

2005

# The Rule of Law and the Achievement of Unanimity in Brown

Stephen J. Ellmann

*New York Law School*, [stephen.ellmann@nyls.edu](mailto:stephen.ellmann@nyls.edu)

Follow this and additional works at: [http://digitalcommons.nyls.edu/fac\\_articles\\_chapters](http://digitalcommons.nyls.edu/fac_articles_chapters)



Part of the [Law and Race Commons](#), and the [Rule of Law Commons](#)

---

## Recommended Citation

New York Law School Law Review, Vol. 49, Issue 2 (2004-2005), pp. 741-784

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

## THE RULE OF LAW AND THE ACHIEVEMENT OF UNANIMITY IN *BROWN*

STEPHEN ELLMANN\*

No case is more integral to our present constitutional order than *Brown v. Board of Education*.<sup>1</sup> Its absolute rejection of school segregation is one of the foundations of modern equal protection law, and its bold approach to constitutional interpretation has surely resonated in the reading of many other constitutional guarantees as well. The transformation of the public school system that it presaged became the hallmark of the many institutional reform efforts undertaken by courts over the past half-century. In these senses, *Brown* is a key component of the rule of law as we know it today.

The processes by which the judges of the Supreme Court achieved their unanimous decision in *Brown* are of special interest as well. Just as *Brown's* result and its spirit have shaped our law, what was required to bring about this decision may be equally key to an understanding of the true nature of the rule of law that the case embodies and exemplifies.<sup>2</sup> There are many striking features to the Court's decisionmaking in this case; I focus here on one of

---

\* Associate Dean for Faculty Development and Professor of Law, New York Law School. This paper was first prepared as a lecture at Columbia Law School in 1992, and I am grateful to the organizers of the *Brown* panel for the opportunity to look at these issues again. I also very much appreciate the helpful comments of Teresa Delcorso, Frank Munger, Edward Purcell, and Mark Tushnet, the generous assistance of Michael Klarman, who provided both extensive comments and copies of documents from the *Brown* case, and the research help of Sarah Valentine of New York Law School's Mendik Library.

1. Michael Klarman has commented that "[o]n a normative level, we seem certain only that *Brown* is right and any theory unable to accommodate it must be wrong." Michael J. Klarman, *Book Review: Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 GEO. L.J. 433, 434 (1994) (reviewing MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936-61* (1994)).

2. My colleague Edward Purcell has used another central decision of our law, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to illuminate profoundly what the rule of law entails. See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000).

the most remarkable, the choice by Justice Stanley Reed to vote with the rest of the Court in favor of the *Brown* judgment, even though he may well have disagreed with the Court's decision.

It is tempting for us to overlook the difficulty of Reed's choice, because we so take for granted that the Court was right in *Brown*. Once we take seriously the idea that Justice Reed may have voted contrary to his own beliefs in this crucial case, however, we can ask seriously whether his doing so was justified, and answering that question will help us to understand the legal order in which Justice Reed lived and which we ourselves inhabit. I begin, in Part I of this essay, by developing in broad terms the proposition that it is *not* always the obligation of the judge to vote for, and express, all and only the propositions of law and fact that he or she believes.

That proposition may be startling — though I will try to show that it should not be — but it takes us only so far; the next question, inevitably, is the question of degree: when and where can judges justifiably express positions that are, partly or entirely, not their actual convictions? I do not seek a complete answer to that question in this essay, but I will look for several elements of the answer in an analysis of Justice Reed's vote in *Brown*. Doing so will first require an exploration of just what he did actually think and decide in that case, a matter that remains less than completely clear; Part II of this essay will look at this history. Then, in Part III, I will turn to the lessons these events suggest for our understanding of the rule of law: lessons about the role of emotion and interpersonal connection in judgment, about the role of social policy considerations in constitutional law, and about the moral experience of judging. *Brown* is not a typical case, either in substance or in process, but I will argue that in process as in substance it is central.

## I. JUDICIAL CANDOR AND THE RULE OF LAW

What are the duties of judges in deciding cases? Though this question may be very hard to answer fully, it is easy to answer in part. For example, we agree that judges must not take bribes.<sup>3</sup> Nor

---

3. Nor may they take direction from members of the other branches of the government. Thurgood Marshall, however, believed that "President Eisenhower had pressured Chief Justice Earl Warren to retain school segregation." Marshall says that Ralph Bunche, a winner of the Nobel Peace Prize, told him that at a White House dinner he

may they flip coins. Instead, if they make decisions about the facts they must evaluate the evidence they hear as fairly as they can, seeking to discern what happened rather than to distort it so as to justify a result they embrace for extra-legal reasons. When determining the law, similarly, they must sincerely seek to understand and, where appropriate, to shape the law according to their best lights.

From such propositions as these it is tempting to infer a much more sweeping judicial obligation — a duty for each judge to examine each case as best he or she can and then to announce the results of his or her efforts, telling us all and only what the judge perceives to be the truth of the matter, regardless of the outcome of doing so. *Fiat justitia, et ruat coelum* — loosely, let justice be done though the heavens fall. Anything less, it might be said, is a violation of the central constitutional function of judges: to say what the law is, rather than pretend it is something else.<sup>4</sup> Falling short of this standard is to judge *with* fear or favor. Or it is simply not to *judge* at all, but to substitute some other function, whether venal (to serve illegitimate interests) or noble (to serve what is morally right).

Powerful as these reasons are for demanding that judges say all and only what they believe, we do not in fact require such uncompromising behavior from our courts. We can see, in the actual practice of judging, two well-established practices that reflect different normative calls. First, courts write in part to persuade, and the demands and conventions of persuasion constrain what they say. For example, it is probably quite common that judges, recognizing that their view of what the law should be departs radically from the thrust of some part of the accumulated precedent bearing on the matter, choose not to overrule the earlier case law but instead to find ways to read those decisions narrowly — knowing full well that

---

heard Warren tell Eisenhower off in no uncertain terms: “I thought I would never have to say this to you, but I now find it necessary to say to you specifically: You mind your business, and I’ll mind mine.” Juan Williams, *Marshall’s Law*, in THURGOOD MARSHALL: JUSTICE FOR ALL 140, 151 (Roger Goldman with David Gallen eds., 1992). Warren himself confirmed that the President spoke to him about the South and school segregation, though as he told it, Eisenhower’s comments, however prejudiced, do not seem to rise to the level of pressure. See THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 655 n.60 (2001) [hereinafter THE SUPREME COURT IN CONFERENCE] (quoting EARL WARREN, THE MEMOIRS OF EARL WARREN 291 (1977)).

4. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

their readings would startle the authors of the earlier judgments, but never saying so. This, the judges may feel, is what deference to the past requires, or at least what the appearance of deference to the past requires, even when that deference no longer requires adherence to the substance of what the earlier courts believed.<sup>5</sup> But in the process doctrines are cast and recast to serve the new justices' overriding purposes.

Still another issue of persuasion may irresistibly enter the thinking of the justices. The Court has no armies, and its power rests on the assent of those who do, and beyond that on the support of the people of the nation. If the Court can justify its decisions in terms that are more familiar, more courteous and more palatable than the considerations that might in fact be uppermost in the judges' minds, perhaps it should do so. Certainly we know, from other evidence too elaborate even to mention, that politicians who seek the support of the people often feel they need to mask their views and disagreements. So, for example, Chief Justice Earl Warren opened the justices' deliberations following the re-argument of *Brown*<sup>6</sup> in 1953 by making clear that he believed segregation, and *Plessy*,<sup>7</sup> could only be upheld on the basis of a belief in the inferiority of black people.<sup>8</sup> That understanding, however, is not avowed in the *Brown* decision; there, Warren carefully says just that the separation of black children "from others of similar age and qualifications solely because of their race *generates a feeling of inferiority* as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"<sup>9</sup> — a powerful indict-

---

5. David Shapiro notes that "[a] certain amount of conscious dissembling, it is sometimes suggested, is an appropriate, even a necessary, way of maintaining a sense of our connection with the past." David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 739 (1987). He argues against this suggestion, but he himself endorses a very free-wheeling approach to precedent, *see id.* at 734, easily broad enough to enable judges — without any actual dissembling — still to engage in the kinds of revisionist readings I refer to in the text.

6. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

7. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

8. *See, e.g.*, BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY* 86 (1983).

9. *Brown*, 347 U.S. at 494 (emphasis added). The phrase "generates a feeling of inferiority" was itself the result of editing; at Frankfurter's request, Warren substituted these words for less subjective language ("a mark of inferiority") that he had initially used. John David Fassett et al., *Supreme Court Law Clerks' Recollections of Brown v. Board*

ment, but not as accusatory as the point he had made in conference. Warren explicitly aimed to be “non-accusatory,” in fact,<sup>10</sup> and *Brown* carefully steers clear of any imputation of malign motives to the South. *Brown* does not even contain an explicit finding of discriminatory intent. The same phenomenon is at work whenever judges recognize their own freedom to shape the law, and exercise it, but do not declare it, and instead couch their innovations in the language of precedent and logical compulsion.

The second well-established departure from the idea of complete judicial candor arises from the fact that appellate courts are multi-member bodies. The presence of multiple judges at once poses the question of whether each individual judge’s task is to express his or her own views (with whatever shading persuasion may call for) or to join in the expression of views of the court as a single entity. It is possible to imagine courts from whose judgments no dissent is permitted; indeed, such courts have existed.<sup>11</sup> But the United States Supreme Court has never been such a court. Dissent has always been an option.

To be sure, justices’ views about when to exercise this option have varied substantially over the past two centuries. It has been almost two centuries since John Marshall persuaded his colleagues on the Supreme Court largely to abandon the practice of delivering multiple individual opinions and instead to join in single majority

---

of Education, 78 ST. JOHN’S L. REV. 515, 556 (2004) [hereinafter *Law Clerks’ Recollections*] (comments of Earl E. Pollock, who was clerking for Warren while *Brown* was being decided).

10. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 315 (2004). E. Barrett Prettyman, Jr., who clerked for Justice Jackson during the decision of *Brown*, recently commented that Jackson welcomed Warren’s draft opinion as a “master work,” in particular because “[h]e was so pleased that there was no blame.” *Law Clerks’ Recollections*, *supra* note 9, at 555 (comments of E. Barrett Prettyman, Jr.).

11. Robert Post observes that “the Constitution of the State of Louisiana forbade the publication of dissents between 1898 and 1921.” Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1311 n.138 (2001). Similarly, in colonial days, “[t]he ultimate appeal available from decisions of the American colonial courts was to the Privy Council in England,” Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 187 (1959), and dissents within the Council, if any, were never, or almost never, revealed, *see id.* at 188-89 & n.18.

opinions,<sup>12</sup> and for most of the Supreme Court's history, dissents were quite rare. A decisive shift took place between 1940 and 1941, however, and we have lived since then in a world in which disagreements among the justices of the Supreme Court are quite common.<sup>13</sup> Even today, though, it hardly seems likely that the many strong-minded members of the Supreme Court have been in complete accord with every element of the opinions that they have joined.

If dissent is permitted but not universal, then each justice in each case must decide whether to suppress his or her distinctive views, in whole or in part, in favor of the views of the court as a whole. For such justices — the justices of our actual Supreme Court — the measure of their responsibilities is neither entirely an individualistic concern for personal candor nor entirely an institutional criterion of court functioning. Justices must necessarily weigh both sets of concerns.

It seems clear that judges weighing these concerns have not considered themselves bound always to say *all and only* what they believe. At the very least, judges must regularly choose to say *less* than they believe, because they can find agreement among themselves on some propositions — sufficient to decide the case at hand without gravely distorting the potential decision of future cases — where they could not reach agreement on all of the legal principles potentially implicated by the case.<sup>14</sup>

It may be more surprising to assert that judges sometimes also depart from the proposition that they should say *only* what they believe, but in fact they evidently do. Robert Post has closely scrutinized the records of the Supreme Court under Chief Justice Taft and found that such distinguished dissenters as Holmes and Brandeis were among the justices who deliberately acquiesced in deci-

---

12. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 143-46 (1999).

13. *Id.* at 138, 175.

14. David Shapiro, in his defense of judicial candor, agrees that "[a]n effective judge must have a sense of when to settle for less than his heart's desire, either in writing his own opinion or in joining someone else's." Shapiro, *supra* note 5, at 743. He suggests, with some hesitation, that the line between proper and improper deference to colleagues is that "the judge not materially mislead the reader." *Id.* at n.54. Under this standard, judges surely would be entitled to say *less* than they believe, in the circumstances described in the text.

sions with which they disagreed, unless those decisions posed issues too important for them to remain silent.<sup>15</sup> Chief Justice Hughes has been said to have followed a similar practice.<sup>16</sup> No doubt jurists such as these have reasoned that their dissents would not alter the results in the cases at hand, might introduce unhelpful uncertainty into the law, and might interfere with the collegial task of deciding each term's set of cases successfully.<sup>17</sup>

To remain silent, when dissent is possible, is a form of speech, though not a very assertive one. But if judges decide not to acquiesce in this way, the result may still not be completely candid judicial speech. Instead, judges may cast their votes, and write their opinions, not with a view to self-expression but with the aim of doing as much justice as possible.<sup>18</sup> To build a court majority in support of a legal proposition, judges may be willing to reach a compromise agreement around a non-optimal, but acceptable, rule

---

15. Post, *supra* note 11, at 1309-55. For examples of the justices' disposition to avoid dissents, see *id.* at 1311 (Taft); 1317-18, 1341 & 1345-46 (Brandeis); 1340-41 (Butler); 1340 & 1343 (Van Devanter); 1341-42 & 1349-51 (Holmes); 1342 (Sutherland); 1342-43 (Sanford); 1343 (McReynolds); 1343-44 (Butler). Post sums these comments up by saying that "they do not so much express a 'norm of consensus,' as a norm of acquiescence." *Id.* at 1344 (footnote omitted). Post also provides statistics on how often justices chose not to dissent even though they had disagreed with or been uncertain about the outcome of the case at conference: "Within the complete set of 1200 conference cases the unanimity rate, as measured by a unanimous vote at conference, was only 50%. The unanimity rate for the published opinions of the conference cases was by contrast 86%." *Id.* at 1333 (footnote omitted). While a number of these decisions not to dissent surely reflect actual changes of heart, it seems entirely plausible that many reflect only the force of the "norm of acquiescence."

16. According to John Fassett, "[i]t is . . . well known that Chief Justice Hughes sometimes voted for decisions with which he disagreed in order to avoid an appearance of conflict on his Court." John D. Fassett, *Mr. Justice Reed and Brown v. The Board of Education*, 1986 YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY 48, 61.

17. For extensive, thoughtful discussions of the factors that might, or might not, properly lead judges to join in opinions with which they do not entirely agree, see Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995); Post, *supra* note 11, at 1345-59; Shapiro, *supra* note 5.

18. Thus Kornhauser and Sager, who take it to be "the norm for judges to sacrifice details of their conviction in the service of producing an outcome and opinion attributable to the court," think that the limit on this behavior may be much looser than the standard of not materially misleading the reader that David Shapiro proposed, see *supra* note 14: "[p]erhaps a judge need only strive for the best that she thinks achievable on the given court." Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 52-53 & 7 n.12 (1993).

of law — a rule with which the judges do not in fact fully agree — rather than permit a cacophony of sincere disagreements to produce outcomes that are not even acceptable. So, as Evan Caminker has suggested, Justice Brennan in *Craig v. Boren*<sup>19</sup> may have opted to shape a majority endorsing intermediate scrutiny in gender discrimination cases, even though he believed that strict scrutiny was the right standard, because the alternative might have been a decision embracing rational relationship scrutiny.<sup>20</sup> But if this is what Justice Brennan did, then he was no longer stating *only* the law as he believed it should be stated, but rather was embracing something he did not himself fully accept and doing so because that was the best achievable statement of the law at the time. It's worth emphasizing, moreover, that the pragmatic compromise Brennan may have made went to the very heart of the case; presumably it is often easier for judges to make such compromises on issues they consider ancillary rather than central.<sup>21</sup>

So far we have focused on the "all and only" rule, and the actual departures from it, in the context of the publicly announced opinions of the Court. But the practice of collegial decisionmaking is not simply the addition, or harmonization, of the results of individual justices' separate, monastic contemplations. The members of a court are in communication with each other regularly, at least in formal settings and no doubt very often in many different informal contexts, from quick notes and phone calls at work to social gatherings. Individual justices likely rotate around or collide with each other in ways that reflect the power of individual persuasion and antipathy; indeed, it was Earl Warren's signal achievement in

---

19. 429 U.S. 190 (1976).

20. Caminker, *supra* note 17, at 2325-29.

21. If it is permissible to compromise on a rule of law, it may also be permissible to avoid ruling on a controversial issue for "prudential" reasons, for example in order to preserve another, even more important, decision from attack. This is exactly what Michael Klarman indicates the Supreme Court did shortly after deciding *Brown*, when it strained to avoid reaching the question of the constitutionality of miscegenation. See KLARMAN, *supra* note 10, at 321-23 (discussing *Naim v. Naim*, 350 U.S. 891 (1955), *on remand*, 90 S.E.2d 849 (Va. 1956), *motion to recall mandate denied*, 350 U.S. 985 (1956)). It is also notable that although Klarman reports that four justices disagreed with the Court's ultimate decision in *Naim*, see KLARMAN, *supra* note 10, at 323, they did not state their dissent publicly.

*Brown* to bring unanimity to a court that was filled with strong and divisive personal feelings.<sup>22</sup>

But a judge who seeks her colleague's support is likely to behave accordingly. She will know that even if she considers this colleague's views on one issue to be absurd, she does not increase her chances of winning the colleague's support on another issue by reminding him of the absurdity of his views on the first point, even if those views are actually relevant to the case at hand. Is the judge who focuses instead on the areas where she sees the potential for dispositive agreement violating her duty to say — privately, to her colleague on the court — *all* that she believes? In a sense, such omissions are manipulative, and it is important not to disregard this aspect of day-to-day human relations.<sup>23</sup> Yet surely we routinely accept some measure of such incompleteness as the appropriate result of good manners, or of consideration for the other person, or simply of commonsense assessment of what harmonious relations and mutual openness to persuasion require.<sup>24</sup> When we can actually see the absence of such incompleteness — in published opinions which fully and vividly detail the author's utter contempt and antipathy for what other justices have offered as their view of the law — we are likely to count what we see not as a victory for candor, but rather as a sign of intemperate disunity.<sup>25</sup>

---

22. Richard Kluger, writing in 1975, characterized the Court before Earl Warren's arrival as "perhaps the most severely fractured Court in history." RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 584 (1975). The Court's voting, he notes, reflected the presence of three blocs: Chief Justice Vinson, joined by Justice Reed and three others; Justices Black and Douglas; and Justices Jackson and Frankfurter. *Id.* The divisions, moreover, were often personal as well as jurisprudential, and "ran every which way." *Id.* at 585. Justice Jackson, for example, was still upset with Justice Black for having, Jackson thought, blocked Jackson's chance of selection as Chief Justice. *Id.* Frankfurter considered Douglas facile, and Douglas found Frankfurter burdensome. *Id.* Before Warren's arrival, several of the justices were quite openly unimpressed with Chief Justice Vinson. *Id.*

23. See generally Stephen Ellmann, *Lawyers and Clients*, 34 *UCLA L. REV.* 717 (1987). Such behavior might also be called "strategic." Cf. Caminker, *supra* note 17, at 2310 n.41 (using this term, but excluding such interpersonal maneuvers by judges from his study of strategic behavior involving the judges' voting insincerely).

