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Book Reviews

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BOOK REVIEWS

Some Observations on Recent Criticism of the Warren Court

THE SUPREME COURT AND THE IDEA OF PROGRESS. By Alexander M. Bickel. New York: Harper & Row, 1970. Pp. xii, 210. $6.50.
POLITICS, THE CONSTITUTION AND THE WARREN COURT. By Philip B. Kurland. Chicago: University of Chicago Press, 1970. Pp. xxv, 222. $9.75.

When two "scholarly critics"[1] of the Supreme Court such as Professors Alexander M. Bickel and Philip B. Kurland publish articulate and thoughtful analyses of the Court's actions over the past several decades, their messages can hardly be ignored. This is particularly so in the case of their recent books because of the large degree of similarity in the views they express.[2] Both Bickel and Kurland say, in substance, that the Warren Court tried to do too much too fast, that what it did was not done well, and that its major decisions are unlikely to be of lasting significance. As an admitted aficionado of the Warren Court,[3] I cannot resist the temptation to take issue with many of the key substantive points made in the two books. I shall take a somewhat different tack, however, both initially and in conclusion, for, in my view, these books raise an equally important matter of continuing significance. This is the difficult problem of assaying the proper role of the Court's critics, which, of course, will survive current criticism of the Warren Court.

I. THE ROLE OF A SUPREME COURT CRITIC

Professor Kurland's book provides a poignant description of the Court critic's dilemma. In it he suggests that public confidence in the Court might be significantly greater if "the attitudes expressed by its critics in academe were representative of the best thought in society" (p. 201). But Kurland says that he doubts that this proposition is true,

1. Judge J. Skelly Wright has aptly dubbed Bickel and Kurland with this title. Wright, *Professor Bickel, The Scholarly Tradition, and The Supreme Court*, 84 HARV. L. REV. 769, 770 n.6 (1971).

2. Both books are also similar in that they were prepared from the Holmes and Cooley lecture series delivered by the respective authors at Harvard and Michigan law schools in the fall of 1969, shortly after Earl Warren's retirement as Chief Justice.

3. *See* Beytagh, *On Earl Warren's Retirement: A Reply to Professor Kurland*, 67 MICH. L. REV. 1477 (1969).

and then laments the fact that academic attitudes "are not necessarily representative of anyone except those in these sheltered groves" *(id.)*. If one assumes the truth of the latter statement, it is hard to see how the Court would be better off if the populace adopted the attitude of the Court's critics, because the Warren Court comes off rather badly at the hands of both Bickel and Kurland. Yet, this inherent ambiguity in function and purpose presents a real and difficult dilemma for the critic who is a serious and knowledgeable student of the Court.

In their respective books, Bickel and Kurland state that from an historical perspective the public's confidence in the Court as an institution was at one of its lowest ebbs when Earl Warren stepped down as Chief Justice. Given the accuracy of the polls to which they refer, this would appear to be so. Both authors view this phenomenon with regret because of the Court's need to maintain the confidence of its constituency. As they surely realize, however, the Court hardly can seek to mirror some common denominator of public opinion on the difficult matters that come before it, such as protection of minorities through interpretation and application of the broad and vague commands of the Bill of Rights. As Judge Wright has pointed out, ours is a *constitutional* democracy with a firmly embedded notion of judicial review,[4] a point to which Bickel and Kurland give only a passing nod. Thus, the Court fulfills its role more properly by adopting those ideas and concepts that represent the best in contemporary society within the framework of our written Constitution. Critics of the Court can help it carry out this function; yet, in large measure, critics like Bickel and Kurland have plainly failed to do so.

One problem facing any critic is a determination of the audience to which his message should be directed. Bickel and Kurland obviously did not direct their message either to the general public or to all lawyers, for they must have known that anyone not a student of the Court would have a difficult time understanding their books. Therefore, they must be regarded as addressing a narrower audience comprised of perhaps a few thousand members of the judiciary, law professors, lawyers, law students, political scientists, and journalists having a special interest in the Court. Still, their books, and others like them, do have an immeasurable impact on members of the public when they realize that respected scholars have reached the same conclusions about the Warren Court as those conveyed to them through the news media. To the extent, then, that these works are thought to contain friendly and constructive

4. Wright, *supra* note 1, at 787.

criticism, the effort is in all likelihood counter-productive.

Timeliness is probably the most important aspect of serious criticism. Both Bickel and Kurland must have felt that prompt appraisal of the Warren Court was desirable, for they hardly waited for the dust to settle. In an era grown accustomed to instant history, this eagerness is understandable. It may prove unfortunate, however, because only through the leavening that comes with the passage of time can one adequately and accurately evaluate the work of the Warren Court. Despite their articulateness, the efforts of Bickel and Kurland strike me as being premature and overgeneralized. Although each pays lip service to the difference, their books signally fail in drawing the important distinction between criticism of the Court as an institution and attack on individual decisions, trends, and personalities. Their works may be characterized, perhaps too glibly, as early overkill. More importantly, the impressions created by such eminent scholars can do real harm in helping to bring about the fulfillment of their prophecy. Of course, if Bickel and Kurland are proved correct by history, their message will be recalled and saluted; if they are proved wrong, few will remember or care.

