supra* note 21, at 118.

23. *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896). *Plessy* was itself an effort to use litigation to affect social change. Railroads and civil rights groups had carefully arranged this test suit, using what they believed was a sympathetic plaintiff in a sympathetic situation. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1746-47 (1993).

24. NEIER, *supra* note 21, at 49 (describing how DuBois foresaw two centuries of segregation and worried about the generations of black schoolchildren who would suffer as a result); TUSHNET, *supra* note 21, at 179.

25. GREENBERG, *supra* note 9, at 57-58.

divisions of school funds . . .”<sup>26</sup> A second version of the same campaign emerges in the work of other scholars.<sup>27</sup> In this version, the process of case selection was more fortuitous and less calculated. Constantly called on to balance the needs and claims of local chapters—many of whose members sought immediate amelioration of stark inequalities in funding and facilities—the NAACP was often distracted from the single-minded focus called for by Margold. In teachers’ salary cases, for example, the NAACP found itself attacking not the core of racial segregation, but some of its results.<sup>28</sup>

For my purposes it is not critical to resolve the extent to which the litigation leading to *Brown* was an unbroken line from a plan made in 1931 to a Supreme Court case decided in 1954, or whether the route contained more detours dictated by circumstances. The important point about this effort lies not in its inspiration but in its exceptionality. Between 1930 and 1950, the courts were not the institutions that came first to the minds of those seeking social change. Even Kalven and Rosenfield’s important, pioneering justification of class suits saw such litigation as an adjunct to administrative action: the private attorney general was to perform the functions that the real attorney general was simply too busy to cover.<sup>29</sup> Litigation was a supplement to, not a replacement for, and certainly not the antagonist of, national governmental power and policy.

*Brown* changed everything. *Brown* provided an inspiration and a model for several generations of lawyers. *Brown* also suggested that a carefully designed litigation strategy, supported by modest resources, could remake the social landscape. Both ideas were heady.

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26. Memorandum from Nathan Margold, Preliminary Report to the Joint Committee Supervising the Expenditure of the 1930 Appropriation of the American Fund for Public Service to the NAACP 93 (A31), *quoted in* NEIER, *supra* note 21, at 48.

27. TUSHNET, *supra* note 21, at 152-55. See also William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1627-30 (1997) (describing, for example, the fortuity of the NAACP’s involvement in *Shelley v. Kramer*).

28. TUSHNET, *supra* note 21, at 20-26. In these cases the plaintiffs, black school teachers, contended that their salaries were unequal to those of their white peers. *Id.* at 20-21. These suits were in many respects natural for the NAACP, because teachers and other well-educated community leaders were particularly likely to be members and supporters of the Association. But these suits involved complicated factual demonstrations, because the usual line of defense was that the teachers were paid less because they had lesser education or credentials. *Id.* at 23. That question, in turn, required the plaintiffs to demonstrate that the generally segregated colleges that these teachers had attended were substantially equivalent to the institutions attended by white teachers—a demonstration that not only stood at odds with the overall strategy of attacking segregated education as inherently unequal, but also required extensive and expensive battles of experts.

29. Kalven & Rosenfield, *supra* note 12, at 687.

In his critique of lawyers seeking social change primarily through litigation, Gerald López describes the way in which *Brown's* pioneering effort began to become a branch of the legal profession:

I remember the arrival in the 1960s of the first wave of self-consciously progressive lawyers to hit East L.A. . . . We probably called them something nifty like "legal aid" or "civil rights" lawyers, if we called them anything at all.

As lawyers they initially struck many of us as curious hybrids in the making. Those among them who hadn't already embraced the 60s cultural revolution were in the midst of a pretty obvious makeover. They seemed to be trying to take advantage of their privilege and, at the same time, to shed the garb and the perks normally associated with it. They seemed genuine, too, in their insistence upon coming to town specifically to fight for us against the status quo. That fact was no small matter in those days, although by itself, it didn't win over many of us, at least not for long.

But their very presence in East L.A. did suggest new strategic possibilities. . . .<sup>30</sup>

The lawyers López and his friends observed were the first wave of what has become a broad public interest bar. Its members sought mostly social change through litigation.<sup>31</sup> Writing in 1982, Aryeh Neier, the former director of the American Civil Liberties Union, described the rapid growth of "cause lawyering":

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30. GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 1* (Robert W. Gordon et al. eds., 1992).

31. More recently groups aiming at community economic development have emerged, typically combining transactional skills with community organizing, rather than litigation. See, e.g., Boston College Law School Community Economic Development Law Group, at [http://www.bc.edu/bc\\_org/avp/law/st\\_org/pilf/pilfpages/ced.html](http://www.bc.edu/bc_org/avp/law/st_org/pilf/pilfpages/ced.html) (last visited Nov. 17, 2004) (describing themselves and the CED principles as "a group of law students interested in helping people by applying their legal skills to develop communities economically. . . . It is an area of law that combines public interest law with basic transactional law, community activism, with pragmatic business principles."); Susan R. Jones, *Pro Bono in Action: Revitalizing Cities with the Help of Lawyers*, *BUS. LAW TODAY*, Jan.-Feb. 2004, at 64 ("[L]awyers may ultimately influence economic development law and policy locally, regionally and nationally . . . [T]he ABA Business Law Section created the CED Committee in the summer of 2001 to assist lawyers whose primary practice or pro bono service is with low-to-moderate income entrepreneurs and community-based organizations working to revitalize rural and inner-city American communities."). But within the public interest bar, the litigation model still dominates. See, e.g., Trial Lawyers for Public Justice, *Welcome!*, at <http://www.tlpj.org/default.htm> (last visited Nov. 17, 2004) ("Trial Lawyers for Public Justice is a national public interest law firm dedicated to using trial lawyers' skills and resources to create a more just society. TLPJ fights for justice through precedent-setting and socially significant individual and class action litigation . . . . Trial Lawyers for Public Justice has special litigation projects that secure access to justice by battling unnecessary secrecy in the courts, mandatory arbitration abuse, federal preemption of injury victims' claims, and class action abuse."); *NEW YORK LAWYERS FOR THE PUBLIC INTEREST, YEAR 2000 ANNUAL REPORT 4*, available at [http://www.nylpi.org/nylpi\\_2000-ar.pdf](http://www.nylpi.org/nylpi_2000-ar.pdf) ("NYLPI continues to meet the expectations of its founders, combining an innovative and always evolving private bar involvement program with an outstanding litigation and advocacy program working on behalf of low-income New Yorkers in the areas of disability rights, access to health care, and environmental justice . . . We have expanded our practice to include environmental justice and community economic development, an area underserved in New York City and one that successfully combines the work of our staff with that of our member firms.").