24. Caminker comments that "a general practice of minor accommodation, of reciprocal 'going-along' voting, might facilitate feelings of good will which then promotes decisionmaking accuracy through improved deliberation." *Id.* at 2373.

25. See Idleman, *supra* note 17, at 1391-92.

If, then, we are inescapably on this road, how far along it should we travel? If the actual process of judging on the Supreme Court does not express the perfect play of principle, perhaps it is ultimately because judges are lawmakers, as well as law-interpreters. When they make law, we might say, they must act as other lawmakers do, not merely shading an argument here and there but bargaining, trading votes, campaigning and in short, practicing politics pure and simple.<sup>26</sup>

If we reject this prospect, as I do, then we must ask what the boundaries are of judging that can qualify as the practice of the rule of law. We believe, or want to believe, that we live under the rule of law, and that it is much to be valued. But it clearly isn't the abstract progress of ineluctable principle. At the same time, it cannot be the sheer play of power and assertion. I certainly do not aim here at a complete delineation of the rule of law, but the experience of Justice Reed in *Brown* can help us to understand this critical and elusive concept better.

## II. THE ACHIEVEMENT OF UNANIMITY IN *BROWN*

When we look at the process of decision in *Brown*, it is impossible not to be struck by how near, and human, a matter it was. Had Chief Justice Vinson not suddenly died and been replaced by Chief Justice Warren, the Court might have been deeply divided. (Felix Frankfurter called Vinson's death "the first indication I have ever had that there is a God."<sup>27</sup>) Had Justice Jackson not suffered a major heart attack, he might have published a concurrence explicitly declaring that "I simply cannot find in the conventional material of constitutional interpretation any justification for saying that in maintaining segregated schools any state or the District of Columbia can be judicially decreed, up to the date of this decision, to have violated the Fourteenth Amendment."<sup>28</sup> Felix Frankfurter may

---

26. Justice Scalia had a similar idea in mind in his caustic opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 999-1001 (1992) (Scalia J., concurring in the judgment in part and dissenting in part, joined by Rehnquist C.J. and White & Thomas JJ.).

27. KLUGER, *supra* note 22, at 656.

28. Jackson went as far as to draft a memorandum that could have become the basis for such a concurrence, from which this language is drawn. Unpublished Memorandum by Mr. Justice Jackson, *Brown v. Board of Education*, at 10 (copy on file with the author). In conference he appears to have been even more outspoken, saying (in Del

have had to wrestle with a similar anxiety about the political nature of the decision before him — or, perhaps, he was clear about his own choice early on and manipulated his colleagues by proposing a re-argument that avoided the risk of a divided decision.<sup>29</sup>

But of course none of these events, dramatic as they were, could have produced unanimity had it not been for the vote of Justice Reed. Stanley Reed was a Roosevelt appointee and a New Dealer.<sup>30</sup> For his time and region (he came from Kentucky), he was a racial moderate. He wrote the majority opinion striking down one of Texas' white primary schemes, despite potential arguments that the particular system was not "state action."<sup>31</sup> At the same

---

Dickson's reconstruction from the justices' notes) "I don't know how to justify the abolition of segregation as a judicial act. . . . As a political decision, I can go along with it — but with a protest that it is politics." THE SUPREME COURT IN CONFERENCE, *supra* note 3, at 658. See also, for discussion of Jackson's thinking and the impact of his illness, KLUGER, *supra* note 22, at 681, 688-91 & 695-98.

29. Mark Tushnet notes that Frankfurter said afterwards that he had "filibustered" after the first argument of *Brown*, "for fear that the case would be decided the other way under Vinson." TUSHNET, *supra* note 1, at 215. But Tushnet's own reading is that Frankfurter was genuinely torn between his dislike of segregation and his unwillingness to render a non-judicial decision, and that this "dilemma led him to urge that the cases be set for reargument." *Id.* at 193; *see id.* at 193-95; *see also* Klarman, *supra* note 1, at 438 (characterizing Frankfurter's statements at the Court's conference following the first argument of *Brown* as "intensely ambivalent"); KLARMAN, *supra* note 10, at 303-07 (discussing the difficulty Frankfurter and Jackson had in *Brown*, "because for them it posed a conflict between law and politics").

A measure of the extent of Frankfurter's difficulty is that he may have drafted his own separate opinion. Kluger mentions — though he discounts — rumors that Frankfurter drafted such an opinion, possibly a dissent. KLUGER, *supra* note 22, at 696-97. Frankfurter's clerk that year, Frank E.A. Sander, recently commented that "I now know that he had some written thoughts of some kind of a concurring opinion. There were a lot of discussions with Justice Jackson about possibly writing a joint concurrence." *Law Clerks' Recollections*, *supra* note 9, at 545 (comments of Frank E.A. Sander). Apparently Frankfurter actually showed Judge Charles Wyzanski what he (Frankfurter) said were "the galley proofs of his and Jackson's separate opinions in *Brown*," although Bernard Schwartz emphasizes that Wyzanski himself was not sure whether the galleys were actually opinion drafts. SCHWARTZ, *supra* note 8, at 95 (quoting Wyzanski's comment in JACK HARRISON POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 174-75 (1979)).

30. For a brief biographical sketch of Reed, see KLUGER, *supra* note 22, at 211.

31. The case was *Smith v. Allwright*, 321 U.S. 649 (1944). For a thoughtful account of this decision and its impact, see Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U.L. REV. 55 (2001). Klarman comments that by 1944 "even Southern whites evinced significantly less commitment to preserving white political supremacy than, for example, to maintaining racial segregation in public education. That is, black disfranchisement ranked relatively low on the hierarchy of white supremacist convictions. This may explain why Kentuck-

time, he was no devotee of integration. He and his wife lived in Washington at the Mayflower Hotel, and Reed was dismayed, after the Court conference in a case in which the Court would unanimously enforce a long-ignored District of Columbia law barring restaurant segregation, to observe: "Why — why, this means that a nigra can walk into the restaurant at the Mayflower Hotel and sit down to eat at the table right next to Mrs. Reed!"<sup>32</sup> In 1947, he firmly declined to attend a Christmas party at the Supreme Court if it was integrated by inviting black messengers employed by the Court, and insisted that this was a social matter rather than a Court one, and that he was therefore free to do as he pleased concerning it — though he also favored permitting a room in the Supreme Court building to be used for the event.<sup>33</sup> He seems to have owned a home with a racially restrictive covenant in its deed; that, at least, is a plausible inference explaining his decision to recuse himself in *Shelley v. Kraemer*, in which the Supreme Court held that courts could not grant injunctions to enforce these covenants.<sup>34</sup>

When *Brown* was argued the first time, Reed's comments at the justices' conference indicated he was disposed to uphold *Plessy*. He had suggested his opposition to holding segregation unconstitutional already, in the Supreme Court's conference discussion of

---

ian Stanley Reed apparently had no qualms about writing the majority opinion in *Smith*, whereas in *Brown v. Board of Education* he planned to dissent until virtually the last minute." *Id.* at 65 (footnote omitted).

32. KLUGER, *supra* note 22, at 595. The case was *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100 (1953), and despite his disquiet Reed did not dissent from it. Michael Klarman has pointed out to me that Reed also wrote the opinion of the Court in *Morgan v. Virginia*, 328 U.S. 373 (1946), a case dealing with segregation on interstate bus lines. Though Reed evinced sympathy for the deep South's "[l]ocal efforts to promote amicable relations in difficult areas by legislative segregation in interstate transportation" in light of the very substantial black population in that region, *id.* at 385-86, he held Virginia's effort to segregate interstate travel unconstitutional under the dormant commerce clause.

33. JOHN D. FASSETT, *NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY* 560 (1994) (quoting from Justice Frankfurter's diary entry of December 20, 1947). See also *id.* at 559 (on other instances of Reed's having "clearly retained many of the attitudes and practices of a southern squire in his personal life").

34. See KLUGER, *supra* note 22, at 254. Justices Jackson and Rutledge also recused themselves in *Shelley*, perhaps for the same reason. *Id.* Reed and Jackson recused themselves in a subsequent restrictive covenant case as well, *Barrows v. Jackson*, 346 U.S. 249 (1953). Michael Klarman has pointed out to me that such covenants were extremely common in some cities at this time.

three cases in the 1949 Term.<sup>35</sup> Now, in the conference on *Brown* held December 13, 1952, he said, according to Justice Douglas' notes:

*Reed*: takes different view from Black [who Douglas wrote had "conclude[d] that segregation per se is bad *unless* the long line of decisions bars that construction of the amendment"] — the state legislatures have informed views on this matter — minority here has not been assimilated — states are authorized to make up their minds on this question — there is a reasonable body of opinion in the various states for segregation. He points to the constant progress in this field and in the advancement of the interests of the negroes — states should be left to work out the problem for themselves — segregation is gradually disappearing; optional in Kansas, Kentucky, and others. Segregation in the border states will disappear in 15 or 20 years. In the deep south separate but equal schools must be allowed.<sup>36</sup>

In short, in 1952 Reed supported upholding *Plessy v. Ferguson*,<sup>37</sup> although Mark Tushnet argues that "Reed's view that the Constitution was not fixed and his meliorist beliefs opened the way for him to agree to a holding that segregation was unconstitutional, if the

---

35. FASSETT, *supra* note 33, at 558-59; see THE SUPREME COURT IN CONFERENCE, *supra* note 3, at 639, 642, 700-01 (conference comments of Justice Reed on *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); and *Henderson v. United States*, 339 U.S. 816 (1950)). See also THE SUPREME COURT IN CONFERENCE, *supra*, at 635 (conference comments of Justice Reed on *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948)).