In light of the above criticisms, one properly might ask what scholarly critics of the Court like Bickel and Kurland should do? They certainly should not hold their tongues for years, thereby avoiding any current appraisal of the Court's work. But they can provide a useful service by avoiding some of the excesses in which Bickel and Kurland have seemed to engage. For example, they might speak more tentatively—and less apocalyptically—to a broad audience about particular things the Court did or failed to do. They might be more circumspect in their conclusions, realizing that they too are applying a set of value judgments to problems—procedural as well as substantive—that the Court has necessarily faced. They might also seek to avoid misleadingly simplistic denigration of the very institution that, as loyal Frankfurterians, they purport to revere. They might be less snobbish in their characterizations of the Court as anti-intellectual, unprincipled, and lacking in style and persuasiveness. Finally, they might concede more openly the great difficulty of the problems the Warren Court faced and be willing to indulge in just a bit of charity, at least insofar as the good faith of the Justices is concerned. In short, they might be a little less petulant and a little more humble. Failing that, they might at least ask themselves whether they should speak out publicly at all, especially if their message is limited to the Justices and a few of their brethren in academe.

II. SPECIFIC ANALYSIS AND COMMENTARY

A. Bickel's Criticism of the Warren Court

The Bickel work is especially interesting in that the author does not limit himself to the Warren Court's "failures of method," but rather points to what he views as its errors of substance.[5] In other words, he challenges the Court on the very ground upon which most of its critics have previously been willing to concede its success—the soundness of results achieved, as distinguished from the reasoning employed or wisdom displayed by acting in certain matters.

After an introductory chapter detailing most of the major actions taken by the Court during the Warren years, Bickel launches into an interesting but unpersuasive discussion of "the idea of progress" that he says guided the Court's entire enterprise. He suggests that the Court's goal was a better society without regard for consistency or contemporary validation. He argues that the Court's "new faith" in egalitarianism as a constitutionally ordained precept was analogous to an earlier Court's "old faith" in laissez-faire, and that both concepts were doomed to failure. Much of Bickel's early discussion is actually a eulogy of Frankfurter—a crucial and pre-eminent figure in Bickel's view of the Court. He laments, however, that Frankfurter "never achieved a rigorous general accord between judicial supremacy and democratic theory" (p. 34). Bickel, presumably, could better his mentor in this regard because he would not be confused by the thought patterns that the Warren Court inherited from the "progressive realists" who sat on the Court in the early part of the century. His resolution of the Court's dilemma in endeavoring to avoid being antidemocratic is hardly a satisfying one; he simply says that the Court should not intervene so long as the "political process is operational" (p. 37). This simplistic view ignores the fact that the Bill of Rights was adopted with complete cognizance of the availability and dangers of the political process. In any event, some of the Warren Court's most important actions stemmed directly from problems such as malapportionment and segregation, which the political process had failed miserably to solve.

Bickel says that the Court's weak reasoning, lack of craftsmanship, and "intellectual incoherence" can be aptly summed up by a notion he terms "the web of subjectivity" (p. 47). His discussion of some of the Warren Court's important decisions is particularly derogatory. For example, the Court's misuse of history is "unjustifiable;" its holdings

5. Judge Wright discussed this at length and most perceptively in his extensive critique of the Bickel book. Wright, *supra* note 1.

worked a "palpable injustice" to certain individuals; it acted "shockingly" in developing a concept of nonretroactivity; and, it "gratuitously reached out" for issues in other cases. Some of these points may be valid, but the extrapolation of an overbroad general theme from them is an unsound leap in analysis.

The theme that "reason and principle alone justify the exercise of supreme judicial power in a political democracy" (p. 95) is the source of much of Bickel's criticism of the Warren Court. His principal complaint stems from the Court's refusal to worship at the shrine of the god of reason that he and his cohorts regard as sacred. There is something sterile and superficial, however, about repeated charges that the Warren Court was lacking in analytical facility, principled judgment, and irrefutable reasoning. A disparate body of men, seeking first and foremost to do justice in difficult cases touching the deepest roots of our society, must apply some system of values in the course of their decision-making. If, as Pascal told us, the heart often has reasons that reason cannot know, result-oriented decision-making, the *bete noire* of the "scholarly critics," may be far more consistent with the Court's proper role than a rigid and unyielding obeisance to the dictates of rationality.

In Bickel's final chapter, which he has entitled "Remembering the Future," he goes beyond his criticism of *how* the Court did things and squarely takes issue with *what* it did. He identifies the following main themes of the Court's decisions: (1) egalitarianism, (2) majoritarianism, (3) centralization and nationalization, and (4) legalization. Bickel questions whether these themes are "in harmony with each other" (p. 115), though he does not indicate why harmony is necessarily a virtue in this regard. He suggests that current social developments are moving counter to the Court's main themes and that "society may not be conforming to the Warren Court's vision" (p. 117) since, he asserts, many people are turning to decentralization and diversity.

Bickel's analysis of the decision in *Brown v. Board of Education*[6] is indicative. It is grounded on a societal model—Madison's idea of "groups of minorities"—that, in his judgment, is contrary to the Warren Court's "vision." He maintains that the centralizing and nationalizing effects of *Brown* and its progeny are probably bad and that *Brown* may be headed for irrelevance, at least in the area of education (p. 151). Putting aside the matter of the Court's "vision" when it decided *Brown*, I seriously doubt that anyone will regard that seminal decision as irrelevant for many years to come. While the matter

6. 347 U.S. 483 (1954).

of de facto segregation still awaits resolution, the Court's recent decision in *Swann v. Charlotte-Mecklenburg Board of Education*[7] exhibits an abiding commitment, regardless of political pressure, to see that desegregation is effectuated.