The emergence of this "public interest" bar is recent. Two decades ago [the period recalled in the passage from López just quoted], it would have been possible to assemble in one small living room all the lawyers in the United States professionally engaged in advancing causes through litigation. Today they would overflow the grand ballroom of a giant hotel. Virtually alone of the innovations of the 1960s, public interest litigation thrives. . . . Organizations hiring lawyers to sue power companies or challenge sex discrimination . . . are deluged with applications from outstanding graduates of the best law schools. Public interest lawyers have become stock figures in popular novels and television melodramas. They symbolize a convergence of idealism and professional skill.<sup>32</sup>

Neier's assessment finds numerous echoes, and most concur in tracing the power of the image to *Brown*. Nan Aron, chronicling the growth of public interest law, writes, "The civil rights movement is, in many ways, the crucible in which modern public interest law was forged."<sup>33</sup> That movement had several branches. One grew from Ralph Nader's attack on General Motors as a menace to consumer safety, which spawned the "consumerist" movement; Nader has linked his own movement to *Brown*:

*Brown* . . . marked the rebirth of the civil rights movement, and, at the same time, carried far-reaching implications for the legal profession. Here for the first time was a movement of young and idealistic lawyers who were determined to use their skills to create precedents — and advance the cause of justice. As the civil rights movement grew, law students and lawyers began to sense dramatic changes taking place in the law. More law graduates versed in social as well as legal theory applied their idealism and commitment.<sup>34</sup>

The images of practice generated by this movement had powerful resonance. Some law students began either to forsake traditional private practice or to demand that firms incorporate public interest litigation into their practices.<sup>35</sup> Today one finds in U.S. law schools "public interest" programs, students demanding that placement offices focus more staff time and resources on public interest employment, queries to private firms about the extent of their pro bono practices, and more. The National Association of Law

32. NEIER, *supra* note 21, at 5.

33. NAN ARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* 8-9 (1989); see also Oliver A. Houck, *With Charity for All*, 93 *YALE L.J.* 1415, 1439-41 (1984) (describing the roots of the public interest law); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 *STAN. L. REV.* 207, 224-41 (1976) (describing the "second wave" of public interest litigation, beginning in the 1960s and 70s and focusing on issues such as consumer and environmental protection).

34. Ralph Nader, *For the Preservation of the Public Interest*, in *TAKING IDEALS SERIOUSLY: THE CASE FOR A LAWYERS' PUBLIC INTEREST MOVEMENT* 125 (Robert L. Ellis ed., 1984).

35. Jerry J. Berman & Edgar S. Cahn, *Bargaining for Justice: The Law Students' Challenge to Law Firms*, 5 *HARV. C.R.-C.L. L. REV.* 16, 22 (1970) (reporting that the number of Harvard Law School students entering private practice had dropped from 54 to 41 percent between 1964 and 1968).

Placement collects statistics concerning students who find employment in public interest organizations.<sup>36</sup>

It is entirely possible to ask whether these professions of allegiance are durable and whether pro bono and public interest practice have proved the most effective levers of social change. Some have asked whether lawyers most effectively spend their time in such efforts.<sup>37</sup> Others have asked whether such efforts, even if nominally successful, work lasting social change.<sup>38</sup> Perhaps the best evidence of the widespread belief in the transformative power of litigation comes from those who deploy the strategy of social change through litigation in the service of ends opposed by Thurgood Marshall's successors. In recent years, for example, the plaintiffs *attacking* the affirmative programs of the University of Michigan's undergraduate and professional admissions programs were supported by conservative public interest affinity groups who described Supreme Court review in the cases as part of a "long litigation campaign,"<sup>39</sup> a campaign the NAACP Legal Defense and Education Fund had sought to defeat.<sup>40</sup> Marshall and company created a powerful new image of the lawyer as a catalyst for social change, social change that would occur at least in part through litigation. Looking soberly back on the change in professional consciousness wrought by the cause lawyering exemplified in *Brown*, Aryeh Neier writes, "In the 1960s . . . litigation

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36. NATIONAL ASSOCIATION FOR LAW PLACEMENT, JOBS & J.D.'S: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2002 12, 17-19, 41 (2003) (tracking placement, salaries, credentials required, and breakdown in categories of public interest positions, which the document distinguishes from "government" employment). NALP reports that in 2002 and 2003, the most recent years for which data is available, approximately 27 percent of recent law school graduates have accepted "public service" positions (a category that includes both judicial clerkships and military positions), and that about 3 percent have accepted the more narrowly defined "public interest" positions. NALP, *Class of 2003 and Class of 2002, Summary Findings*, available at <http://www.nalp.org/nalpresearch/newgrads.htm> (last visited Nov. 17, 2004). The latter figure, NALP reports, represents the largest portion of recent graduates entering public interest positions since the early 1990s. NALP, *Class of 2003, Summary Findings*, at 3, available at <http://www.nalp.org/nalpresearch/ersini03.pdf> (last visited Nov. 17, 2004).

37. See Scott Cummings, *The Politics of Pro Bono* (May 2004) (on file with author).

38. Compare GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 35-36 (Benjamin I. Page ed., 1991), with KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* 8-10 (1993).

39. Linda Greenhouse, *Court to Revisit Colleges' Efforts to Regain Diversity*, N.Y. TIMES, Dec. 3, 2002, at A1 ("Getting the issue back on the Supreme Court's docket is the culmination of a long litigation campaign by a public interest group here, the Center for Individual Rights, which opposes affirmative action and helped recruit the three unsuccessful white applicants who are the plaintiffs in the two cases.").

40. NAACP Legal Defense and Education Fund, *NAACP LDF Applauds U Michigan Supreme Court Ruling* (June 23, 2003), at <http://www.naacpldf.org/content.aspx?article=58>.

seemed to be the way to deal with every question."<sup>41</sup> No one would have thought so in 1952, on the eve of *Brown*. That the legacy of this revolution had collateral effects unimagined by its participants would not make it different from any other revolution.

### III. *BROWN* AND THE STRUCTURE OF THE BAR

If *Brown* had only furnished lawyers and law students with an enduring image of litigation as an agent of social change, it would be worth remembering as part not only of a civil rights revolution but as part of our broader legal culture. But *Brown* began a process that may prove just as durable: the deregulation of the legal profession.

#### A. *Deregulation as a Child of Brown*

The campaign culminating in *Brown* required choosing a progression of individual cases, each of which would aim at a vulnerable chink in the legal armor of racial segregation. To engage in such litigation, the NAACP and its Legal Defense and Education Fund<sup>42</sup> had to do two things: select plaintiffs who would be both sympathetic and steadfast and focus on claims that would serve the long-range goals of desegregation as much as immediate relief to individual clients. For example, a claim that a racially segregated school received insufficient funding would, even if successful, do nothing to integrate that school. If the NAACP stuck assiduously to its plan, such a claim would not be pursued.<sup>43</sup> An opponent of the integration effort could therefore attack in two ways: head-on, by defending the constitutionality of existing segregation, or tactically, by aiming at the process of case selection and control lying at the base of the effort. Southern states, having failed in the former task, tried the latter. The consequences for the legal profession are still with us.

Perhaps the best evidence that contemporaries understood exactly what *Brown* represented came from six Southern states that, within two years after *Brown*, had amended the regulations governing their state bars.<sup>44</sup> These regulations aimed at challenging the tactics

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41. NEIER, *supra* note 21, at 213.

42. There is, of course, a history of occasionally tense relations between the parent Association and the Fund, which began life as a department of the Association and in time became a separate legal entity, with goals that occasionally clashed with those of the parent. See GREENBERG, *supra* note 9, at 19-20, 244-45, 478-81.