36. Unpublished Conference Notes of William O. Douglas, *Brown v. Board of Education*, Dec. 13, 1952 (I rely here on a typed transcription of excerpts from these handwritten notes, prepared by a librarian at the Library of Congress, and kindly provided by Michael Klarman) (on file with the author). Justice Jackson's notes also have Reed saying "[u]phold segregation as constitutional," and Justice Burton's notes on Reed end with the words "Uphold Seg". KLUGER, *supra* note 22, at 596. For a reconstruction of Reed's remarks at this conference based on all the available conference notes, see THE SUPREME COURT IN CONFERENCE, *supra* note 3, at 649; this passage ends with Reed saying, "I uphold segregation as constitutional."

37. In a memorandum he wrote for his files the day *Brown* was handed down, Justice Douglas commented that in the 1952 conference Chief Justice Vinson supported *Plessy*, and that "Reed followed the view of Vinson and Clark was inclined that way." William O. Douglas, Memorandum for the File *in re Segregation Cases*, May 17, 1954, reprinted in THE SUPREME COURT IN CONFERENCE, *supra* note 3, at 660.

opinion stressed how times had changed and the remedy allowed gradual adaptation."<sup>38</sup>

As is well known, the Court decided not to resolve the case in 1953 but instead to have the case re-argued that fall. In the months preceding the re-argument, Reed "continued to discuss . . . plans for a dissenting opinion," and apparently as late as August (shortly before Vinson's death in September, 1953), anticipated that the Court would vote against segregation but that he, Vinson, and "at least one other justice" would dissent.<sup>39</sup> At the first conference on the case after its re-argument, in December, 1953, Reed appears to have made clear that he still felt *Plessy* should be reaffirmed, although he did not express absolute ardor for that conclusion.<sup>40</sup> Perhaps reacting to the comments by the other justices at that conference, he came to expect that he would be alone in his dissent,<sup>41</sup> but he did not give up, and in February, 1954, he gave his law clerk "a handwritten draft of what obviously was the beginning of the justice's proposed dissent."<sup>42</sup> But he never completed that dissent, and instead he voted with the rest of the Court to make the decision unanimous.

---

38. TUSHNET, *supra* note 1, at 192.

39. FASSETT, *supra* note 33, at 567.

40. Kluger describes Reed as having "made it plain, despite the new Chief's [Earl Warren's] resolute remarks, that his views remained what they had been — against closing up Jim Crow schools." KLUGER, *supra* note 22, at 680. Tushnet agrees that "Reed reiterated his view that segregation was constitutional," but notes Reed's observation that *Plessy* "might not be correct now" because the states had not provided equal facilities to African-Americans. The tone of Reed's comments is not easy to capture," Tushnet comments, "but he seems not to have committed himself to a vigorous fight." TUSHNET, *supra* note 1, at 210-11. See also the reconstruction of Justice Reed's comments at this conference in THE SUPREME COURT IN CONFERENCE, *supra* note 3, at 655-56, which closes with Reed saying, "This is not a political question, but we should not move to change the law. If there is to be a change, Congress should do it." *Id.* at 656. Justice Douglas in his subsequent file memorandum comments tersely that "Reed voted the other way," that is, for *Plessy*. Douglas, *supra* note 37, at 661.

41. Fassett, *supra* note 16, at 57.

42. FASSETT, *supra* note 33, at 570. Fassett reprints the draft, *id.* at 570-71. Fassett himself was the law clerk in question, and makes clear that of Reed's two clerks, he (Fassett) was the one mainly involved in working with Reed on *Brown*. See *id.* at 572; Fassett, *supra* note 16, at 55-56. (Fassett's account does not seem to confirm, however, the rumors of the day that Reed had hired an extra law clerk specifically for the purpose of working on his *Brown* dissent. Thurgood Marshall, for one, heard those rumors. See Williams, *supra* note 3, at 151).

Why didn't Reed dissent? Despite the intense scholarly attention paid to the *Brown* deliberations, the answer to this question is not clear. One vivid story has it that after Reed cast the sole dissenting vote at the Court's conference,<sup>43</sup> Warren continued his efforts at persuasion, and eventually brought Reed around, at the end of months of gentle discussion, by telling him, "'Stan, you're all by yourself in this now . . . You've got to decide whether it's really the best thing for the country.'" So George B. Mickum, III, one of Reed's clerks at the time, may have told Richard Kluger in the course of Kluger's research on *Brown*.<sup>44</sup>

But is this story accurate? While Kluger says that Mickum was "on hand" for this conversation,<sup>45</sup> Mickum's co-clerk, Fassett, says that Warren and Reed discussed *Brown* behind closed doors, in keeping with the extreme secrecy that surrounded the Warren Court's entire deliberative process in *Brown*.<sup>46</sup> So Fassett writes in his biography of Reed that Mickum "apparently overheard" Warren's remark — and maintains that Reed had actually voted with the rest of the Court at the conference as much as two months earlier, and that Warren must have been discussing the form by which the Court would state its intention to set the issue of remedy down for a second re-argument.<sup>47</sup>

Yet this explanation is itself puzzling. Reed certainly cared about remedy — in January, 1954, at the Court's second post-re-argument conference discussion of the case, Reed said that "the Court should offer 'opportunities to adjust' as a 'palliative' to the 'awful' desegregation decision."<sup>48</sup> But it seems likely that the basic points about remedy — that there would be another re-argument devoted just to this matter, and that by one formula or another enforcement would be made a gradual process — were already gener-

---

43. See KLUGER, *supra* note 22, at 694.

44. *Id.* at 698 (quoting Mickum, evidently from an interview or correspondence with him, *see id.* at 821).

45. *Id.* at 698.

46. FASSETT, *supra* note 33, at 572.

47. *Id.*

48. TUSHNET, *supra* note 1, at 220. Bernard Schwartz reads these comments by Reed (recorded in notes taken by Felix Frankfurter) as "indicat[ing] that he was just beginning to feel that the 'awful thing' of desegregation was becoming palatable, if enough time for adjustment was given." SCHWARTZ, *supra* note 8, at 92.

ally agreed upon well before the final days.<sup>49</sup> Agreement on these basics was not agreement on everything, and Mark Tushnet comments that “[d]efining a gradualist remedy proved more difficult than agreeing on the principle of gradualism.”<sup>50</sup> But I know of no other indication that in May, 1954, Reed was “all by himself” on some aspect of the remedy issue, and if this explanation of Mickum’s recollection is unpersuasive then it seems possible to infer from Fassett’s treatment of this event that this dramatic conversation quite possibly never took place. In an interview in 2004, in fact, Fassett said he was “convinced” that this story was “erroneous,”<sup>51</sup> and in a 1981 oral history interview, Mickum appears to deny that he ever reported it to Richard Kluger, in whose book it appears.<sup>52</sup>

Whether or not Earl Warren finally persuaded Stanley Reed by invoking the need for unanimity just weeks before the decision

---

49. See KLUGER, *supra* note 22, at 695.

50. TUSHNET, *supra* note 1, at 219.

51. *Law Clerks’ Recollections*, *supra* note 9, at 547 (comments of John David Fassett). Fassett also did not believe that Reed made up his mind only as the end of the Term approached. He comments in this interview that although Reed showed him a draft dissent in February of 1954 and asked for his comments, “I’m convinced he’d written it the former summer . . . and was thinking about it and that he was just sort of teasing me at that stage. . . . It was my view that he had already told the Chief Justice that he would join an opinion if it was an opinion that he could accept.” *Id.* at 548 (comments of John David Fassett); see also *id.* at 555 (“Justice Reed had done nothing further on a dissent after December [1953]”) (comments of John David Fassett).

But the timing of Reed’s decision may never be settled; in this same interview Earl E. Pollock, who had clerked for Warren during this same time, said “I don’t think Reed made that clear to the Chief Justice until almost the end of April . . . .” *Id.* at 548-49 (comments of Earl E. Pollock). Justice Douglas, in his file memorandum, appears to say that as late as May, 1954 “[e]veryone thought that at least Justice Reed was going to write in dissent but he finally agreed to leave his doubts unsaid and to go along.” Douglas, *supra* note 37, at 661. When Thurgood Marshall, who as counsel in *Brown* had heard rumors that Reed was writing a dissent, “came to the Supreme Court in 1967, his first order of business was to ask Earl Warren what had happened 13 years earlier to the dissent Stanley Reed never wrote in the *Brown* case. Warren told him it would be best if he forgot about the subject and quit asking questions,” and Marshall commented that “Since I’ve been on this court . . . I’ve been able to find out everything about the past but the *Brown* case. Nobody will talk.” Williams, *supra* note 3, at 155.

52. Interview with George B. Mickum, III (Mar. 18, 1981), in Stanley Forman Reed Oral History Project, Kentuckiana Digital Library, at <http://kdl.kyvl.org/cgi/t/text/text-idx?c=oralhist&tpl=kukohsfr.tpl>, last visited January 4, 2005, at 6 [hereinafter *Mickum Interview*]. Mickum does not refer to Kluger by name, but he appears to be saying that he never spoke with Kluger at all. *Id.*

would be issued, it is certainly possible that Reed did react to the need for unanimity and the pointlessness of dissenting by himself. Fassett, the clerk most involved with Reed's deliberations on the *Brown* case, had urged on him the fruitlessness of a solitary dissent, which could not even serve the function of alerting Congress to the need for corrective legislation, and Reed reportedly "acknowledged that fact."<sup>53</sup> No doubt Warren and others would have discussed the importance of unanimity in so controversial a case.<sup>54</sup> So Reed might have set aside his own convictions and voted with the rest of the Court because he felt that a unanimous decision would be better for the country and the Court than the same outcome arrived at by an 8-1 vote. In the words of his clerk Mickum: "I think he was really troubled by the possible consequences of his position . . . . Because he was a Southerner, even a lone dissent by him would give a lot of people a lot of grist for making trouble. For the good of the country, he put aside his own basis for dissent."<sup>55</sup>

But it is also possible that he did not put aside his convictions at all. He intended at one time to dissent, but he was no great supporter of segregation. Felix Frankfurter wrote to Reed a few days after the decision in *Brown* to thank Reed for the service he had done to the nation in voting as he did.<sup>56</sup> Reed replied, not that

53. See FASSETT, *supra* note 33, at 570.

54. Other justices were explicitly concerned with achieving unanimity in *Brown*. See KLUGER, *supra* note 22, at 698 (quoting Justice Burton, predicting a unanimous opinion and calling it "[a] major accomplishment for [Warren's] leadership"); FASSETT, *supra* note 33, at 575 (quoting Justice Frankfurter, who wrote to Reed three days after *Brown* was announced that to have decided the case with dissents and concurrences would have been "catastrophic" and "disastrous"). In conference discussion of the remedial phase of the case (*Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), often referred to as *Brown II*), Justices Black, Burton, Minton and Harlan all emphasized the need for unanimity. THE SUPREME COURT IN CONFERENCE, *supra* note 3, at 665, 668. Michael Klarman indicates that the justices remained concerned about unanimity in school desegregation cases throughout the 1950s, though they did not always attain it. See KLARMAN, *supra* note 10, at 331-33.

