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Conceptions of Law in the Civil Rights Movement

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Conceptions of in the Civil



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On February 1, 1960, four undergraduates from the Agricultural and Technical College of North Carolina sat down at the lunch counter at Woolworth's in Greensboro, North Carolina. The students were black; the lunch counter was "whites only." But when the store manager asked them to leave, the young men stayed put. So began the student sit-in movement, a non-violent protest campaign that spread and gathered force throughout the South that spring, injecting new energy into the struggle for African American equality and eventually leading lunch counters across the South to abandon their segregationist policies.

The students who launched these protests were frustrated by the slow pace of reform through the traditional political and legal avenues. As James Lawson, one of the young strategists behind the sit-in movement, explained, "the legal redress, the civil rights redress, are far too slow for the demands of our time...[T]he sit-in is a break with the accepted tradition of change, of legislation and the courts." By enacting with their bodies the social reality they sought to create, the students were adopting a new set of rules, those of nonviolence and civil disobedience.

In a forthcoming article, ABF Faculty Fellow Christopher Schmidt explores the sit-in protesters' attitude toward "the law." The protesters' "claim to be standing outside the realm of the law," he notes, was grounded in a distinctive and firmly held conception of law. While recent histories of the civil rights era have framed the students' use of direct action as a part of the broader "legal process"—a process in which there is little distinction

between "the law" and the rest of society—Schmidt reminds us that many of the actors in the civil rights movement conceived of law as a force apart from and acting upon (with varying degrees of effectiveness) society. In his article Schmidt analyzes the conceptions of law held by the sit-in protesters as well as other groups and individuals during the civil rights era. The challenge for legal historians, he advises, is not to lose sight of historical actors' own understanding of the meaning and function of law, even as they incorporate the insights of sociolegal scholarship that reveal the social processes inherent in the formation and enactment of "the law."

Defenders of Jim Crow

First, Schmidt examines the ideas of defenders of "Jim Crow" laws. Supporters of Jim Crow based their defense of segregationist state and local law against federal interventions on the "assumption that law should reflect norms and customs that had

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evolved outside the law,” he notes. Law, they argued, should not be used to attempt to change society, or in the words of the influential sociologist of the turn of the last century, William Graham Sumner, “stateways’ are powerless to change ‘folkways.’” In this context, Schmidt explains, “‘folkways’ were the customs and practices of white supremacy, ‘stateways’ were civil rights.”

An early and classic example of this way of thinking about the law can be found in the Supreme Court decision in the case of *Plessy v. Ferguson* (1896), where the Court upheld the doctrine of “separate but equal.” As the Court stated, “legislation is powerless to eradicate racial instinct or to abolish distinctions based upon physical differences...and the attempt to do so can only result in accentuating the difficulties of the present situation.” As Schmidt summarizes, “*Plessy* is pervaded with a general skepticism toward the power of law to effect change in the ‘social’ sphere.”

Decades later, during the modern civil rights era, these same arguments were used in the segregationist argument in *Brown v. the Board of Education* (1954). Schmidt cites the example of Justice Jackson, whose sympathy for the cause of desegregation was tempered by his belief that there was much merit to the segregationist critique of the capacity of law to uproot social practices. In an unpublished concurring opinion, Jackson wrote, “today’s decision is to uproot a custom deeply embedded not only in state statutes but in the habit and usage of people in their local communities...In embarking upon a widespread reform of social customs and habits of countless communities, we must face the limitations of the nature and effectiveness of the judicial process.” In the aftermath of the *Brown* decision, Schmidt notes, southern segregationists such as the 101 members of the US Congress who signed the 1956 “Southern Manifesto,” continued their criticism of “stateways.” Citing the “separate

but equal” doctrine of *Plessy v. Ferguson* that had been overturned by *Brown*, the Manifesto signers wrote “[Re]stated time and again, [it] became part of the life of the people of many of the states and confirmed their habits, traditions, and way of life.” As Schmidt states, in this line of reasoning, “law’s proper role...was to respect commitments that had taken shape outside the realm of the law.”

Schmidt points out that the segregationist conception of law as subordinate to and independent of social norms was riddled with inconsistencies and ironies. As Schmidt states, “segregationist claims tended to ignore the inconvenient fact that a crucial component of the construction of the ‘tradition’ of Jim Crow was, in fact, law.” The *Plessy* decision, despite its emphasis on the limits of law was, after all, about upholding a segregationist Louisiana statute. Schmidt cites the eminent historian C. Vann Woodward who emphasized the centrality of law to segregation’s development. While Woodward acknowledged that segregationist practices preceded segregationist laws, he argued that these practices were not so harsh or rigid as they later became when they were codified. According to Schmidt, Woodward argued that segregationist law was used to give the “illusion of permanency” to segregationist practices. Schmidt argues that Woodward’s insight “that laws played a central role in the solidification of what segregationists

would come to defend as custom, is irrefutable. Segregationist portrayals of law as subordinate to society sought to efface the role that law played in the maintenance of Jim Crow.”