43. See *supra* text accompanying note 25.

44. NAACP v. Button, 371 U.S. 415, 445 (1963) (Douglas, J., concurring and citing statutes in Arkansas, Florida, Georgia, Mississippi, and Tennessee, in addition to the Virginia statute at issue in the case at hand).

of solicitation and of strategic guidance of clients.<sup>45</sup> Both challenges had their roots in a traditional picture of the lawyer as an agent whose client would seek him out and who would then pursue all possible lawful strategies to assist the client, taking instructions from the client.<sup>46</sup> As Ben Sheppherd, the Attorney General of Texas, asserted in 1956, the "p" in NAACP meant, "Pick the Place, Prepare the setting, Procure the Plaintiffs, and Push them forward like Pawns."<sup>47</sup> If tighter state regulation could prevent the Association and the Fund from seeking the right clients and from dictating overall litigation strategy, those new regulations could cut off the flow of future cases. It was a brilliant counterstrategy that almost succeeded. Just as important, its rejection opened the way to a new picture of the lawyer and the client, a picture with resonance far from social reform movements.

The targets fought back, and the repercussions of the fight still shape the contemporary legal profession. *NAACP v. Button*<sup>48</sup> grew from a declaratory action filed by the Association, which sought to have declared unconstitutional several of the newly enacted portions of Virginia's scheme for regulating lawyers. By the time the case reached the U.S. Supreme Court, its focus was on a provision broadening the scope of unlawful solicitation of legal business to include "an agent for an . . . organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability."<sup>49</sup> The Virginia Supreme Court, correctly perceiving which "organization" this statute was aimed at, had held that

under the expanded definition [of solicitation] . . . activities [of the Association and Fund] constituted "fomenting and soliciting legal business in which they are not parties . . . and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control."<sup>50</sup>

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45. See, e.g., Carle, *supra* note 21, at 299 (discussing the South's post-*Brown* tactics: "These initiatives were part of a broad campaign to cripple the NAACP's post-Brown desegregation efforts. Other legislative avenues included laws requiring political organizations to register and disclose their membership lists to the state, use of reporting and disclosure requirements under corporate and tax laws, and outright prohibitions against advocating school integration."); GREENBERG, *supra* note 9, at 217-22 (describing the attempts of several southern states to hinder the NAACP's efforts). See generally TUSHNET, *supra* note 21, at 272-300.

46. Carle, *supra* note 21, at 300.

47. TUSHNET, *supra* note 21, at 272.

48. 371 U.S. at 417-19 (the case was originally filed in 1957, but detours through several layers of the Virginia and federal courts delayed its arrival in the U.S. Supreme Court).

49. *Id.* at 423 (citing Code of Virginia, 1950 §§ 54-74, 54-78, 54-79, as amended by Acts of 1956, Ex. Session ch. 33).

50. *Id.* at 426 (quoting *NAACP v. Harrison*, 116 S.E.2d 55, 66 (Va. 1960)).

After nearly ruling against the NAACP (and two rearguments of the case),<sup>51</sup> the U.S. Supreme Court held that the regulation, as thus construed and applied to the plaintiffs, violated First Amendment rights of “expression and association.” As an immediate effect, that holding lifted a cloud over the efforts at social reform through litigation. More important for purposes of my argument, *Button* did so in ways that made possible broader changes in the plaintiffs’ bar. For *Button* made its ruling in the light of some bad facts. As described (in a footnote in the majority opinion and with more emphasis in the dissent of Justice Harlan), Virginia presented testimony that blank retainer letters were circulated at meetings called by the Association’s chapters and that several of the plaintiffs in Virginia school litigation did not know they were parties to any litigation and said they had never met with counsel.<sup>52</sup> Moreover, Harlan accepted a finding that the overall strategy of litigation had, “to a considerable extent” been shaped by the Association rather than by clients.<sup>53</sup> Because those facts were bad if the case were seen from the perspective of traditional models of the legal profession, the Court necessarily had to bless them in reaching its conclusion that the solicitation and litigation control of the Association were protected. It did so: “[T]he State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner’s activities, which can justify the broad prohibitions which it has imposed.”<sup>54</sup>

The problem (or the opportunity) arose because, although Virginia had acted with racial animus, it had used tools that were entirely traditional. As Susan Carle has written, *Button* involved a collision between an elite conception of lawyering for the public good (even if those efforts involved a collision with rules of ethics) “and the motives of those from a lower strata of the bar, who were engaging in comparable activities with pecuniary, self-interested intent.”<sup>55</sup> Indeed, Mark Tushnet has demonstrated that the ethical rules involved were so traditional that the first draft of the opinion would have acquiesced in Virginia’s criminalization of the NAACP’s solicitation efforts.<sup>56</sup> For purposes of my argument, the NAACP’s near

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51. Mark Tushnet has unearthed archives indicating that only the resignations of Justice Whitaker and Justice Frankfurter—and their replacement by Justices White and Goldberg—prevented the affirmance of the Virginia regulations. TUSHNET, *supra* note 21, at 278-82.

52. *Button*, 371 U.S. at 422, 450.

53. *Id.*; see also TUSHNET, *supra* note 21, at 281.

54. *Button*, 371 U.S. at 444.

55. Carle, *supra* note 20, at 100.

56. TUSHNET, *supra* note 21, at 272-300.

loss emphasizes how close in concept were the Association's efforts to those of many lawyers who were soliciting for reasons of profit rather than principle. If it was lawful to solicit business *en masse*, and if it was lawful for lawyers to process a case without much connection with the individual client, many changes in the legal profession could occur.

And they did, though not all at once, because of limitations inhering both in the opinion and in the circumstances that gave rise to *Button*. First, *Button* had made much of the way in which the entities behind the litigation (the Association and the LDF) were using litigation as a form of political expression, and that they did not stand to gain financially from their actions; indeed they were incurring expenses, and these were the days before fee-shifting statutes. So the holding seemed to have little application to the ordinary practice of law, in which the lawyer's living and the client's financial compensation were principally at stake. Second, precisely because the *Button* plaintiffs engaged in litigation that was obviously cause-related, the link to political action was clear. By contrast, *Button* did not have immediately apparent application to ordinary lawsuits, which did not seek a major reordering of social or political relationships. Those applications emerged only as the Supreme Court confronted implications of *Button* over the next fifteen years.

Change came in several steps. The year after *Button*, the Court upheld the right of a labor union to establish a lawyer-referral system for ordinary workplace injuries;<sup>57</sup> the opinion focused on the associational ties of the union members, likening it to *Button*.<sup>58</sup> This small step was relatively easy because labor unions, like the NAACP, had for years been engaged in various forms of political activity on behalf of members. It was not a great stretch to see the referral scheme as a form of collective, quasi-political action. However small, the step was important because it suggested that a quite ordinary personal injury lawsuit could be a form of protected political action. In the same year, another union successfully defended on similar grounds a scheme in which it directly paid its own lawyers to handle such claims on behalf of members. Citing *Button*, the Court said that the protected associational values need not be ones of pressing political importance.<sup>59</sup> Four years later came a case in which still another union referred any injured member to a panel of outside lawyers with whom it had negotiated a maximum contingent fee;<sup>60</sup>

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57. *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1, 8 (1964).