55. KLUGER, *supra* note 22, at 698 (quoting Mickum); see also Mickum Interview, *supra* note 52, at 7 ("It was a sense on Reed's part that it was in the best interests of the . . . country that the opinion be unanimous."). Kluger adds: "The only condition [Reed] extracted from Warren for going along, Mickum believes, was a pledge that the Court implementation decree would allow segregation to be dismantled gradually instead of being wrenched apart." KLUGER, *supra*, at 698. I return below to the question of whether Reed should be seen as having traded his vote for a concession of this sort. See *infra* notes 120-138 and accompanying text.

56. FASSETT, *supra* note 33, at 575 (quoting Frankfurter's letter).

he had decided unanimity was of surpassing importance, but rather that “[w]hile there were many considerations that pointed to a dissent they did not add up to a balance against the Court’s opinion.”<sup>57</sup> He went on to say that the case might better have been decided under due process than equal protection, but that in the end “[e]qual protection comes close to this situation.”<sup>58</sup>

Here we have an apparent conversion. Perhaps this conversion was evidenced by the tears that George Mickum reported seeing in Reed’s eyes as Warren reached the end of his reading of the *Brown* judgment in open court.<sup>59</sup> Whether those tears ever existed, however, is less than clear. Mickum’s co-clerk Fassett noted in his biography of Justice Reed that Mickum missed the beginning of the reading of the *Brown* opinion because he’d gone off to lunch before Justice Reed suggested that that afternoon’s court session might be worth attending.<sup>60</sup> That would not rule out the possibility that Mickum returned in time to see some of the session, but in an interview in 2004 Fassett is blunter about his belief that Mickum’s recollection is mistaken on this score as well.<sup>61</sup> Instead, Fassett alludes to quite a different incident from that afternoon: in Thurgood Marshall’s words, “When Warren read the opinion . . . [Reed] looked me right straight in the face the whole time because he wanted to see what happened when I realized that he didn’t write that dissent. I was looking right straight at him, and I did like that [a nod of the head], and he did like that [a nod in response].”<sup>62</sup> Tears or no tears, though, Reed might have experienced a conversion, and his nonverbal exchange with Marshall

---

57. *Id.* (quoting Reed’s letter to Frankfurter).

58. *Id.* Reed’s letter suggests a change of heart both on the choice of constitutional clause — Reed had favored approaching the case as a due process issue — and on the outcome, since Reed’s initial judgment had been that there was no breach of due process liberty in segregation. Reed made these points in his comments at the Court’s first discussion following the re-argument, see KLUGER, *supra* note 22, at 680.

59. *Id.* at 708; see also HOWARD BALL, A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA 133 & 395 n.46 (1998) (quoting Mickum to similar effect, from the *Mickum Interview*, *supra* note 52, at 7).

60. FASSETT, *supra* note 33, at 745 n.60.

61. See *Law Clerks’ Recollections*, *supra* note 9, at 558, 561-62 (comments of John David Fassett).

62. Williams, *supra* note 3, at 151 (quoting Marshall). Marshall adds elsewhere, “I’m sure Reed laughed at that [this nonverbal interaction].” JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 226 (1998). Fassett’s reference to this

would at least not be inconsistent with this possibility. His repeated comments in later years that *Brown* was one of the most important decisions ever rendered by the Supreme Court,<sup>63</sup> and his statements in public remarks that the decision was “inevitable” and “appropriate,”<sup>64</sup> could also be consistent with the possibility of conversion.

But was he actually converted? On this point, too, we will never be certain. Remarkably enough, three years after the decision in *Brown* Reed spoke with his former law clerk Fassett about the case. What he said then was that “he still thought he had the better of the argument on the law but that it was more important that there be unanimity in view of the importance of the decision.”<sup>65</sup> This is quite a different note than the one Reed struck in his letter to Frankfurter in 1954. His statements about *Brown*’s importance, inevitability and appropriateness, moreover, have the ring of policy rather than of law, and so they are quite compatible with Reed’s 1957 assessment that on the law *Brown* was not correctly decided. Still, we do not know whether Reed’s assessment in 1957 captured his actual thinking in 1954, or whether it instead reflected his second thoughts in the years that followed.<sup>66</sup>

Whether or not Reed experienced a conversion, his comments about *Brown*’s significance and importance add to our understanding of his thinking because they suggest that he was taking into account considerations of social policy. These considerations included, but do not seem to have been limited to, the value of unanimity and the pointlessness of an isolated dissent; those issues, important as they evidently were to Reed, do not seem to bear on what he would later call the “appropriateness” of the Court’s decision. That Reed was giving weight to issues of social policy is espe-

---

interaction, which seems somewhat inaccurate (Fassett has Reed nodding to Marshall and giving him “a big smile”), is in *Law Clerks’ Recollections*, *supra* note 9, at 561.

63. FASSETT, *supra* note 33, at 579.

64. *Id.* at 580.

65. Fassett, *supra* note 16, at 61.

66. Fassett reports that “[a]t the time of his retirement, Reed continued to ponder the question ‘Is abolition of coeducation of the sexes or elimination of all school-sponsored social or athletic activities a partial answer?’ to the problems of desegregation.” FASSETT, *supra* note 33, at 745 n.63. See also THE SUPREME COURT IN CONFERENCE, *supra* note 3, at 666 (Reed, in conference comments on *Brown II*, saying that lower courts “might classify on grounds of sex, or they might integrate class by class.”).

cially noteworthy because he had earlier made clear to Fasset, while *Brown* was still awaiting its re-argument, that he "did not conceive" rule by judges — "krytocracy" — "to be the Court's function."<sup>67</sup> Yet even before the case was decided, Reed had spoken in distinctly krytocratic mode, commenting that he had been giving a great deal of thought to the impact of *Brown* on the United States' position in the world, even though that impact should be irrelevant.<sup>68</sup> It is particularly striking, therefore, that Fasset concludes his discussion of Reed's role in the case by saying that "on several occasions [Reed] restated privately that he continued to believe that he had participated in the prime example of krytocracy during his tenure on the Court."<sup>69</sup>

It is quite possible to defend some rule by judges, as part of the rule of law in the United States,<sup>70</sup> but Reed did not normally agree with such views. Perhaps Reed did experience a conversion on the law, and felt, at least for a time, that *Brown* was legally correct. But if he did not take that view of the legal doctrine, he apparently did feel that he could legitimately concur in a decision that rested on a mode of judging that he himself viewed as ordinarily wrong. This is a conversion itself, or at least a profound stretch of Reed's normal views of the bounds of judicial authority. Reed may well have put aside his view of the law, and his view of the proper role of Supreme Court judges, because he felt he had to contribute to a social change that the Court had decided on, and that he himself, rather uneasily, found acceptable. If this was the choice Reed made, it may have been a very hard one indeed.

## II. CONVERSION, KRYTOCRACY AND CONSCIENCE IN THE RULE OF LAW

Each of the versions of this story presents its own questions about the nature of the rule of law. We can discuss them under three headings: conversion, krytocracy, and conscience. We should begin, though, with a caveat: In what follows, we will be asking

---

67. FASSETT, *supra* note 33, at 567.

68. *Id.* at 571. Though Reed felt this foreign policy concern should be irrelevant, it had been argued to the Court by the Justice Department in its brief. KLARMAN, *supra* note 10, at 299.

69. FASSETT, *supra* note 33, at 580.

70. *See infra* notes 88–103 and accompanying text.

whether Justice Reed expressed his actual beliefs when he joined in the Court's unanimous decision, and whether, if he did not, his decision not to do so was justifiable. These questions implicitly assume that Justice Reed's participation in the decision was an expression of belief. In the particular context of *Brown* — its immense public significance, the justices' conscious effort to demonstrate unanimity to the nation — this seems quite correct. Still, it is worth noting that Justice Reed did not actually speak, or write; he concurred, wordlessly — as judges on multi-member courts normally do in this country. It is not self-evident that the decision to adhere to an opinion of the Court should always be seen as an expression of belief; we do not, after all, suppose that citizens who vote for a particular candidate thereby endorse all of that candidate's positions, and if judges believe in a "norm of acquiescence"<sup>71</sup> then their decisions not to dissent can't be equated with expressions of agreement. Whatever the proper distinctions between judges who speak explicitly and those who do not, however, here I will assume that Reed expected, and intended, to have his participation taken as agreement with the *Brown* opinion.

#### A. *Conversion*

Justice Reed may have voted with the rest of the Court in *Brown* because he believed the decision was legally correct — despite his having taken the opposite view at earlier stages of the case — or because he believed that he could ethically support the Court's exercise of a "krytocratic" authority — despite his considering such authority beyond the normal purview of judges. Either account suggests a profound reassessment, whether of the law or of his role in lawmaking, and so the word "conversion" may well be apt. If this reading of Reed's thinking is correct, we might examine whether Reed's logic was sound, but we would have no reason to dispute his integrity.<sup>72</sup>

Yet if we look at the route by which unanimity in *Brown* was achieved, we do have reason to see the processes underlying the rule of law as entailing much more than the play of reasoned argument. On the contrary, unanimity was sought, and planned for, by

---

71. See *supra* note 15.

72. Unless his logic was so evanescent as to amount to self-delusion.

Earl Warren. In three central ways, Earl Warren may have deployed emotion to help engineer conversion.