It is equally ironic, Schmidt notes, that southern efforts to resist the implementation of *Brown* relied heavily on law. Post-*Brown* segregationists used state laws to “shift decision-making power over school assignments so as to minimize desegregation,” Schmidt states. “Segregationists thus shifted back and forth between proclaiming law as subordinate to practices and attitudes and turning to law to protect these same attitudes when threatened by the civil rights movement...[F]or the segregationists, the construction of the law-society boundary was an effort to both demote law’s capacity for social change and elevate this same capacity so as to warn against reckless attempts to use the law for social transformation.”

The Racial Liberal Argument for the Capacity of Law

Schmidt next examines the conception of law embraced by the civil rights activists of the 1940s and 1950s. While, like the segregationists, these activists viewed law as operating on a plane distinct from “society,” they fought to reverse the segregationist “society-over-law” hierarchy. Rather than calling for laws to reflect “folkways,” Schmidt states, liberal scholars and activists insisted that “law could shape social behavior.”

In the 1940s and 1950s racial liberals recognized Jim Crow laws as crucial to the perpetuation of segregation. Thus, according to Schmidt, “racial liberals increasingly attributed the major sins of racial oppression less to underlying attitudes and more to legal

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constraints on behavior.” The liberal case for the “capacity” of law made two main arguments: “[I]niquitous racial customs and prejudices were not nearly as entrenched as was generally assumed...and wide scale legal reform was the most effective way to lead the nation away from its damaging tradition of racial inequality. Attitudes, liberals argued, followed actions...The premise for the legalist reformers was that law could move society. And for law to move society, it must have some causal force, independent of society. To lead society, law must stand apart from society. As it gained strength in the 1940s and 1950s, the racial liberal campaign for civil rights reform was thus premised on a faith in the idea of a clear divide between law and society.”

The Sit-ins: An Alternative to Law?

As committed to integration and equal rights as the racial liberals, the student sit-in protesters of 1960 took a different stance toward the law. As Schmidt states, the sit-in participants adopted an “anti-legalist posture” that “self-consciously identified their protest as a critique of civil rights lawyers and their reliance on the courts.” Seeing their movement as an “alternative to the sphere of the law,” the students “understood law as something that could be delineated, differentiated, and thereby used as a defining characteristic for their own sense of identity as participants in the larger struggle.”

The sit-in protesters focused on “drawing attention to offensive practices that were designed to subjugate and humiliate African Americans and drive them from the public sphere,” more than on changing particular laws. By sitting down at a whites-only lunch counter, the students *enacted* “an alternative social practice,” Schmidt emphasizes, engaging in “what Thoreau memorably termed ‘the performance of right’.” Schmidt quotes the African American journalist Louis Lomax as saying that the sit-in protesters shifted the desegregation struggle “to one of individual dignity rather than civil rights.” As Schmidt points out, the students’ focus on small-scale goals “had the tremendous advantage in that they held the possibility of immediate attainment,” in contrast to the gradual, lengthy court battles fought by civil rights lawyers.

Inevitably, the sit-in protesters did become entangled in the legal process, most notably when they were arrested. Yet their encounters with lawyers from the NAACP, who came to their defense, again highlight the differences between the protesters’ relationship with the law and that of the racial liberals. As they advised and represented the students, the NAACP lawyers “sought to redefine the goals of the protests,” Schmidt notes. The lawyers argued that by working outside the legal process, the students limited their effectiveness and risked losing sight of the “main objective” of the protests, which the lawyers

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assumed was “the judicial recognition of the constitutional rights of the protesters.” The lawyers, Schmidt observes, reasoned that “lasting change required the availability of authoritative, formal, external constraints on behavior.”

While the lawyers advised that students plead not guilty to disorderly conduct or trespassing charges, pay bail and appeal any convictions, many of the protesters preferred Martin Luther King’s tactic of “jail, no bail,” Schmidt notes. Rather than working their way through the courts, the protesters sought to “use the central institutions of the legal system, the courtrooms and the jails, as platforms from which to continue their appeals to the conscience of the defenders of Jim Crow—and to the nation at large.” They brought “their own set of rules, the rules of nonviolence and civil disobedience” to the struggle.