58. *Id.* at 6-8.

59. *United Mine Workers v. Illinois State Bar Ass'n.*, 389 U.S. 217, 221-23 (1967).

60. *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 577-78 (1971).

again, the Court held the state's contrary regulation unconstitutional. Thus far, the shadow of *Button* fell principally on groups that looked in many respects like the NAACP. Unions, like the NAACP, existed for purposes other than litigation; they had organizational structure and aims separate from the lawsuit, and they sought political goals broader than their members' economic wellbeing. Moreover, like the NAACP, they had long been disadvantaged by the law and had emerged into positions of legitimacy and power only in the mid-twentieth century. So in many respects it was easy for the Court to assimilate their litigation efforts to those of the NAACP.

Then, a dozen years after *Button*, came an important sidestep into another regulated industry. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, a consumers' group obtained a declaration that it was unlawful for the state to prevent a licensed pharmacist from advertising the price of prescription drugs.<sup>61</sup> *Board of Pharmacy* took the Court further than its preceding cases in several ways. First and obviously, there was no litigation "project": the consumers' group just wanted price information so as to stimulate competition. And while one might characterize the plaintiff's agenda as political in a broad sense (and the majority did<sup>62</sup>), it was far less obviously so than that of the NAACP. Consumers, though they might be flexing their muscles as a result of organizing efforts like those of Ralph Nader, were neither a discrete and insular minority nor a downtrodden group. Nevertheless, the Court, citing *Button*, and elaborating the commercial speech doctrine, held that the ban could not be justified by the state's desire to regulate the profession. But the opinion was careful to say that its rulings did not necessarily apply to medicine and law, where other considerations might dominate.

A year later it turned out that the distinctions between pharmacy and law were not strong enough to prevent *Button* from extending to the advertising of prices of common legal services—an uncontested divorce or adoption, a personal bankruptcy, or a name change. *Bates v. State Bar of Arizona*<sup>63</sup> traces its descent directly to *Button*, because the obvious basis for challenging the bar's prohibition on price competition through advertising—the Sherman Act<sup>64</sup>—was off limits: the so-called "sovereign action" limitation on the Sherman Act

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61. 425 U.S. 748, 772-73 (1976).

62. See *id.* at 763 ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

63. 433 U.S. 350 (1977).

64. The Sherman Anti-Trust Act, 15 U.S.C. §§ 1 et. seq. (2004).

insulates from scrutiny uncompetitive rules specifically blessed by the state.<sup>65</sup> Only *Button's* First Amendment lineage got the *Bates* Court to its conclusion:

[A]dvertising by attorneys is not an unmitigated source of harm to the administration of justice. It may offer great benefits. Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.

[From the footnote appended to the preceding sentence:]Decided cases reinforce this view. The Court often has recognized that collective activity undertaken to obtain meaningful access to the courts is protected under the First Amendment. [Citations to the union cases and *Button* omitted.] It would be difficult to understand these cases if a lawsuit were somehow viewed as an evil in itself. Underlying them was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. This concern applies with at least as much force to aggrieved individuals as it does to groups.<sup>66</sup>

This passage bears the marks of the NAACP's long campaign. Litigation—and the solicitation of litigation—has become not a social evil but a form of political expression and, in particular, an avenue for plaintiffs (the “aggrieved”) to learn of and to “effectuate” “legal rights.” With *Bates*, *Button* became the charter for a new view of the legal profession and of litigation. Justice Powell, in dissent, understood the implications and did not like them:

Although the Court appears to note some reservations (mentioned below), it is clear that within undefined limits today's decision will effect profound changes in the practice of law, viewed for centuries as a learned profession. The supervisory power of the courts over members of the bar, as officers of the courts, and the authority of the respective States to oversee the regulation of the profession have been weakened. Although the Court's opinion professes to be framed narrowly, and its reach is subject to future clarification, the holding is explicit and expansive with respect to the advertising of undefined “routine legal services.”<sup>67</sup>

One can disagree with Justice Powell's gloomy view of the consequences while believing him correct about the structural change. *Bates*, drawing its strength and doctrinal underpinnings from *Button*, recast the legal profession in a new light—as a medium of political action. Litigation, even ordinary civil litigation, became a form of political right-seeking. Moreover, the power to invoke this right lies not only in the hands of clients, but also in the hands of the representatives—the lawyers—who can seek out and encourage those who might wish to vindicate their rights.

*Bates* has drawn criticism not only from those, like Justice Powell, who believe the deregulation of the legal profession was

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65. *Bates*, 433 U.S. at 359-63.

66. *Id.* at 376-77 (citations omitted).

67. *Id.* at 389 (Powell, J., dissenting).

unwise. Another strand of critique comes from scholars and judges who believe that, without regard to their effect on professional regulation, doctrines of commercial speech rest on shaky foundations.<sup>68</sup> For present purposes neither critique need be confronted: my argument is positive rather than normative. Nor does my argument involve the insistence that the present regulation of the legal profession in *Bates* could not have happened without *Brown* and *Button*. In a parallel universe we might have come to *Bates* had *Brown* and *Button* never been decided. My argument is simply that *our* path to deregulation *did* lie through *Brown* and *Button*, and that the consequences of that particular, contingent path are still with us.

### B. The Reconstitution of the Plaintiffs' Bar

*Button* and its offspring created a deregulatory opening that allowed the plaintiffs' bar to remake itself. It has taken the opening. Three critical things have changed that bar. First, it has increased its modal organizational size. Second, that bar has recapitalized itself.<sup>69</sup> Third, it has specialized. Each of these changes, sketched below, is important. All were facilitated by the deregulation that, in our history, traces itself to *Button*.

The modal size of the practice organization in which U.S. lawyers operate has increased over the past fifty years. Many have watched with a mixture of awe and horror the much-chronicled emergence of the megafirm, with hundreds or thousands of lawyers. But, even so, most lawyers do not practice in such settings. For my purposes the more important change came at the lower end of the practice spectrum. Until 1960 more than half of all U.S. lawyers practiced alone.<sup>70</sup> Some of these lawyers were excellent, fully

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68. See, e.g., *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998) ("The parties' differing views as to the degree of First Amendment protection to which Bad Frog's labels are entitled, if any, stem from doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved. In particular, these decisions have created some uncertainty as to the degree of protection for commercial advertising that lacks precise informational content."); Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093, 1119 (1991) ("Thus, even if a commercial speech categorization could serve some purpose, the court's inability to fashion a coherent definition of commercial speech undermines its usefulness. Such an uncertain definition disserves judges, who need clear doctrinal guidance, and exacerbates the chill of protected speech.").

69. See Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183, 198-211 (2001) (describing changes in the legal marketplace resulting in financial parity between the plaintiffs' and defense bars).