The reapportionment decisions of the Warren Court also are subjected to criticism by Bickel. He says that the Court failed to focus on the problem of "proper constituency formation" (p. 156), but he gives us no better definition of what this might be—apart from a system based on population—than did the dissenters in *Reynolds v. Sims*[8] and companion cases. How can a government be structured "in terms of clearly defined interests" (p. 157), as he suggests, when the interests of individuals are so diverse and disparate? People of "like interests" are rather hard to find in a sophisiticated, pluralistic society such as ours. The only sensible starting place, as the Court concluded in *Reynolds,* is people, not "interests." Bickel's call for participatory democracy is curious since one significant effect of the reapportionment cases might well be to restore more of a balance between the federal government and the states, including their political subdivisions. Nonetheless, Bickel concludes that, like *Brown, Reynolds* is headed for "substantial irrelevance" (p. 165). State legislators elected as a result of *Reynolds* might disagree with him on this point.

In the end, despite his erudition and articulateness, Bickel really has little to say. He concludes that because the Warren Court misread the future, its major decisions "are heading toward obsolescence, and in large measure abandonment" (p. 173). Ending with a whimper, he says that the Court will probably endure despite its failures, that things might not have worked out much differently if it had stringently followed reason and principle, and that it might just save the country yet in a time of great need. Surely, this is unnecessary cynicism. Granting that the Warren Court made some mistakes, its dominant ethic of doing individual justice in the cases that came before it can hardly be faulted. If the Court actually had some settled "idea of progress," it was making the concept of "equal justice under law" a reality for all who came before it—the black, the indigent, the criminal defendant, the disenfranchised. Much of what the Court did during those years may become irrelevant and obsolescent in time, for few human decisions have lasting significance, but its substantial reshaping of our society will have a long-term impact. Moreover, its symbolic role during the Warren years—what it *was* and not just what it *did*—was of inestimable value

7. 402 U.S. 1 (1971).
8. 377 U.S. 533, 587 (1964).

to those citizens living, in President Kennedy's words, on the outskirts of hope. When the final chapters are written on the Warren Court, it is likely that the verdict will be rather more favorable than Bickel's.

B. Kurland's Treatment of the Warren Court

Many of the observations in the Kurland book track those of Bickel. On the whole, it is fair to say that Kurland is less biting and cynical in his criticism and more understanding of the problems the Court was called upon to handle. Kurland strains to prove that the Warren Court did not create any of the major doctrines it sought to effectuate, but this is hardly a telling criticism of the Court, for it is the pattern of history generally. He also asserts that the Warren Court's decisions have not been effectively implemented, but here he would appear to be on shaky grounds factually. In any event, it is doubtful that there has been adequate time for thorough implementation and, moreover, this is a questionable measure to apply to the Court's actions. Kurland categorizes the basic shortcomings of the Warren Court as its unpersuasively reasoned opinions, its attempt to decide too much, and its failure to recognize its own institutional weaknesses in data-gathering and administration of broad rules. These criticisms parallel Bickel's theme that the Court was too political.[9] Like Bickel, Kurland says that in order to restore public confidence the Court must seek to persuade rather than coerce. Neither writer, however, explains how public confidence in the Court would be restored by more carefully reasoned opinions. Since few members of the public ever read Court opinions, the point that Bickel and Kurland seek to make must be that better reasoning would lead, at least in some cases, to results more palatable to a majority of the people. Almost two hundred years of history sufficiently contradict the characterization of the Court implicit in this assumption.

Kurland's first chapter is aptly entitled "The Tyranny of Labels." It effectively disposes of a number of shibboleths frequently used to characterize the Court and its members. It also develops a distinction, which Kurland continues to use throughout the book, between the judicial mode and the political or legislative mode of acting on public issues.[10] One is reminded that those who support an activist Court must be willing to accept decisions that meet with their disfavor—a point that

9. At one point Kurland makes a gratuitous, obnoxious, and wholly unnecessary reference to courts "in Hitler's Germany, in Stalin's Russia, and in the Union of South Africa" (p. xxiv).

10. He does admit that both modes involve rulemaking processes, but of a different type (p. 174).

seemed rather obvious until Richard Goodwin made an issue of it.[11] Finally, Kurland hedges his bet on how history will view the Warren Court (p. 13), but this does not deter him from passing judgment.