Thus, Schmidt concludes, the student sit-in protesters’ conception of the law was “formal and institutional” and, to them, the “legal approach” consisted of “legal challenges fought out in court.” This conception stands in contrast to that of contemporary sociolegal scholars, who view the student protests as a kind of rights claim against legal norms, a “powerful challenge to the meaning of the Constitution, well before the lawyers took the sit-in cases to court.” While many who now write about the 60s era civil rights protests view the students as actors in a broad kind of

legal process, Schmidt argues that it is important to recognize and discuss the protesters’ view, because “the process of constructing the law-society divide was an essential organizational tool for this generation of pioneering civil rights protesters.”

Law as Social Change: King and Bickel’s Conceptions of Law

In contrast to the student protesters, liberal lawyers, and Jim Crow segregationists, all of whom saw their interests advanced by adopting a conception of law as separate from society, others insisted that the civil rights movement demonstrated the collapse of the distinction between legal and social processes. To make this point, Schmidt examines two very different figures: Martin Luther King, Jr. and law professor Alexander M. Bickel. According to Schmidt, both King and Bickel “sought to reconceptualize law so as to recognize processes of cultural change, social disorder, and political agitation as an integral part of giving meaning to the law.” Law for them was “an unfolding social process.”

Alexander M. Bickel (1924-1974), perhaps best known for his classic book, *The Least Dangerous Branch*, was a highly influential scholar of constitutional law who joined the Yale Law School faculty in 1956. As Schmidt explains, in his early work, “Bickel’s central project was to balance his commitment to a limited

role for the judiciary in American life with his equally strong commitment to the rightness of *Brown*.” Though himself supporting *Brown*, Bickel saw the post-*Brown* popular resistance to school desegregation as “part of the process of creating law,” Schmidt notes. The fact that the state had to use force to enact *Brown* showed the weakness of “the law.” Thus, Schmidt explains, in Bickel’s view “law requires some level of consensus; coercion can only do so much. The system requires opportunity to express disagreement with Court decisions, even to defy their validity as law.” As Schmidt elaborates, “Bickel... envisioned law as the product of a dialogic relationship... between the Court, whose job is to translate fundamental principles into legal commands, and society (including the elected branches).”

Bickel’s struggle to make sense of the limits of formal legal commands and the role of social contestation in giving meaning to law eventually steered him toward an increasingly conservative attitude toward the use of law as a tool of social reform, Schmidt notes. As Bickel himself wrote, “the Court must not overestimate the possibilities of law as a method of ordering society and containing social action. And society cannot safely forget the limits of effective legal action, and attempt to surrender to the Court the necessary work of politics.”

While Bickel advised judicial restraint and respect for custom and tradition in the creation of law, Martin Luther King focused more on “the work required to give life to basic legal principles,” Schmidt states. “For King, the recognition of the process of law in society was a call to action.” Schmidt then elaborates on how King went about promoting the process of law as a social and political struggle.

King acted as a “mediator” between the sit-in protestors and the NAACP lawyers, attempting to “stand astride the law-society boundary.” Able to shift back and forth between “protest marches and White House signing ceremonies,” he created for himself a “powerful position from which to assess the value and accomplishments of both legal and extralegal reform efforts.” From this position King would come to adopt “a view of law as a project of social and political construction.”

In the decade following the *Brown* decision two major developments—the rise of mass segregationist resistance to *Brown*, and the emergence of direct action protests such as the lunch counter sit-ins—posed a challenge to the legal strategy of the racial liberals. King articulated the weakness of the legal liberal agenda, explaining that, while legal change was valuable, “the law itself was limited in its ability to affect hearts and minds,” Schmidt notes. As King himself said, “Our job now is implementation... We must move on to action... in every community in the South, keeping in mind that civil disobedience to local laws is civil obedience to national laws.” King was careful to distinguish between desegregation and integration, Schmidt observes. He quotes King, who remarked that desegregation without integration leads to “a society where men are physically desegregated and spiritually segregated, where elbows are together and hearts are apart.”

Thus, King was skeptical of law’s ability to change society when unaccompanied by social action. King’s radical vision encompassed a pessimistic realism about human nature, Schmidt explains; when deep-seated prejudices are challenged,

King felt that violence was inevitable. According to King, “nonviolent resistance was the best policy because it had the ability to ‘absorb’ violent resistance to change.” As Schmidt states, the experience of the post-*Brown* years underlined the weakness of “formal, legal-centric approaches to social reform” leaving room for King and the direct-action protesters in the national debate.

Despite the vast differences in their backgrounds and their involvement in the civil rights movement, Schmidt argues that King and Bickel ultimately shared a similar conception of the law. “Each in their own way sought to reconceptualize law so as to recognize processes of cultural change, social disorder, and political agitation as integral to the legal process,” Schmidt argues. “Their effort to break down the law-society division, like the efforts of those who sought to emphasize this same division, came in response to the pressures and demands of the civil rights movement.” Thus, for King and Bickel, Schmidt states, “law is not always law.” Rather, “law is part of a process of struggle; it never stands apart from that struggle... Law must be constructed, and this is a process in which there are no clear boundaries between a legal and social sphere.”