70. RICHARD L. ABEL, *AMERICAN LAWYERS* 300 (1989) (reporting on tabulation of lawyers listed in Martindale-Hubbell).

justifying their folkloric status; many more were marginal, barely scraping by and doing their clients few favors in the process.<sup>71</sup> Describing the situation of this segment of the bar a few years after *Brown*, Jerome Carlin chronicled their meager professional and economic means.<sup>72</sup> Lacking the intellectual or financial capital to take their cases deep into litigation, they were forced to hope for a quick settlement.<sup>73</sup>

In the closing decades of the twentieth century this segment of the bar reconstituted itself in ways that were facilitated by the deregulation that followed from *Button*. Two basic changes occurred. First, the modal practice group increased in size—not from one to a hundred lawyers but from one to a few. In California, a survey conducted by the State Bar in 2001 found that of the lawyers in private practice—almost 80 percent of all active lawyers—more than half practiced in firms with between two and twenty lawyers.<sup>74</sup> More precisely, 30 percent of all lawyers in private practice were in firms of between two and five lawyers; 27 percent of the same group were in firms of between six and twenty lawyers.<sup>75</sup> Patterns obviously differ among regions, and one would expect, all things being equal, that urban practices would be more likely to contain groups of lawyers than those in rural areas. Nevertheless, the slow national disappearance of the solo practitioner tells us that California is not unrepresentative.

The changes represented by this shift in practice demographics are qualitative rather than quantitative and, together with the modest deregulation of practice, transformative. The shift from a solo practice to a six- or ten-lawyer firm was enormous not only in crude statistical terms, although it is worth noticing that such a change dwarfs in percentage terms the growth of many of the highly celebrated or condemned megafirms. More important than the statistical transformation, however, is the potential for mutually supportive practices. Herbert Kritzer's important work in describing the

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71. See JEROME E. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* 205, 208-09 (1962) (characterizing solo practitioners as at the "bottom of the status ladder" and questioning whether most of these attorneys' work should properly be considered lawyers' work as opposed to bookkeeping and brokering).

72. *Id.* at 87-90. In his second edition, published in 1994, Carlin finds solo practitioners complaining that the "plaintiffs' bar," characterized as specialists in firms, are taking away the solo practitioners' most profitable injury cases. JEROME E. CARLIN, *LAWYERS ON THEIR OWN: THE SOLO PRACTITIONER IN AN URBAN SETTING* xxi-xxii (Austin & Winfield 1994).

73. *Id.*

74. *Survey Finds Bar Makeup is Shifting, But Slowly*, CAL. ST. B.J., Nov. 2001, at 1 (reporting a survey of 1500 randomly selected CA lawyers).

75. *Id.*

conditions of life in the plaintiffs' bar in Wisconsin shows us how this effect works out in practice.<sup>76</sup> These small practice groups typically work across a spread of case types: some low-fee, high realization<sup>77</sup> cases like workers' compensation representation, some relatively routine vehicle injury cases on a contingent fee, where careful case selection, good investigation, and experience in dealing with the insurance industry and its lawyers will yield a flow of higher but less certain fees; and a case or two characterized by high risk and high potential recovery (for example, a product liability case with uncertain liability but high damages). This diversification of case "portfolio" may not yield enormous returns—Kritzer reports a number of excellent plaintiffs' lawyers who have never collected a million dollar verdict—but it will enable the lawyers involved to make a decent living, at an imputed hourly rate comparable to that of their defense counterparts.<sup>78</sup> One of Kritzer's most striking findings was that the imputed hourly return to these plaintiffs' lawyers (the total return per hour of lawyer time) was just slightly higher than the hourly rates of the lawyers on the other side, paid by the insurance carriers.<sup>79</sup> This finding is important in two respects. At the time *Brown* was decided, ordinary plaintiffs' lawyers inhabited economic and professional

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76. See IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD (Herbert M. Kritzer & Susan S. Sibley eds., 2003); Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 227-239 (2001) (describing various pressures leading to changes in the legal profession, such as increased specialization/stratification and practice consolidation); Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say*, 80 TEX. L. REV. 1943, 1977-78 (2002) (arguing that a firm's ability to diversify its litigation portfolio, thereby hedging its risk, depends on the firm's size); Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 782 (2002) (suggesting that personal injury law firms may yield higher returns than other types of firms because of a combination of "expertise and efficiencies that the lawyers are able to obtain"); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 304 (1998) (describing various lawyers' portfolio practices and noting the influence of firm size and reputation on these strategies) [hereinafter Kritzer, *Wages of Risk*]. Much of this work is collected in HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (forthcoming August 2004).

77. Those who study law firms use "realization" to describe the rate at which lawyers are paid for the hours they invest in clients' work. A high realization rate means efficient billing and collection, a function both of the lawyers' practices and of the clients' ability and willingness to pay. See, e.g., F. Leary Davis, *Back to the Future: The Buyer's Market and the Need for Law Firm Leadership, Creativity and Innovation*, 16 CAMPBELL L. REV. 147, 171-72 (1994) (describing a management initiative: "Tactics adopted to improve realization address the issue of how firms can collect for as much of the work they do as possible. These tactics, including improved time-keeping and billing procedures, improved letters of engagement and disengagement, and appropriate utilization of technology, benefited [sic] both firms and their clients.") (emphasis omitted).

78. Kritzer, *The Wages of Risk*, *supra* note 76

79. *Id.* at 302 ("The returns from contingency fee practice are at best 'somewhat better' than what lawyers earn from hourly fee practices.")

universes entirely different from those of their defense counterparts. Today, some commentators argue that plaintiffs' lawyers as a group grow fat off the land.<sup>80</sup> For my purposes, even the finding of equality with defendants' lawyers is big news.

The growth in modal firm size does more than permit economic stability. In most cases it qualitatively improves the legal product coming from these firms. Again, the reasons are relatively easy but very important to see. Apart from financial stability, a lawyer with five or ten colleagues can do a better job on any given case because she has quick and cheap access to others' expertise and experience. Anyone in a law firm or law faculty knows that a five minute conversation with someone who has dealt with a question before will save twenty hours of research. Just as important, a half-hour conversation about basic case strategy will often result in an exponentially stronger approach to the entire matter. One of the many important lessons flowing from the litigation team behind the cases leading to *Brown* is that the discussed case is the better-litigated case. The NAACP provided not only a constitutional landmark but also a model for the effectiveness of a small group of plaintiffs' lawyers with slender financing but a deep grasp of litigation strategies. The change in practice groups was not sufficient to produce higher-quality lawyering, but it was probably necessary.

The reference to *Brown* also, however, highlights an important difference between the ordinary plaintiffs' bar and the NAACP lawyers. Although they suffered from deep disadvantages, the NAACP lawyers, because of their basic strategy, had one very significant advantage over the lawyer representing the traffic accident victim: in lawsuits, law is relatively cheap, but facts are typically expensive.<sup>81</sup> As the Margold report recognized<sup>82</sup>, the NAACP could easily dissipate all its funds by trying to use *Plessy* as a lever, attacking unequal funding on a county-by-county basis. The frontal assault on segregation flowed as much from litigation budgets as from strategic planning or moral vision: by choosing a strategy in which facts didn't matter much—to the point of stipulating, as they did in some cases,

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80. Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 664 (2003) (disputing Kritzer's findings and arguing that many contingent fee lawyers earn unethically high contingent fees). *But see* Herbert M. Kritzer, *Estimating Effective Hourly Rates: Lester Brickman's Junk Science and Questionable Scholarship* (unpublished manuscript on file with author) (forthcoming 2005).