The second chapter on "The Congress, the President and the Court" is a rather low-key discussion that points up little direct conflict between the Warren Court and the other branches of the federal government. On the other hand, it notes that Congress found considerable displeasure with the Court's actions. Kurland downgrades the Court's role in "legitimizing" congressional actions because its opinions were "shabby" and the results achieved "hardly came as a surprise to anyone" (p. 35). In discussing the executive branch, he underscores the importance of the President's appointment power as a check on the Court and the probable effect of changes in personnel. The Burger Court's performance thus far has amply validated this observation.[12]

In his next chapter, entitled "Federalism and the Warren Court," Kurland discusses the Court's role in effectively transferring power from the states to the federal government through the medium of its decisions. Although what he has in mind is far from clear, he says that the Court's imposition of national standards on state criminal processes violated "what federalism is all about" (p. 82). Conceding that revision in the criminal procedure and racial discrimination areas was needed, Kurland does not seriously fault the Court for the results it achieved in those areas. On the other hand, Kurland has something of a fixation on the nefarious purposes supposedly underlying the Court's reapportionment decisions and also a pathological conviction that they have been wholly ineffective. In this area, he naively suggests that the Court grossly overreacted to "a bad case of acne" (p. 83). Kurland regards the reapportionment decisions as an unprincipled *ipse dixit* on a matter beyond the proper ken of the institution, thereby distinguishing himself from Bickel who thinks the decisions were a misguided attempt to return power to the people. While Kurland likes decentralization and would reinvigorate local governments, his suggestions are hardly more realistic than Bickel's reliance on the political process to work out difficult questions of public policy.

After repeating Bickel's litany of procedural criticisms, Kurland turns increasingly to the Warren Court's fixation with egalitarianism, which, for him, was its hallmark. He correctly notes that equality is

11. Goodwin, *The Shape of American Politics*, COMMENTARY, June 1967, at 26-27.

12. For a pained and poignant lament about the trend of Court decisions during the last term see Justice Brennan's dissent in Rogers v. Bellei, 401 U.S. 815, 845 (1971).

an elusive and amorphous concept that is not self-defining. This leads into his discussion of *Brown* whose aftermath, he says, showed that the Court was "incapable of effecting fundamental changes in society" (p. 113). This observation, however, misses the point for, in my judgment, it fails to consider the contribution that the judicial process can and should make in the resolution of thorny problems, such as segregation, by serving as a catalyst and a conscience.

Kurland's extensive discussion of the Warren Court's grappling with the "state action" concept seems pointless. Since congressional action was imminent and in fact eventually occurred, the Court's failure to resolve the ultimate issue presented in the sit-in cases[13] is a good example of the sort of judicial self-restraint that the "scholarly critics" ordinarily applaud. The absence of a thoroughgoing rationale for the "state action" concept, however, bothers Kurland greatly; but, in view of the lack of practical significance the question now has, his criticism resembles a law professor's fetish for the settlement of an intriguing doctrinal point. Even he concedes that the Court may have moved beyond the issue in *United States v. Guest*[14] and *Jones v. Alfred H. Mayer Co.*[15] by upholding antidiscrimination legislation based upon the thirteenth and fourteenth amendments.

Kurland's discussion of the freedom versus equality dilemma is interesting, as is his treatment of the Court's uncertain approach to the "reverse discrimination" problem. But his handling of the reapportionment cases, as indicated previously, leads one to conclude that he must have lost a bet on how they would come out.[16] His reference to a developing notion of "substantive equal protection" is intriguing but incomplete. Moreover, his Orwellian fears about conformity and uniformity resulting from the egalitarian notions the Court has spawned are surely overstated. Much inequality of opportunity still exists, and our country is very far from being a single-value society. Furthermore, the main thrust of egalitarianism has been to remedy gross, glaring, and unjustifiable inequities, not to produce the dull sameness that troubles Kurland.

In his final chapter, entitled "Problems of a Political Court," Kurland returns to his differentiation between the judicial and legislative modes. By acting too much in the legislative mode, he reasons, the Court has "endangered its capacity to perform its peculiar function" (p. 172)

13. *E.g.*, Bell v. Maryland, 378 U.S. 226 (1964).
14. 383 U.S. 745 (1966).
15. 392 U.S. 409 (1968).
16. For a more extensive discussion in this regard see Beytagh, *supra* note 3.

of protecting minorities. He quickly notes, however, that the "Court's actions have occurred primarily in the area where enhanced legislative responsibility will not work" (p. 179) because of the limitations of the political process. In this respect, Kurland is surely closer to reality than Bickel, who places far more confidence in the political process. While the Court must conserve its power to act effectively, and can do so by operating in the judical mode, whether the Court should act or stay its hand in a particular situation is a subtle question of judgment. In my view, the Warren Court stayed reasonably within the bounds of the judicial mode so as not to spend its authority unwisely or unnecessarily. Kurland has not made out a convincing case to the contrary.

Some of Kurland's concluding points merit comment. He discusses in cogent fashion the institutional limitations on the Court as a policymaker. The recitation of his "personal beliefs"[17] about the Court is also illuminating. He says the Court is undemocratic—but perhaps it must indulge in some amount of "political" activity to function effectively. He informs us that the Court is anti-majoritarian—but, again, that is what was intended, although the point he makes about the Court's preservation of its ability to act is well taken. Finally, he concludes that the Warren Court's failure to persuade people generally of the soundness of its decisions caused a serious crisis of confidence in the Court as an institution. Yet, the rather general crisis of confidence that presently exists with regard to all of our governmental institutions makes it far from clear that the Court would have come off better by acting differently.