First, Warren led the Court as it continued a very unusual procedure for its deliberations after the *Brown* argument. Instead of meeting to discuss the case and then voting, as they normally did,<sup>73</sup> the Justices decided not to vote, but just to discuss, and keep discussing, as long as they needed to — for months, as it turned out.<sup>74</sup> Warren certainly did not manipulate the justices into this choice; they had in fact followed the same procedure in their one conference about the case while Chief Justice Vinson was still alive.<sup>75</sup> They surely understood that the procedure they were adopting was meant to avoid polarization if polarization could be avoided; Reed himself “said that he favored the idea of delaying the vote; even if there were differences, it would help them to fix the issues.”<sup>76</sup> Perhaps this effect was deepened further by the exceptional secrecy that surrounded the *Brown* deliberations.<sup>77</sup> Law clerks were mostly left out of the loop during the drafting of the opinion;<sup>78</sup> the Justices’ conference vote, when it eventually took place, was carefully left unrecorded (or at least no records have survived);<sup>79</sup> and no word of the impending announcement of the decision leaked out to the press.<sup>80</sup> Within this carefully insulated, patient, deliberative circle, unanimity could be achieved as a collective product.

Second, Warren focused the second of the Court’s conference discussions after the oral argument on the issue of remedy.<sup>81</sup> Per-

---

73. Frankfurter said that *Brown* was “the only [case] which he could recall ‘in which we postponed a vote after argument for further study.’” SCHWARTZ, *supra* note 8, at 85.

74. KLUGER, *supra* note 22, at 683. The first conference took place on December 12, 1953, *id.*; the Court finally voted on the case “[s]ome time between late February and late March,” *id.* at 694.

75. KLARMAN, *supra* note 10, at 294.

76. SCHWARTZ, *supra* note 8, at 84.

77. *Id.* at 95-96.

78. When Warren undertook the drafting of the opinion, he said, the Justices “agreed that only my law clerks should be involved, and that any writing between my office and those of the other Justices would be delivered to the Justices personally. This practice was followed throughout and this was the only time it was required in my years on the Court.” WARREN, *supra* note 3, at 285-86; see SCHWARTZ, *supra* note 8, at 96.

79. KLUGER, *supra* note 22, at 694.

80. SCHWARTZ, *supra* note 8, at 102.

81. *Id.* at 90.

haps this choice of agenda reflected Warren's confidence that the Court would strike down segregation, and his optimism — misplaced, as it turned out — that both substance and remedy could be decided during that term.<sup>82</sup> He might even have thought, again mistakenly, that the justices would find the experience of reaching agreement on remedy so easy that it would help them agree on the rule of law that the remedy would implement. But even if Warren was not so optimistic, this choice of agenda may have been powerful. Schwartz suggests that “[b]y concentrating on the *remedy*, all the Brethren would work on the assumption that the decision itself would strike down segregation. . . . Those who, like Reed, found it most difficult to accept a decision abolishing segregation, would grow accustomed to what might at first have seemed too radical a step.”<sup>83</sup> If this was his intention, it may have been obvious to his colleagues — or, perhaps, here Warren was shaping the conference environment in a way that didn't altogether meet his colleagues' eyes.

Third, Warren talked with Reed many times over the months of the Court's deliberations. He lunched with Reed often, along with Justices Burton and Minton, who Schwartz comments were “the two most congenial to Reed and the most likely to influence his vote, particularly by stressing the baneful effects of a split decision.”<sup>84</sup> The content of these conversations may have been less critical than their tone. Mickum's recollection may be correct in substance, even if not in detail. “You're all alone on this one, Stan,” says Earl Warren, conveying — in Mark Tushnet's telling appraisal — not so much an argument as an empathetic concern for his colleagues that may have been compelling.<sup>85</sup>

If we think, then, that Stanley Reed, the moderate segregationist, achieved a personal conversion,<sup>86</sup> we should remember that

---

82. TUSHNET, *supra* note 1, at 219.

83. SCHWARTZ, *supra* note 8, at 91 (emphasis in original); for Schwartz' interpretation of Reed's comments at this conference session, see *supra* note 48.

84. SCHWARTZ, *supra* note 8, at 90.

85. TUSHNET, *supra* note 1, at 214.

86. Perhaps Reed's conversion was something closer to mere acquiescence. Kluger comments that “Black and Frankfurter thought Reed often lacked the courage of his convictions,” KLUGER, *supra* note 22, at 585. Elsewhere, Kluger characterizes Reed as “[a] lawyer whose mind lacked the cutting edge of many of his colleagues' and who was therefore often disposed to take the judicial path of least resistance.” *Id.* at 242.

conversions are intense and emotional experiences. Reed himself makes clear that he was never completely convinced by any legal argument, and his comments years later about having participated in the leading instance of kryptocracy during his tenure on the Court have a rueful echo. And yet, very possibly, he was converted, or at least swayed — through an interactive process in which Warren's personal warmth and his determination to lead the fractious members of the Court in a patient, exploratory, reassuring and supportive journey towards consensus were probably essential.

From this perspective, the triumph of the impulse for justice that *Brown* represents was intuitive and emotional as well as logical and legalistic. The rule of law depends on judges' ability to arrive at decisions about what the law is, and the rules or standards they state need to meet the test of reason. But they are not formulated entirely by reason, or, perhaps more accurately, here, as in other parts of life, the heart has its reasons that reason does not know.

---

Felix Frankfurter, in discussions with his former law clerk Philip Elman, nicknamed Reed "the Chamer, which means fool, or dolt, or mule in Hebrew." Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 844 (1987). These phrases are not complimentary, but if they describe a judge modest about his own attainments and more willing to be persuaded than colleagues as adamantly convinced of their own beliefs as Black and Frankfurter may have been, they do not mark out a person unworthy of respect.

Michael Klarman offers another explanation of what might have been Reed's, and some of his colleagues', acquiescence in *Brown*. Klarman suggests that once Warren had stated his views at the first conference after the re-argument, it was clear to everyone on the Court that there were 5 votes for overturning *Plessy*. At that point, Klarman suggests, it was easier for the remaining justices to see dissent as pointless in terms of affecting the result in the case. For those morally opposed to segregation, a pointless dissent on the wrong moral side could have seemed particularly unattractive. Klarman, *supra* note 1, at 444-45; see also Idleman, *supra* note 17, at 1389-90. It does appear that Reed, though initially prepared to file even a solitary dissent, was concerned about the pointlessness of doing so. See *supra* notes 35-42 & 53 and accompanying text.

Whatever Reed's degree of conversion or acquiescence, one might ask whether he was entirely conscious of the considerations, or traits, that were influencing his decision. I take it that judges have a duty to seek self-understanding, but that this duty falls well short of psychoanalytical introspection. Whether Reed met this none-too-demanding standard I do not know; his ability to observe that he was actually thinking about a matter that ought to be irrelevant, see *supra* note 68 and accompanying text, suggests, however, that he may well have. For an interesting exploration of the interaction of candor and judicial introspection, see Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990).

### B. *Krytocracy*<sup>87</sup>

Reed's vote may have been an instance of, or contribution to, krytocracy in any of three ways. He may have embraced a decision that although made by judges was suffused with social policy considerations. Even if he did not accept that decision or the social policy judgments that it embodied, he may have decided to join the Court's decision for a social policy reason, namely to protect the Court itself and the efficacy of its decisions by presenting a unanimous face to the nation. Finally, without necessarily endorsing either the social policy views of *Brown* or the social policy function of protecting the Court, Reed might have entered the realm of krytocracy by acting legislatively — to be more precise, by trading his assent to the decision in *Brown* for concessions on some other matter, much as a legislator would. These different forms of krytocracy are not morally equivalent, and we need to take the measure of each as a possible component of the rule of law.

#### 1. A Vote for Social Policy

Justice Reed disliked krytocracy, but it is hard not to see *Brown* as an instance of rule by judges, and hard not to approve it as such. It seems clear enough that the judges who decided *Brown* regarded themselves as engaged in a task closely related to the making of social policy (a term I use to embrace both pragmatic considerations and principles of social justice). Justice Jackson was tempted to say in a separate opinion that although neither original intent, past precedent, nor popular custom showed that segregation was unconstitutional prior to the decision in *Brown* itself, "present-day conditions require us to strike from our books the doctrine of separate-but-equal facilities."<sup>88</sup> Justice Frankfurter may have been deeply worried about the lack of legal foundation for a decision he welcomed as a matter of social policy.<sup>89</sup> The opinion of the Court, the work of Chief Justice Warren, is really quite candid on this score. The Court declares that original intent is unclear,<sup>90</sup> and pro-

---

87. "Krytocracy" is the term Justice Reed used; "juristocracy" is more current today.

88. Unpublished Memorandum by Mr. Justice Jackson, *supra* note 28, at 6-20, 22.

89. See *supra* note 29 and accompanying text.

90. *Brown*, 347 U.S. at 489-90.

ceeds to rule upon the role of race in public education in light of public education's evolving role in the nation and in light of evidence and intuition about the impact of segregation on black children.<sup>91</sup> The Court tells us, essentially, that what the equal protection clause today requires is shaped by these considerations of social policy. The justices did not believe they could overturn *Plessy* on the basis of original intent, and they may well have been right;<sup>92</sup> at any rate, this is what they thought, and what Reed joined them in.<sup>93</sup>

Is *Brown's* krytocracy a violation of the rule of law? It is so hard now to imagine a rule of law that permitted racial segregation that this question seems almost to answer itself. In South Africa, where law at the time *Brown* was decided was being turned into an even more relentless agent of segregation, critics came to call the result "rule by law" to distinguish it from a "rule of law" that embodied

---

91. *Id.* at 492-95.