81. Modern discovery regimes require staged investments in document requests and production, depositions, experts, and the like, which produce expenses substantially greater than those involved in legal research.

82. Neier, *supra* note 21, at 48.

that the funding of the dual school systems was equal—they kept litigation expenses down.

That path will not be open to most plaintiffs' firms, because their cases will, by and large, turn on facts rather than on law. Developing facts, particularly in realms where interpretation of facts requires expert witnesses, is expensive. We have chosen a litigation system that requires—and rewards—extensive pretrial investigation and discovery.<sup>83</sup> Lawyers operating on a contingent fee basis and spending substantial sums on discovery<sup>84</sup> have to be well and stably capitalized. This fundamental capital requirement shapes modern practice. Lawyers who are handling a portfolio of contingent fee cases need both diversification and a steady flow of work to handle the capital requirements of effective representation.

*Brown* via *Button* and *Bates* indirectly address this requirement of capitalization. *Bates* (and cases that followed—allowing lawyers to solicit clients who had suffered specific kinds of harms, and then to advertise generally)<sup>85</sup> allows lawyers to do mass advertising, creating the possibility of a flow of cases into the office. That flow can then be sorted. Cases can be screened along several dimensions: the size of the potential recovery, the strength of the merits, the estimated investment required, and the area of practice involved. The last two criteria are related. It costs much more for a lawyer to develop or extend an area of practice than for her to take a

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83. See Stephen C. Yeazell, *The Vanishing Trial: ABA Section on Litigation Symposium, December 2003*, J. EMPIRICAL LEGAL STUDIES (forthcoming 2004); *Celotex Corp. v. Catrete*, 477 U.S. 317, 322 (1986) (“In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” By thus aligning the burdens of production at summary judgment with the burdens of production at trial, the Court’s opinion forced parties to make effective use of the discovery process in order to avoid summary judgment).

84. At common law, a lawyer could not advance expenses to support litigation. See NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* (2d ed. 2000). Today most jurisdictions today allow the contingent advancement of litigation expenses. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.8(e) (2003) (permitting a lawyer to advance litigation expenses and court costs on a contingent basis and allowing a lawyer to simply pay the litigation expenses and court costs if the client is indigent); see also MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt.10 (2003) (prohibiting lawyers from subsidizing their clients’ lawsuits because of the increased risk of frivolous claims and a potential conflict of interest created by the lawyers increased financial stake in the litigation).

85. *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 111 (1990) (holding unconstitutional a state law prohibiting designation of certification in a lawyer’s advertising materials, as an abridgement of First Amendment protections); *Shapero v. Ky. Bar Ass’n.*, 486 U.S. 466, 477 (1988) (“The record before us furnishes no evidence that scrutiny of targeted solicitation letters will be appreciably more burdensome or less reliable than scrutiny of advertisements.”) (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 379 (1977)).

case in a familiar area.<sup>86</sup> Recent interesting work by Dr. Sara Parikh has documented the vigor and effectiveness of the referral system among Chicago plaintiffs' lawyers.<sup>87</sup> Cases regularly move up and down among members of the bar according to the area of expertise and the required size of the investment.<sup>88</sup> A big-case firm is likely to refer small cases down the ladder, fully expecting that a smaller firm will refer a large case upwards. Referral fees also follow this chain.<sup>89</sup> The combination of advertising and a vigorous referral system thus has created a market in claims representation in which a plausible claim is quite likely to get into the hands of a competent lawyer who can invest the amount necessary to reach a good result for the client. This situation represents a fundamental change in the conditions of legal representation.

*Brown* did not create the modern plaintiffs' bar. It was certainly not a sufficient cause, and it may not even have been necessary. One cannot say that we would not have found our way to the same point if desegregation had occurred as a result of legislation, a constitutional amendment, or gradual social change. The years in question saw a number of deregulatory moves in fields far from the legal profession: airline travel, contraception and family planning, trucking fees, federal control over broadcast and telephonic communications, and numerous other areas now operate under far less stringent regulatory regimes than they did at the time *Brown* and *Button* were decided. It requires no heroic assumptions to believe that we might well have found ourselves in the same place in regard to the legal profession without *Brown* or *Button*. But it is just as important to note that, in our real, contingent world, our path to the present traveled through *Brown*.

It is important so to note because two separate, roughly parallel paths of intellectual and social history moved out from *Brown*. One was what we might call the cultural aspirations of law students and some lawyers: to use law and litigation as a tool of social change, as the plaintiffs in *Brown* had done. The second was the professional

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86. At a minimum, the lawyer will need to spend more time in familiarizing herself with the applicable law than if she were navigating in familiar waters; she may also need to associate herself with other lawyers in the new field, thus diminishing her share of any recovery.

87. Sara Parikh, *Plaintiffs' Practitioners: Competition and Cohesion in the Personal Injury Bar*, 14 RESEARCHING LAW: AN ABF UPDATE 2 (2003).

88. *Id.* at 3-5.

89. Forty states have formally abandoned restrictions on referral fees, and experienced observers report that even where prohibitions persist they are rarely observed. See, e.g., *id.* at 3; CRYSTAL, *supra* note 84, at 238 (reporting that despite the prohibition against referral fees embodied in the old MODEL CODE OF PROF'L RESPONSIBILITY DR 2-107(A)(2) (1980), "the practice of referral fees appeared to be fairly widespread in the profession").

arena in which those cultural aspirations might play out. Through *Button*, *Brown* allowed the reforming of plaintiffs' practices. Most of those changes did not occur in the name of social change as the *Brown* plaintiffs understood that phrase. The lawyers in question were often looking for a more profitable practice rather than a new vision of social justice. But the two were linked together: the plaintiffs' bar could wrap itself in the mantle of defenders and vindicators of rights, even if those rights were subconstitutional. One can see this heritage in the most homely places; in many U.S. cities, buses carry ads—in several languages—that solicit business for plaintiffs' lawyers, who regularly portray themselves as “defenders” of rights.<sup>90</sup>

By the same token, those attracted to the “vindication of rights” stance could see litigation as a path to the vindication of rights. And, as the plaintiffs' bar gradually reorganized itself, it amassed both the financial and the intellectual capital to conceive of projects grander than the representation of individuals who had suffered injuries on the job or the highway. This is not the place for histories of the environmental or consumer movements, but both of them can lay claim to *Brown* as at least a distant forebear. Both could plausibly claim that they were seeking to vindicate previously unrecognized rights of large groups. Closer to the civil rights movement, both could also claim to be the litigation extensions of affinity groups: Ralph Nader and Co. served as the analogue to the NAACP for consumers; organizations like the Sierra Club and the National Resources Defense Council did so for the environmental movement. For my purposes the important connection is all these groups had strategies that sought social change both through affinity-group organization and through litigation. Even more significant, in both cases the litigation movement had two branches. One, funded by affinity group dues (and, later, partially through fee-shifting statutes) sought change that benefited the public at large. Another branch sought what looked more like individual redress—the suit in which an individual plaintiff sought damages for a violation of consumer or environmental laws, vindicating the values they protected by calling the defendant to account. Such cases formed a bridge between the social reform