III. CONCLUSION

This crisis of confidence in our institutions brings me back to the earlier points made about the role of the Court critic. It is commonplace that events of the 1960's have led many to question our ability to govern ourselves. There is much polarization, divisiveness, and, if you will, social schizophrenia. In many minds there are gaps existing between blacks and whites, rich and poor, educated and uneducated, young and old that simply cannot be bridged. Some seriously question the basic premises on which our society has been structured, and some want to tear that structure down, though it remains unclear what they would replace it with. Our society's institutions are veritable targets for the disaffected; the courts and universities are among the most important of

17. Kurland's use of this phrase to describe his concluding observations is somewhat curious and confusing for it leads the reader to wonder how earlier remarks—spread across some 200 pages—should be characterized.

those institutions. Because of their importance, availability, and vulnerability, they have been, and continue to be, subjected to a continuing tirade of abuse. Whether the courts and universities can long withstand such attacks is uncertain, for they are probably the most defenseless and fragile of our institutions. At this juncture in our history, when a common bond of mutual understanding and constructive support should unite court and college, it is peculiar and a bit ironic that the academic world has produced some of the judiciary's most vocal critics. Neither court nor college can probably survive the forces that oppose them and adjust to the new demands being placed upon them without help from each other. If the scholarship of men like Bickel and Kurland tends in the end to disserve their purposes, then some questions can legitimately be raised about the worth of it. And if in tearing down the Court they confirm the idea of a general institutional malaise, then they unwittingly assist those who would undermine their own institutions—the universities—as well. Perhaps this analysis is overly simplistic, but it is something, I would suggest, that Bickel and Kurland and others like them could profitably ponder.

When two thoughtful scholars such as Bickel and Kurland agree on so much about the Warren Court, there must be something to what they say. Indeed, there is much erudition and food for thought in these two books. But there is a great deal lacking in analysis and approach as well. If the two writers had contented themselves with careful and articulate discussions of what the Court did and how it did it, if they had spoken to a wider audience and sought to help that audience understand the Court as an institution, and if they had been somewhat more reluctant to indulge in premature prognosis and overgeneralized characterization of Chief Justice Warren's tenure, their products might have served all of us—bench, academe, bar, and public—far better. It would seem, however, that "scholarly critics" are no more inclined to that sort of approach than, in their minds, are the Justices they are wont to criticize.

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Law and Social Change

POLITICS OF SOUTHERN EQUALITY: LAW AND SOCIAL CHANGE IN A MISSISSIPPI COUNTY. By Frederick M. Wirt. Chicago: Aldine Publishing Co., 1970. Pp. 335. $10.00.

I. BACKGROUND

Professor Frederick M. Wirt's book is a study of the impact of the federal civil rights statutes of 1957, 1960, 1964, and 1965, and the United States Supreme Court decision in *Brown v. Board of Education*[1] on the residents and institutions of Panola County, Mississippi. The county—located in the northwestern part of the state—is more or less typical of Mississippi both in population and in life style. While Panola does have some industry, its residents are chiefly engaged in agriculture, and a majority are black. The incomes of more than two-thirds of its residents are below the poverty level, and, as one would expect, the general educational level is quite low. Furthermore, most of the housing is old and lacks many of the modern conveniences normally associated with American life.

Economic conditions in Panola County have been significantly affected by national agricultural policy, which, by making it profitable for large landholders to reduce cotton acreage, has helped produce large-scale unemployment of agricultural workers. Panola has experienced a shift to cattle raising, but this has created few job opportunities for the unskilled tenant farmer. The county has a surplus of unskilled black labor; while employment in manufacturing has grown, white workers have filled most of these jobs. As in most counties in the rural South, young blacks are leaving for the North and West in search of better economic opportunities. Professor Wirt's study is set against the historical and legal background of the decisions of the Supreme Court in *Plessy v. Ferguson*[2] and *Brown*. *Plessy*, which gave constitutional sanction to racial segregation, bolstered white supremacy throughout the United States. This resulted in the flowering of raw racism in the South as well as acceptance and enforcement in the North of various racial limitations on the black man's opportunity, hopes, and aspirations. Indeed, these restrictions, designed in purpose and effect to confine blacks to a permanently inferior status in society, were accepted as the way things were supposed to be. *Brown* and the federal legislation dealt with in the study eliminated this constitutional and legal

1. 347 U.S. 483 (1954).
2. 163 U.S. 537 (1896).

support for white supremacy and helped spawn an era of black militancy. Blacks are now demanding all the amenities of equal citizenship status as of right and are insisting on acceptance by society as blacks, with all that this means in terms of identification, values, and a life style that differs from the white norm.

The struggle of the 1960's to increase black voting strength in Panola, which the *Brown* decision helped produce, is a major concern of Professor Wirt's study. Before the commencement of that struggle, there were approximately 7,639 whites and 7,250 blacks of voting age in the county. At least 5,343 whites were registered, and only two blacks—one a 92-year old who had registered in 1892 and the other a black who registered in 1952.[3] Intimidation, fear, and threats of physical and economic reprisals had kept most blacks disenfranchised. In addition, registration required the would-be registrant to interpret the constitution to the satisfaction of the registrar. While illiterate whites were able to qualify with ease, educated blacks were uniformly rejected.

Racial segregation was a strictly observed custom in Panola prior to 1960, and blacks were systematically deprived of any semblance of either educational equality or equal economic opportunity. The rituals which the protocol of a system of white superiority and black subordination fostered were the commonplace social graces of the county.