Defining Law’s Boundaries in Histories of the Civil Rights Movement

Schmidt concludes with a section that is primarily of methodological interest to legal historians and law and society scholars. Here Schmidt traces the changing ways historians themselves have conceived of the law-society divide as they have chronicled the civil rights movement over the past forty years. As Schmidt states, the various ways historians have conceptualized

law in relation to the civil rights movement, have, in fact, “mirrored history.” The four approaches to the law-society divide that Schmidt outlines in his article—the “folkways” skepticism toward the capacity of law; the legalist claims of the NAACP lawyers...; the grassroots anti-legalist tactic of the sit-in movement activists; and the effort to break down the law-society boundary embraced by King and Bickel—each capture different assumptions about law that can also be found within civil rights historiography.”

The first generation of civil rights historians situated law and lawyers at the heart of change. Progress in the civil rights movement was “best measured by the changes in the law that had resulted.” These historians argued that the *Brown* decision served as a catalyst for change. Black nationalist scholars of the late 1960s and 1970s, on the other hand, were skeptical about law’s power to bring about change. Their writings constituted a challenge to the white-dominated legal structure; for them, the *Brown* decision was not a catalyst. As Schmidt states, black nationalist scholars believed that “all *Brown* did was to ‘bring the Court up to date’ with changes already taking place.” According to Schmidt, black nationalist scholars generally believed that “law could be effective in shaping social practices, [but] they simply thought it invariably served majority interests. Therefore even those legal breakthroughs that seem most significant, such as *Brown* and the Civil Rights Act of 1964, ultimately had limited racially egalitarian effects in challenging entrenched patterns of racial inequality.”

Social historians of the 1980s focused their accounts of the civil

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rights era on ordinary people and local organizing. In these histories “law plays only a background role...,” according to Schmidt, where law “was readily separable from the lives and achievements of the participants.” In the 1990s, historians who studied the social impact of judicial decisions critiqued the idea of *Brown* as a catalyst for change. At best, they argued, *Brown’s* effects were indirect: the radicalization of white southern politics in reaction to *Brown* led to increased support for civil rights legislation in the North. These scholars conceptualized law as something independent of “society”; a force acting upon society, and thus separate from politics: “law is the product of the courts; politics is the product of democratic institutions and social activism.” For these historians, the law-society “boundary” is essentially “a circle around the judiciary,” according to Schmidt.

Current historians, Schmidt explains, “have found more law on the grassroots level than social historians had recognized...[T]he past decade or so has seen a flowering of legal historical scholarship on the civil

rights movement that simply asks different questions and focuses on different areas of civil rights law and activism. This scholarship has sought to undermine the assumption of a clear distinction between law and the rest of society.” For example, Schmidt points out, “the latest scholarship on the NAACP has emphasized the diversity of its efforts, drawing attention to the work of its lawyers in settings outside the courts.” In this approach to the history of the civil rights movement, “the lines between activism and legal reform, between politics and law are blurred to the point where they no longer seem to matter.”

Scholars in political science and sociology have also produced valuable work that further undermines “law” as a discrete category of analysis. Recent scholarship on “the creation and development of legal consciousness” exemplifies this trend, Schmidt states. “Law, in this sense, is a social phenomenon...it acts within society rather than upon society. The central concern of sociolegal scholars doing this kind of work is less with whether law produces social change

and more with the way in which law functions within different institutions and in different social settings...From this perspective, talk of the boundaries of the law makes little sense.”

Conclusion

As Schmidt summarizes, the civil rights movement illustrates that “all struggles for social change create incentives for putting forth a vision of what the law is—and what it is not.” For those involved in the civil rights movement, “law was important not simply for its ability to regulate behavior or to legitimate certain norms (although it could have these attributes), but for the way it helped to organize the complex landscape of social reform politics. The act of conceptualizing the law was often a way to define and to justify one’s role in the movement.”

The best recent historical scholarship of the civil rights movement recognizes “law as functioning in a constitutive manner within society, rather than in a causal manner upon society,” Schmidt acknowledges. However, Schmidt makes the case for tempering this trend with careful attention to historical actors’ understanding of the nature of “the law.” While recognizing law’s constitutive function, he argues that historians should “also recognize that a perception of separateness has often resonated in powerful ways with the subjects we are trying to understand.” Thus, regardless of the methodological stance historians favor at any given time, “the law-society dichotomy remains an essential object of legal historical inquiry.”

Schmidt’s article “Conceptions of Law During the Civil Rights Movement,” is forthcoming in the *UC Irvine Law Review*. Quotes in this issue of *Researching Law* are from a preliminary version of the article.

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