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90. See, e.g., Lawyer Juan J. Dominguez, Advertisement with detachable leaflets (obtained May 29, 2004) (on file with author). The advertisements were distributed on certain Los Angeles County Metropolitan Transportation Authority buses. The front of the advertisement simply says “Accidents” and provides the attorney's name and a toll-free, twenty-four hour telephone number. The reverse side presents an “Accident Guide.” On this guide, accident victims are prompted to collect pertinent data, including date and time, driver's license information, insurance information, witnesses' contact information, and diagrams of the front and back side of a body, where victims are instructed to “Mark on the body figures any area of pain or injury from the accident. Indicate any swelling, bruising, cuts, soreness, etc.”

litigation exemplified by *Brown* and the next generation of social reform litigation, which ambiguously combined strands of self- and public interest.

The bridge between these two generations rested on two pylons, one a theory formed while *Brown* was still a gleam in the eyes of Thurgood Marshall, and the other statutes enacted in the wake of *Brown's* success. The theory, elaborated by Harry Kalven and Maurice Rosenfield, enabled those who sought damages to describe themselves as "private attorneys general," vindicating the public interest by allowing regulatory statutes to be uniformly and widely enforced.<sup>91</sup> Kalven and Rosenfield's original article described a new function for the still unusual class action. By vindicating group rights, such actions, which the authors imagined as based chiefly on regulatory statutes such as securities laws, would harness self-interest to the common good, supplementing the enforcement actions of governmental officials. This is a powerful and attractive idea. In a market economy, one would like to think that individual rights and the public interest can be joined, that one can do well by doing good, and do good by doing well.

This possibility was reinforced by an important change in the financing of some lawsuits—the fee-shifting statute. When the NAACP and its affiliates filed *Brown* and *Button*, the cost of litigation, including attorneys' fees, was borne by the groups sponsoring the litigation. Indeed, that fact was one of the motivations behind the Southern states' strategy restricting solicitation: not only would they prevent "outsiders" from stirring up trouble, as they saw it, but without access to a funding base, even homegrown litigants would be hard pressed to mount a strong case through the inevitable several layers of appeal. Nor did the Supreme Court cooperate. After some early cases in which lower courts awarded attorneys' fees on a "private attorney general" theory, the U.S. Supreme Court held that it was inappropriate for federal courts to use their common law powers in this way absent Congressional authorization.<sup>92</sup> Congress responded promptly with legislation providing for the award of attorneys' fees "in any action or proceeding to enforce a provision [of specified civil rights statutes]."<sup>93</sup> Moreover, the context of the legislation—designed to support plaintiffs' cases—was sufficiently clear that, in spite of the apparently symmetrical command of the statute that such fees should

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91. See generally Kalven & Rosenfield, *supra* note 12, at 721.

92. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 270-271 (1975).

93. The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988(b) (2004)).

be awarded to "the prevailing party," the Court a few years later interpreted this language to mean that the prevailing *plaintiff*, but not prevailing defendants, should get such fees.<sup>94</sup> The Court that so decided was probably correct; the image in the Congressional mind was that of the NAACP plaintiffs, and it was unthinkable that, had they lost *Brown*, they would have been liable for the attorneys' fees of half a dozen states.

Given my argument, one cannot imagine the fee-shifting statutes except in the wake of *Brown* and the more general acceptance of litigation as a form of social and political action. But to appreciate the significance of these statutes, it is worth imagining an alternative history. Suppose, in a parallel universe, the U.S. had judicially or legislatively created a fee-shifting arrangement in cases vindicating constitutional rights. Now imagine the strategic choices facing the NAACP in 1930. It would have been financially as well as strategically possible to attack segregation with the levers suggested in *Plessy v. Ferguson*,<sup>95</sup> arguing that the actual facilities, from school buildings to teachers to textbooks were not equal. That path was the one favored by W.E.B. DuBois, who feared, correctly as it turned out, that the frontal attack on segregation would consume decades and leave a generation of children to suffer the ill effects of segregated education.<sup>96</sup> One cannot know which course the Association would have taken. But it would have been a choice, not a conclusion dictated as much by the economics of litigation as by moral vision and master planning.

As with so many of the collateral effects of the social revolution instigated by *Brown*, the fee-shifting statutes took on a life of their own, independent of the movement for racial justice, but very much a part of the transformation of the legal profession. Scores of federal statutes and a couple of thousand state statutes carried such provisions by the middle of the 1980s.<sup>97</sup> Such statutes have a dual effect: first, they testify to legislative acceptance of social change through litigation, and they cast reflected legitimacy on the portion of the bar—typically representing plaintiffs—who conduct such cases. Second, they provide another source of financing for the bar and make some number of low-value, higher-risk cases economically feasible.

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94. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). The only exception to this principle was in cases where it was shown that the plaintiff had acted in bad faith in bringing the suit.

95. *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896).

96. See *supra* text accompanying note 24.

97. Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 322-23 (1984).

Fee-shifting statutes have not proved to be a magic carpet for claimants, even civil rights claimants. For example, the existence of these statutes has not yet produced a robust plaintiffs' bar in employment discrimination.<sup>98</sup> But the existence of these statutes embeds in U.S. law the idea of a plaintiffs' bar engaged in litigation as a means of social change. With that image we can step aside from the path I have been tracing and consider some implications of these changes.

#### IV. IMPLICATIONS: SOCIAL CHANGE AND THE POLITICS OF ORDINARY LITIGATION

One regularly reads of plaintiffs who announce that they are suing, not (just) for the compensation, but because they are "seeking justice" or because they "want to send a message." Some of these people are doubtless insincere. Others have absorbed and internalized the litigation revolution of which *Brown v. Board of Education* was the central example: not just the legal culture, but the broader general culture, has come to conceive of civil litigation as an instrument of social change. That is an idea that would not, I think, have occurred to most Americans in 1935. Ordinary civil litigation claims for itself the mantle of social justice: the powerful shall be held to account by the weak, a theme as ancient as the Psalms of the Old Testament.<sup>99</sup> Civil litigation in this guise presents itself not as governmentally sponsored dispute resolution but as a form of social reform and as the vindication of rights, typically of those occupying a subordinate social position. Films like *Erin Brockovich*, *A Civil Action*, *The Rainmaker*, and others<sup>100</sup> testify to the hold of this image on the popular mind: civil litigation has become an avenue for changing the *status quo*, for challenging the powerful, for rearranging the economic and political

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98. In part this may be because many such cases require the engagement of experts and the compilation of significant statistical data, which is costly—and the costs were not covered until the Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (adding subsection (c) to codified 42 U.S.C. § 1988). Even so, awarding experts' fees remains in the courts' discretion. 42 U.S.C. § 1988(c) (2004).