Despite the Civil War, the thirteenth, fourteenth, and fifteenth amendments, and growing national pressure for a new deal in race relations, Panola County as late as 1960 appeared to be securely anchored in the past. The fetters of slavery seemed permanent, incapable of disintegration. Much, of course, was bubbling below the surface in black communities throughout Mississippi, but virtually no one would have believed that within a few short years the state would explode into civil rights activity, mass demonstrations, court litigation, voter registration drives, economic boycotts of white businesses, organized efforts to secure prosperity, and financial independence for the black small farmer. Even those who were aware of this "revolutionary" ferment did not suspect that the black voter would become a potent political force in the state by 1968; that 81 black elected officials would be holding local offices throughout the state in 1970;[4] that in the 1971

3. The Negro who was registered in 1952 died before the litigation with which much of the study is concerned reached the appellate level. After the filing of the lawsuit, but before trial, another black was registered in 1962. The registration data cited are taken from the court's opinion. United States v. Duke, 332 F.2d 759 (5th Cir. 1964).

4. Metropolitan Applied Research Center & Voter Education Project, Southern Regional Council, National Roster of Black Elected Officials (Feb. 1970).

statewide elections one black man would be running for Governor and 150 other blacks for local office.[5] Furthermore, they would not have predicted that breakthroughs in industry and agriculture, small but real, would occur,[6] and that desegregation would become a fact of life in much of the state by 1970.[7]

II. TEXTUAL ANALYSIS AND COMMENTARY

Professor Wirt tells part of the astounding story of black progress in the 1960's as it took place in Panola County. Since his purpose was serious and dedicated scholarship, he carefully accumulated a massive amount of factual detail by spending a great deal of time in the county and talking to and corresponding with a varied number of principal and peripheral personalities. Therefore, his study is well researched and is recommended as a detailed account of civil rights activities in both Panola County and the State of Mississippi during the 1960's.

The stated objectives of Professor Wirt's study are to "seek to specify the conditions under which a given set of laws was effective," and, if successful, "to generalize the future chances of law inducing change" (p. 12). The author does not merely propose to isolate the conditions under which law is capable of successfully regulating and modifying behavior patterns and institutional response. His larger ambition is to appraise the impact of law upon values and attitudes as well.

At the outset, Professor Wirt informs us that there are two conflicting schools of thought concerning law and social change. One school contends that law can only mirror the established values in society and cannot legislate morality nor lead society where it does not wish to go. The other view is that law can successfully effectuate attitudinal changes. Professor Wirt's purpose is to demonstrate the

5. NEWSWEEK, Aug. 2, 1971, at 22, gives the number of blacks who filed to run as 150, but other estimates are higher.

6. Some industry has been attracted to Fayette, Mississippi, by Charles Evers, its black mayor and candidate for Governor. The West Batesville Farmers Cooperative, to which reference is made in this book, provides "custom harvesting, combining, and marketing services" for 265 members. The co-op was organized in 1965 by a group of small farmers, SNCC organizers, and a representative of the National Cooperative Fund. The immediate objective in forming the co-op was to free the black independent Panola farmer from the power of a white okra buyer who had a monopoly on their crops. The co-op completed its fourth season in 1969. Beset at first with financial, management, and record-keeping difficulties, it has nonetheless survived and seems to be overcoming these problems. Not yet a sound business venture, its future prospects are greatly improved. For more details about this and other cooperatives see F. MARSHALL & L. GODWIN, COOPERATIVES AND RURAL POVERTY IN THE SOUTH 53-55 (1971).

7. N.Y. Times, Aug. 5, 1971, at 59, col. 4, describes the Mississippi school system as "now one of the most desegregated in the nation."

validity of the latter thesis and to define the circumstances under which law can succeed in altering opinions and concepts, modifying not only custom and usage but perceptions and perspectives as well.

There is, however, a third view held by pragmatists and activists, including some social scientists, who refuse to concern themselves with the law's effect on what people think or how they feel. For them the critical issue is: how accomplished is the law in regulating public conduct? They have little patience with the thesis that attitudinal change must also be one of the objectives of law reform. This reaction is understandable in the race relations field, since emphasis on the level of personal sentiment has usually meant opposition to whatever governmental sanction was being proposed.

In my judgment, those who focus on the law's efficacy in regulating behavior and institutional response in the race relations field have by far the better argument. Working from that limited perspective, there are a number of valuable studies showing how in the race relations area the law can accomplish effective social engineering.[8] Most of these studies have come to a common-sense conclusion, bolstered by experience, that the law's social objectives in race relations can best be assured by a clear and unequivocal statement of policy, firm law enforcement, and a refusal to tolerate minor evasions.[9] These studies, it seems to me, have provided a sufficiency of utilitarian knowledge on how to induce social change through law. Moreover, we know that law itself constitutes a choice of values. Hence, it necessarily reinforces some attitudes and weakens others. Attitudinal change is thus an indirect consequence of effective law enforcement. This is no less true in the race relations field.[10]

Professor Wirt adds no new insight in concept, methodology, or analysis to what we learned from these earlier studies, and his findings are substantially similar. Although his study provides little to increase our knowledge of the effect of law on behavior and attitudes, it could conceivably be of value as pure empirical scholarship. It seems to me, however, that the work is fatally flawed even when assessed on that level.

8. *E.g.*, O. CARMICHAEL & W. JAMES, THE LOUISVILLE STORY (1957); R. WILLIAMS & M. RYAN, SCHOOLS IN TRANSITION (1954); Clark, *Desegregation: An Appraisal of the Evidence*, 9 J. SOC. ISSUES 2 (1953). *See also* A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW (1971); M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATIONS IN EMPLOYMENT (1966).