92. Michael W. McConnell, in a fascinating article, has argued that "[b]etween 1870 and 1875, both houses of Congress voted repeatedly, by large margins, in favor of legislation premised on the theory that de jure segregation of the public schools is unconstitutional." Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1140 (1995). This is a striking finding, though it remains possible that even the passage of time from 1866 (when the Fourteenth Amendment was sent to the states by Congress) to 1870 was long enough for a lot of thinking and re-thinking, so that these not-quite-contemporaneous constitutional arguments against segregation may reflect what the Fourteenth Amendment's supporters had come to believe it meant rather than what they had firmly in mind when they voted for it. Even if McConnell is right about the intentions of the Congressional supporters of the Fourteenth Amendment, moreover, the weight their understanding should have if it was not communicated to the ratifiers in the states or to the public at the time of ratification is uncertain. On this and other issues raised by McConnell's inquiry, compare Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995), with Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995).

93. I do not mean to argue that the justices in *Brown* believed that their decision had *no* basis in conventional constitutional interpretation (though some of them may have leaned that way). I also do not mean to say that taking changed conditions into account is necessarily out of place in, for example, interpretation bounded by original intent. My point here is only that a very healthy measure of the justices' thinking was founded in considerations of social policy, fused (to some extent) with more orthodox constitutional reasoning.

fundamental decencies without which the mere use of law seemed meaningless.<sup>94</sup>

It is anything but irrelevant to the rule of law inquiry that *Brown* was so right as a matter of morality and social policy. But there is, of course, more to be said on behalf of the justices' intervention as social policymakers, in this particular context and in general. Most immediately, the disfranchisement and intimidation of black citizens in the South made the political system far from representative, and created the classic case for *Carolene Products* intervention by the courts.<sup>95</sup>

More broadly, courts make their decisions through a particularly disciplined process.<sup>96</sup> This is, admittedly, not a very democratic process, though judicial selection is sharply colored by political power so that judges are certainly not completely unrepresentative of the nation they serve. It is, however, a notably — not completely, but notably — impartial and dispassionate process. Both sides must be heard. Indifference to precedent and to reasoned argument is professionally and perhaps politically intolerable, and the duty to do justice to the actual litigants before the court is powerful. These procedural features are meant, essentially, to promote wisdom. We cannot guarantee wisdom, of course, and we are likely to agree with Learned Hand that it would be most irksome to be ruled by philosophers, however wise,<sup>97</sup> and yet the

---

94. See, e.g., ANTHONY MATHEWS, FREEDOM, STATE SECURITY AND THE RULE OF LAW: DILEMMAS OF THE APARTHEID SOCIETY 1, 20-22 (1986); JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 44-45 (1978).

95. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (envisioning closer judicial scrutiny of government intrusions on the rights of "discrete and insular minorities," against whom "prejudice . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"). John Ely was perhaps the leading exponent of what he called a "representation-reinforcing theory of judicial review" in the spirit of *Carolene*. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181 (1980). Michael Klarman has demonstrated that by 1954 the disfranchisement of black southern voters had been significantly eroded, but even so only 20% of potentially eligible African-Americans were registered to vote as of 1952, Klarman, *supra* note 31, at 69-71, and the political power of white segregationists remained intense.

96. Cf. Caminker, *supra* note 17, at 2357-60 (examining the bearing of courts' special lawmaking processes on the propriety of vote trading and other judicial strategic behavior).

97. See LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 73 (1958).

potential for a *contribution* to our public policy making by people whose positions help make them wise is not something to regret.

And, finally, courts' power is quite limited. Their decisions may win adherence, but they may also prompt sharp resistance. The judicial moves to end the death penalty ended with a national reaffirmation of execution;<sup>98</sup> the establishment of a woman's right to choose is still hotly contested;<sup>99</sup> but the duty to desegregate, or at least the prohibition on deliberate segregation, has come to be widely accepted throughout American life. In the dialogue between the courts and the country that may be the ultimate test of any constitutional position, *Brown* prevailed, despite all the struggles over implementation and despite all the continued conflict around race in this country. To borrow the words of the *Planned Parenthood v. Casey* plurality, in *Brown* "the Court's interpretation of the Constitution call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,"<sup>100</sup> and, after a contest lasting many years, the nation accepted that call — imperfectly, incompletely, but still meaningfully. Since the constitution does not have to be right, *Brown's* legitimacy rests most firmly not on its rightness but on the fact that it has indeed been accepted by the country.

To say that courts engage in the making of social policy as they interpret the constitution is not, in the end, surprising. It might be more surprising to maintain that judicial decisions somehow emerge untainted by the justices' views of what is right for their country. It would be especially odd to imagine the Supreme Court disengaged from considerations of social policy, since we have, as a nation, chosen to live under a constitution whose text remains

---

98. After the Supreme Court struck down essentially all of the nation's death penalty statutes in *Furman v. Georgia*, 408 U.S. 238 (1972), as Justice Marshall ruefully observed, "the legislatures of 35 States have enacted new statutes authorizing the imposition of the death sentence for certain crimes, and Congress has enacted a law providing the death penalty for air piracy resulting in death." *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting).

99. See *Planned Parenthood v. Casey*, 505 U.S. 833, 864-70 (1992) (plurality opinion of O'Connor, Kennedy & Souter, JJ.) (declining to overturn *Roe v. Wade*, 410 U.S. 113 (1973), in part because doing so in the midst of popular controversy would undermine the Court's legitimacy).

100. *Planned Parenthood v. Casey*, 505 U.S. at 867 (plurality opinion of O'Connor, Kennedy & Souter, JJ.).

largely fixed even as the conditions of the country evolve and generate exigencies the framers could scarcely have foreseen.<sup>101</sup> The concise words of the constitution may or may not have been meant to leave the way open to broad reinterpretation,<sup>102</sup> but broad reinterpretation is what we have needed, and this process of re-reading could hardly have been indifferent to social policy considerations. It may be odd that we have evolved a process of reshaping our fundamental law and social policy that relies in part on freewheeling democratic politics and in part on the deliberations, sometimes intuitive and pragmatic, sometimes highly intellectualized and almost philosophical, of judges, and in particular of nine rather cloistered individuals — but we have.<sup>103</sup>

All of that, it seems to me, makes it quite easy to defend *Brown's* kryptocracy in rule of law terms. Perhaps a more formalistic version of the rule of law is possible, but the rule of law we have developed is one that calls on judges to make constitutional law in part by reflecting on social policy.

## 2. A Vote for Unanimity

Perhaps the reason Reed joined the *Brown* decision was not, or was not solely, that he believed (even if reluctantly, and at that only by virtue of a personal conversion) that the court should play such a

---

101. It was Chief Justice Marshall who emphasized that the Constitution should be read to enable the new nation to adapt to "exigencies which had not then occurred, and which must have been foreseen but dimly and imperfectly." *McCulloch v. Maryland*, 17 U.S. (3 Wheat.) 316, 385 (1819).

102. Alexander Bickel, after finding that the Fourteenth Amendment, "as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation," Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955), nevertheless concluded that the words of the amendment might have been chosen to allow the potential for future reinterpretation, *id.* at 61. On this basis, Bickel concludes his article by saying that for the Supreme Court in *Brown*, "the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866." *Id.* at 65.

103. Professor, now also Judge, Gerard Lynch similarly observed, years ago, that "[p]ermitting judges to reject political choices they find inconsistent with their views of the nation's basic values may be just another part of a system that on the whole does not require instant effectuation of the will of today's majority, but that rather commonly requires major decisions to be based on broader, more lasting consensus . . ." Gerard E. Lynch, *Book Review*, 80 COLUM. L. REV. 857, 863 (1980) (reviewing ELY, *supra* note 95).

krytocratic role. Instead, he may have believed only that he should stand with his colleagues since *they* had decided to act in this way. Michael Klarman has noted that Frankfurter said, years before *Brown*, that "Reed was a soldier and glad to do anything that the interest of the Court might require."<sup>104</sup> Here, Reed may have decided that he had a duty to enable the court to hand down this crucial decision unanimously, even though he felt the decision was mistaken. He may have seen the decision as "inevitable" and in social policy terms "appropriate" despite also being wrong as a matter of law, and he may have decided that because it was inevitable and appropriate it should be made as effective as possible. He may also have felt a loyalty to the other members of the Court, and to the Court as an institution, a loyalty which led him in effect to say that he would support the Court even when it was in error, because to do otherwise might weaken the entire process of doing justice in the United States.

These are potent considerations. Once we accept that the Court is an institution that can prosper or weaken, it is hard not to accept that the Court has some right, and responsibility, to try to prosper. Once we take a further step and accept that the Court is playing a role in the making of social policy, it is hard not to accept that this policymaking should, if possible, be successful rather than stillborn.<sup>105</sup> I do not mean to press this argument without limit, and I will turn in a moment to several possible reasons for criticizing Reed's acting on this basis, but it seems fair to say that a discretion to rely on such considerations as these is welcome provided that it actually makes some positive contribution to lawmaking and provided that it does not create grave dangers of abuse.

On the first of these points, it is hard now, fifty years later, to know whether unanimity really made a great difference to *Brown*. The movement for racial equality would not achieve widespread support and (relative) success for years to come, and in the meantime Earl Warren became a target of intense political opposi-

---

104. KLARMAN, *supra* note 10, at 302.

105. *McCulloch v. Maryland* is instructive on this point as well as Michael Klarman has (skeptically) reminded me. As Marshall said there, "[t]he power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means." *McCulloch*, 17 U.S. at 408.

tion. Perhaps people were not fooled by unanimity into presuming infallibility any more than they might be now. Or perhaps a divided court would have generated an even more divided and violent response. We do not know, but we do know that members of the *Brown* Court, who were far closer to the situation than we are, believed that unanimity was important.<sup>106</sup>

Yet Reed's decision to join a judgment with which (let us now assume) he disagreed, for the sake of such concerns as these, might also have entailed real costs, and the possibility of such costs is the second factor we must assess in considering the propriety of Reed's choice. Three overlapping charges that might be leveled against Reed call for consideration: that by concealing his objections he undercut *Brown's* ultimate legitimacy; that he acted in an authoritarian fashion; and that his choice was unjustifiably paternalistic.