99. C.S. Lewis has remarked that a characteristic stance of the psalmist is that of a plaintiff in a civil action, having suffered wrong, and appealing for justice, which, to the psalmist, will entail a judgment for the plaintiff. C. S. LEWIS, REFLECTIONS ON THE PSALMS 9-19 (Collins 1961) (1958).

100. ERIN BROCKOVICH (Jersey Films 2000); A CIVIL ACTION (Touchstone Pictures, Paramount Pictures, Wildwood Enterprises, Scott Rudin Productions 1998); THE RAINMAKER (American Zoetrope, Constellation Films, Douglas/Reuther Productions 1997). One would want to add to this list at least PHILADELPHIA (Clinica Estetico Ltd., Tristar Pictures 1993), CLASS ACTION (20th Century Fox, Interscope Communications 1991), and in the foreign film category, THE CASTLE (Working Dog 1997).

landscape, for, in the phrase used to title this Symposium, “achieving social change through litigation.”

This conception is vigorously contested. The Insurance Institute, the Chamber of Commerce, and similar organizations have mounted vigorous challenges to the plaintiffs’ “movement,” and there are some who offer evidence that these efforts have in part succeeded.<sup>101</sup> For purposes of my argument it is sufficient that the defense bar has seen the reorganized plaintiffs’ bar as sufficiently powerful to require a response of this sort. It is hard to imagine such a response in 1935 or 1950, or even 1960. For more evidence of the force of this change, one can look to Congress. In the past ten years, under both Democratic and Republican Congresses, we have seen legislation—some passed, some proposed—aimed either at segments of the plaintiffs’ bar or at that bar more generally. The Securities Litigation Uniform Standards Act of 1998<sup>102</sup> testifies to the success of a segment of the bar that took to heart—and, some would argue, to pocketbook as well—the message of Kalven and Rosenfield, by creating an active and successful plaintiffs’ securities bar that has supplemented and perhaps supplanted the enforcement efforts of public agencies. Congress, believing that this segment of the bar has been too successful, or successful in the wrong cases, has acted to impair its activities.<sup>103</sup> Again, for my purposes it is not important whether Congress is correct in this judgment. Correct or not, it is difficult to imagine Congress in 1935, or 1953, believing that any segment of the plaintiffs’ bar had enough significance to warrant legislation.

Nor is the fight confined to securities litigation. Recently introduced federal legislation would cap some medical malpractice

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101. See generally William A. Lovett, *Exxon Valdez, Punitive Damages, and Tort Reform*, 38 TORT & INS. PRAC. L.J. 1071, 1105-1112 (2003) (describing specific areas of modern tort reform as they have developed out of the tension between business and insurance on the one hand and the plaintiffs’ bar on the other: “The heart of the modern tort reform controversy is a reaction to the widely perceived ‘excesses’ of the U.S. tort and punitive damages system. A growing range of business, industrial, insurance, professional, farming, and even consumer interests now see excessive, burdensome, and even outrageous costs and disruptions from many tort and punitive damages claims and awards — especially the upper tail of larger claims, verdicts, and awards . . . . In response, the plaintiffs’ bar, notably the American Trial Lawyers Association, together with other consumer advocates and scholars, have objected to these restrictions and cutbacks.”).

102. Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p (2004).

103. See, e.g., Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1 et seq (2004); Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p (2004) (both increasing the difficulty of filing securities fraud claims); Lawsuit Abuse Reduction Act of 2004, H.R. 4571, 108th Cong. (2004) (amending Federal Rule of Civil Procedure 11 to its pre-1993 form and making it applicable to state court suits involving interstate commerce).

recoveries.<sup>104</sup> As interesting as the details is the rhetoric. For proponents of the bill, it is a struggle between the People and The Lawyers. "It's time for my colleagues to take a stand and decide whether they are with the mothers and the children or with the personal injury lawyers," said Senator Jim Bunning, a Republican from Kentucky.<sup>105</sup> For opponents, not surprisingly, the sides are differently defined: "Instead of looking at ways to reduce medical errors so that there would be fewer lawsuits, instead what they've said is, 'we've got to help these big insurance companies.' Not help the individual states, not help the people involved, but help the big insurance companies," said Senator Patrick Leahy, a Democrat from Vermont.<sup>106</sup> These debates mark the mature emergence of a segment of the bar. Congressional debates about whether plaintiffs' lawyers are a threat to the nation constitute a backhanded form of recognition for a reorganized and recapitalized segment of the legal profession.

Deep within this transformation lies an apparent paradox to which I believe that *Brown* is, again, the key. On its face, civil litigation appears to be a market-oriented alternative to regulation. One can imagine a regime of economic regulation in which tort and contract, reinforced by criminal law, were the *only* regulatory regimes: in some libertarian visions of society this appears to be the aspiration. For such a regime to operate, of course, one would need plaintiffs and their lawyers as well as defendants and theirs. Plaintiffs' lawyers would not be the enemy in such a regime, any more than buyers are the enemy in a market economy. They would instead be the representatives of the invisible regulatory hand, achieving through the outcome of numerous lawsuits the optimal degree of product safety, risk, and reward in a market for claims. One might imagine that those who attached high value to deregulation would embrace civil litigation as its alternative. One might further imagine that the lawyers who ran such an apparatus would be natural recruits to the political party of deregulation and that such a party would see them as natural allies—the purveyors of the antidote to governmental regulation—civil litigation. Life, of course, is different. As a group, plaintiffs' lawyers currently ally themselves politically with the Democratic Party. And currently, the Republican Party has, as an

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104. Healthy Mothers and Healthy Babies Access to Care Act of 2003, S. 2061, 108th Cong. (2004) ("A bill to improve women's access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the delivery of obstetrical and gynecological services").

105. Jesse J. Holland, *Republicans Push Medical Malpractice Bill*, ASSOCIATED PRESS NEWSWIREs, Feb. 23, 2004.

106. *Id.*

important tenet, the proposition that much, if not all, civil litigation—and certainly all brought by that malevolent group known as “the trial lawyers”—is a social ill and a drag on the economy. There are many reasons for this apparent misalignment, but I believe one of them has roots in *Brown*. Once the Democratic Party, as a result of Lyndon Johnson’s push for the civil rights legislation in the mid-60s, had aligned itself with the social movement represented by *Brown*, it became the natural resting place for those lawyers who, at least in rhetoric, and sometimes in reality, presented themselves as vindicators of the rights of the oppressed against the powerful. That alliance rests not on logic, but on the powerful ideological reverberations of *Brown* within the U.S. legal profession.

Because *Brown* culminated what was for its time an imaginative and unusual use of litigation, it challenged existing conceptions of legal practice. Some of the challenges were cultural: the movement represented in *Brown* allowed lawyers to see themselves and their profession as potential actors in a broad drama of social transformation. That possibility has inspired several generations of lawyers who, even in settings far removed from those of *Brown*’s architects, seek settings in which they can enact that drama. *Brown*’s other heir is the plaintiffs’ bar. For the strategy behind *Brown* to succeed, lawyers needed to seek clients; in the process of blessing that process, the Supreme Court set in motion a chain of events that led to substantial deregulation of the U.S. bar. We live today in a world shaped by both.

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