9. *See* Clark, *supra* note 8.

10. M. BERGER, EQUALITY BY STATUTE: THE REVOLUTION IN CIVIL RIGHTS (1967), a work that deserves more attention, discusses law and social change in this context and concludes that in changing behavior law transforms attitudes and values. Pettigrew, *Complexity and Change in American Racial Patterns: A Social Psychological View*, 94 DAEDALUS 974 (1965) is of the same view.

If Professor Wirt's purpose was to measure the impact of law on the racial attitudes of white Panola County residents, it strikes me as conceptually erroneous to equate reform in this area with attempts to deal with other social problems as he seems to do by asking: "Why did the abolition of slavery work while the abolition of liquor did not?" (p. 10). American racism, we have come to realize, is a singular quality of American life. It is unique, separate, and apart from all else that effects how we think, feel, act, or respond. The depth, special quality, and tenacious hold of American racism that have disfigured our lives for so long are only now being illuminated by informed scholarship.[11]

Professor Wirt should have concentrated more on plumbing the depths and meaning of racial attitudes in Panola County to give his work scholarly quality and importance. He finds racial prejudice deplorable, but his failure to appreciate its pervasive and intrusive effects is made manifest at those critical points in the study when he is stating what he regards as the impact the law had achieved. For his purposes it was enough to paint a generalized profile of white Panola County residents' racist attitudes. Yet to say that white Mississippians hold racial prejudice is not enough. I would not make so much of this except that Professor Wirt's stated objective—to evaluate the impact of law on values and attitudes, meaning here racial values and attitudes—required that he do more to inform us about the nature of these racial attitudes and values than he chose to do. Perhaps as a consequence of this failure, the study reflects an insufficient appreciation of the heroic role local blacks played in the effort to secure implementation of the various laws with which the book is concerned. The role of local blacks is favorably mentioned, but the author's true heroes seem to be the attorneys in the Civil Rights Division of the United States Department of Justice[12] and the white volunteer students who came to Mississippi in large numbers to assist in the COFO (Council of Federated Organizations) statewide voter registration drive.

11. Three brilliant studies—D. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE (1966); G. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY (1971); W. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARDS THE NEGRO 1550-1812 (1968)—have traced the origin, development, and manifestations of American racist ideology to the eve of World War I. From Frederickson's work, we learn that democratic tenets and racial discrimination are inextricably tied together— white equalitarianism and anti-black bias. As a result of these studies and those they generate, we may achieve a fuller understanding of the reasons for the pervasiveness of racism in this society.

12. For a far less favorable view of the Department of Justice and its operations during this period see Burns, *The Federal Government and Civil Rights* in SOUTHERN JUSTICE 228 (L. Friedman ed. 1965). A chief criticism of the Department at that time was its failure to protect local blacks from physical violence in their attempt to exercise their rights.

At one point, Professor Wirt writes: "I found in Panola that those [blacks] who had co-operated with John Doar had a deep drive for freedom and a sense of needing a better life, two objectives they linked closely" (p. 78).[13] "But," he continues, "blacks were not without fears about their co-operation . . . . They were often reluctant to tell what they knew . . . fearing such cooperation would get out into the community. The mass of this fear, reinforced by an apathy shaped by past frustrations, was enormous" (pp. 78-79). How could anyone familiar at all with the nature of race relations in Mississippi have expected anything else? What should have evoked Professor Wirt's comment was not the presence of the fear but the fact that as early as 1961, Department of Justice lawyers were able to secure in Panola County a sufficient number of blacks as witnesses in a lawsuit by the Government against the local registrar, despite the real and terrible dangers that this public exposure was likely to cause. The courage of local blacks, therefore, enabled the Department of Justice to file, try, and win *United States v. Duke* on appeal, which resulted in opening the registration rolls to large numbers of blacks before enactment of the Civil Rights Act of 1965.

Neither the Department of Justice attorneys nor northern volunteers could operate in a vacuum. They succeeded only because the "deep drive for freedom" was an overwhelming and universal force in Panola's black community—manifested strongly by some and feebly by others. Local blacks were the real heroes. The enormity of the courage, guts, and will that was required for local blacks to challenge the white community by seeking to register and in cooperating with federal authorities is simply inestimable. Other figures in this struggle, while vital and necessary, cannot be cast in a heroic mold. That is the exclusive preserve of the local blacks.

Professor Wirt's ignorance or naivete concerning Mississippi race relations is again evident in his description of the implementation of Title VI. He seems to understand that "freedom of choice" places the burden of integration on black parents and children. He concludes, however, that integration in Panola County, with freedom of choice in effect, has been limited because blacks found the academic standards in the white schools shockingly high, and, as a result, large numbers of blacks transferred back to the all-black schools after a year or two of integration. I regard this as misplaced cause and effect. If school authorities had assumed their responsibility for school integration, pupil

13. At the time, John Doar was Burke Marshall's chief assistant and subsequently succeeded Marshall as head of the Civil Rights Division of the Department of Justice.

reassignment would have been on a system-wide basis. These authorities were aware of and should be accountable for the academic deficiencies in the black schools. It was their responsibility not only to reorganize the school district so that segregated pupil assignment would be eliminated but also to initiate massive remediation programs as a necessary ingredient of success in school desegregation.

To Professor Wirt, laggardness in the area of faculty integration was a result of the fears of the black teachers. He reports that one of the best black teachers threatened to leave the state if required to transfer to the white school (p. 226). This is both a superficial analysis and an erroneous judgment. Failure to achieve faculty integration was the result of the policies and procedures of school authorities. Individual black teachers should not have been singled out as the cause for this failure, particularly in a study promising to give a disciplined account of the role of law in effectuating change.

In a number of instances Professor Wirt forgets his role of scientific objectivity. He offers advice, for example, to black political leaders to form coalitions with white officials. The ballot, he says, will be a useful black tool "when it is concerned with the issues which cost the whites little to change, have a limited visibility among whites, involve the whites' sense of fairness and impartiality and lie within the public sector of community life" (p. 171).[14] This can hardly pass for objective scientific knowledge or even professional wisdom. What we are offered is the author's personal views, obviously weighted with his own biases and conceits, as to how blacks may best pursue their political objectives. Whatever its intrinsic value, deigning to give it is excessively patronizing. Moreover, any political leader who would act on that kind of advice would not remain in politics very long. It is altogether obvious that no political movement can survive if its members seek only to achieve meaningless and unimportant gains through the political process.

III. CONCLUSION

My concluding assessment is that Professor Wirt's study seems curiously dated. Concern with the ways and means by which law could successfully induce social change was at a high point among civil rights observers during the 1950's and 1960's. In the immediate aftermath of *Brown,* there was a great deal of faith in the law as an effective

14. R. MURPHY & H. GULLIVER, THE SOUTHERN STRATEGY 199-226 (1971), on the other hand, seems to accept the reality that blacks, like all other segments of the American electorate, will vote in what they regard as their self-interest and views this as necessarily leading to improved race relations in the South.

instrument of reform. Disillusionment came, but belief in the efficacy of law as a lever for progress in race relations remained the dominant factor even through the sit-ins and mass demonstrations of the 1960's. Today, however, the law's utility as a means of securing political, economic, and social equality for nonwhites is being seriously questioned. Blacks who once believed in federal law as the key to full equality now see the law as an instrument of oppression. The law requires equal educational opportunity, but educational deprivation of black children remains the norm. Employment and housing discrimination are prohibited by law, yet these practices continue virtually unabated either because power enclaves have succeeded in frustrating the effective reach of federal and local laws against discrimination or because institutional racism has become so normalized and entrenched that law is impotent to move the massive forces that seek to preserve the status quo of racial inequities. Many are now contending that the injustices in our system will not be eliminated through law reform. They argue that only when nonwhite minorities are able to secure levers of political and economic power will they have the means to make the society responsive and to alleviate its deep rooted inequities.

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Reapportionment Reexamined

THE APPORTIONMENT CASES. By Richard C. Cortner. Knoxville: University of Tennessee Press, 1970. Pp. ix. 283. $10.00.

While the title "The Apportionment Cases" could well characterize a much broader survey, Professor Richard C. Cortner's book is primarily an in-depth study of the Supreme Court's landmark decisions in *Baker v. Carr*[1] and *Reynolds v. Sims*.[2] One might be led to believe that this is simply a technical examination of the opinions in these all-important cases and a criticism of the legal methodology by which the Court utilized the equal protection clause of the fourteenth amendment to accomplish a veritable revolution in constitutional theory. From the preface itself, however, we discover that the design of the book is not

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1. 369 U.S. 186 (1962).
2. 377 U.S. 533 (1964).

so limited. The author begins his discussion with an examination of the origins of the cases in the states of Tennessee and Alabama, respectively. This discussion contains interesting observations about the principal actors involved in the two scenarios, a step-by-step analysis of the litigation in each case, and, lastly, an examination of the judicial and political impact of these momentous rulings. In the closing chapter, the author makes some penetrating observations concerning the operation of the judicial process in our constitutional system. His comparison of the Court's exercise of judicial power in *Brown v. Board of Education*[3] with its subsequent action in the apportionment cases is particularly interesting.

Written in a most readable style, Professor Cortner's work should appeal not only to lawyers, judges, and political scientists, but also to all citizens interested in obtaining an insight into the judiciary's recent role within our governmental framework. The subject of apportionment, however, is much broader than the particular aspects of the problem dealt with by Professor Cortner. Although the reader will find within its four corners some indication of the effects that the apportionment decisions have had, the book is limited in this respect, perhaps for the obvious reason that the full impact of these decisions cannot yet be known. The author does discuss the effect of the rulings in bringing about a dramatic shift of political power in state legislative assemblies from rural to urban centers of population, but he makes little attempt to assess other results. There is no analysis of drastic shifts in voting strength in connection with innumerable subordinate units of state government or of the impact of the "one man, one vote" principle in the broad and important area of congressional redistricting.

Much has been written on the technical aspects of *Baker v. Carr* and *Reynolds v. Sims*, and the present treatment adds nothing new from this standpoint. On the other hand, Professor Cortner's analysis of the judicial process and its potential for accomplishing needed changes in the basic structure of government when other possible modes of redress have proved fruitless is a valuable contribution to legal literature.

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3. 349 U.S. 294 (1955).

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