The question of legitimacy arises because Reed's decision not to declare his objections unmistakably denied the American people the opportunity to engage in a fully informed dialogue with the Court about the decision. Precisely by creating the pretense of unanimity, Reed may well have sought to make the *Brown* decision seem ineluctable, rather than the contestable product of debatable reasoning.<sup>107</sup> If so, then the dialogic rationale for *Brown's* legitimacy might be undercut.

This is a troubling proposition, if (as I have argued above) the fundamental justification for *Brown* as constitutional law is its acceptance by the country.<sup>108</sup> Normally, Americans pay rather little attention to Supreme Court opinions, a reality that both raises questions about the validity of dialogic understandings of the legiti-

---

106. See *supra* note 54. Klarman emphasizes that Justice Reed would have considered the need for unanimity in the context of also recognizing that a dissent would have no impact on the Court's result in the case. Klarman, *supra* note 1, at 444-45; see also *supra* note 86. It seems quite appropriate that a judge weighing the impact of his dissent would consider not only the harm it might do but the absence of good, as Reed may have.

107. So Richard Kluger characterizes the significance of a unanimous opinion: unanimity "says that the nine men have in union apprehended truth and now reveal it; more than one opinion suggests that truth may be glimpsed from many angles — or that there is none, only conflicting opinion among mere mortals, and that another season may bring another outcome." KLUGER, *supra* note 22, at 708-09. The subsequent opposition to *Brown* demonstrates that many people were able to disregard this symbolic message, but it remains possible that others took it to heart.

108. See *supra* notes 98-100 and accompanying text.

macy of most Supreme Court decisions and makes any particular instance of judicial silence or lack of candor less likely to have any real impact on public responses.<sup>109</sup> But *Brown's* unanimity was no mere detail, and *Brown* was a matter of intense public interest.

Yet the very centrality of *Brown* to our national political life means, I think, that its dialogic foundation is solid. More precisely, that foundation *became* solid, as the result of the profound social conflict and reconstruction to which it contributed. Legitimacy based on society's acceptance is legitimacy based on social and political processes, and those processes will be complex and not always neat, but they can generate conclusive results.<sup>110</sup>

Reed's decision (understood as a choice to join the decision for the sake of unanimity) might also be characterized as a form of authoritarianism, all the more worrisome since judicial decision making has a counter-majoritarian flavor at the best of times.<sup>111</sup> Our present, post-modern skepticism about uniting multiple voices in any single tune may encourage us to see his choice as a suppression — of Reed's own voice, of the voices of those who might have responded to his — rather than a unification. Perhaps so — but perhaps, instead, it is our current sensitivities that are exaggerated. Clearly there is a persistent tension between individual judicial self-expression and collective judicial coherence, a tension that judges at different times have resolved differently,<sup>112</sup> and it would be impossible to say that an effort to achieve unanimity was out of kilter with the traditions of the rule of law in the United States.

What is most intriguing about the *Brown* Court's search for unanimity is, perhaps, the fact that by 1954 the justices were in gen-

---

109. Scott Idleman points out these realities of our constitutional "dialogue" and emphasizes their significance (and other considerations) in undercutting dialogue-based arguments for strict judicial candor. Idleman, *supra* note 17, at 1355-56, 1363-65.

110. It is instructive, on this score, to remember the startling departures from normal legal processes in the framing of the Constitution and, even more dramatically, in the approval of the Fourteenth Amendment. See DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 37-47, 322-26 (1990).

111. As Michael Klarman has emphasized to me, several members of the *Brown* Court were dismayed that Congress had not acted. Klarman writes that Jackson in particular "lamented" that "if we have to decide the question . . . then representative government has failed." KLARMAN, *supra* note 10, at 308; see also *THE SUPREME COURT IN CONFERENCE*, *supra* note 3, at 658 (Jackson's conference comments, including this one, on December 12, 1953, following the first reargument).

112. See *supra* notes 11-17 and accompanying text.

eral much more willing to dissent or concur separately than they had once been.<sup>113</sup> A number of factors may have shaped the justices' new readiness for public disagreement, including changes in leadership,<sup>114</sup> the justices' growing sense of themselves as nine separate justices rather than one Court,<sup>115</sup> and the Court's growing authority to control its own docket and so enable the justices to focus their work on only the most important cases.<sup>116</sup> It is also worth noting that even when dissents were rare, they were more common in constitutional cases than in most others.<sup>117</sup> In *Brown*, the justices returned to an emphasis on a unified voice of authority that they had elsewhere largely put aside. But in 1954 the ideal of unanimity was a more vivid memory than it is today, and it is difficult to fault Reed and his colleagues for having reached out for unanimity as they confronted the awesome task presented to them by *Brown*. Moreover, it is simply implausible to imagine that the Court's unanimity denied the American people a genuine democratic debate over the role of race, or even that it denied those who follow the

---

113. John Kelsh notes that the nonunanimity rate on the Supreme Court "peaked at 86% [of all decisions other than per curiams] in 1947. It has hovered around 75% ever since." Kelsh, *supra* note 12, at 175.

114. Harlan Fiske Stone became Chief Justice in 1941. Stone may have had his problems as a leader; he also "broke[ ] with his predecessors' attitude regarding the propriety of dissent." *Id.* at 179 (citing Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988)). Nor was his successor, Fred. M. Vinson, equal to the challenge of restoring harmony, *see supra* note 22, though he had apparently been selected to do just that. *See* ZoBell, *supra* note 11, at 204 (quoting Carl Brent Swisher, *The Supreme Court - Need for Re-Evaluation*, 40 VA. L. REV. 837, 845 (1954)). Even Earl Warren's personal skills did not fundamentally alter the Court's new pattern of behavior, although in the *Brown* years, 1954 and 1955, the Court's nonunanimity rate was somewhat lower than it had been in 1951-53 and than it would be in 1956-57. ZoBell, *supra*, at 204-07.

115. *See* Kelsh, *supra* note 12, at 168-70, 179-80. Kelsh also emphasizes the growing normative legitimacy of separate opinions, even before the explosion in their frequency. *Id.* at 170-74.

116. *See* Post, *supra* note 11, at 1306 (suggesting that "[b]y empowering the Court to choose its own jurisdiction, the [Judiciary] Act [of 1925] shifted the Court's emphasis away from opinions addressed to private litigants, and toward opinions addressed to those concerned with the development of American law"). Post emphasizes that this jurisdictional change coincided with a significant jurisprudential development as well, the rise of the sense of law as impermanent and a proper subject of human, including judicial, choice. *See id.* at 1347-55, 1380-83.

117. *See* Kelsh, *supra* note 12, at 150, 152, 155-56, 163.

details of judicial opinions a meaningful debate over the strengths and weaknesses of *Brown*.

Third, we might maintain that Reed's decision, even if it was not so undemocratic as to deserve the label of "authoritarianism," was still a form of paternalism. In effect, Reed was deciding that we the people of the United States were not strong enough to handle the reality of judicial disunity and needed instead to be presented with an image of united, quasi-parental authority. If we see Reed's vote as in effect trying to protect us from ourselves, then it was paternalistic. We might not see it that way, of course. We could equally say that Reed was trying to protect some of us — African-Americans — from others of us — whites — and in that case his decision was not paternalism but a classic instance of limiting one group's claims of right in order to protect others from suffering unjustified harm as a result of the first group's exercise of its supposed liberties.

If we do see Reed as trying to protect all of us from our own baser potentials, however, then the question would be whether such paternalism could be justified. We should not be quick to accept paternalism<sup>118</sup> — but sometimes we may be right to accept it in the end. One calculus for answering the question of justification asks whether the people subjected to paternalistic restriction were impaired in some way that would have prevented their acting competently if given unrestricted freedom of action; whether the restriction imposed was as limited as possible under the circumstances; and whether the risks of harm were great.<sup>119</sup> It does not seem hard to say that the restriction involved here — denying the American people knowledge of judicial disagreement — was a plausible response to the prejudice and disfranchisement that held sway at the time in American politics; that it was a very limited restriction indeed since it hardly prevented the expression of sharp disagreement with the reasoning laid out by the Court; and that the risks of harm, in the form of polarization and violence, may have been substantial. Perhaps Reed's calculation (if he reasoned in this way) was

---

118. See Shapiro, *supra* note 5, at 745-46.

119. David Luban offers a formulation on these lines in David Luban, *Paternalism and the Legal Profession*, 1981 WISC. L. REV. 454, 465, drawing on Dennis F. Thompson, *Paternalism in Medicine, Law, and Public Policy*, in ETHICS TEACHING IN HIGHER EDUCATION 245, 250-51 (Daniel Callahan & Sissela Bok eds., 1980).

mistaken, but such calculations do not seem inconsistent with a morally principled approach to governance, and if that is right then I think we should accept that even some erroneous calculations of such considerations are part of the rule of law.

The upshot of this discussion is that there is good reason to accept, as part of the rule of law, that judges may exercise discretion to join opinions with which they do not agree, for the sake of unanimity. It would be surprising, indeed, if our analysis had led to a contrary conclusion, because precisely this discretion has been so significant a part of the actual practice of the judges of the Supreme Court during our history. But it is worth adding that the existence of that discretion is not a mandate for exercising it, and certainly not a mandate applicable at all times and circumstances. The force of the need for unanimity in *Brown* in 1954 can still be felt, but we ourselves live in a much more self-consciously multi-vocal world.

### 3. A Vote for a Deal

There is one other way that Reed might have been engaging in kryptocracy. Perhaps he neither accepted the social policy basis of the case nor lent his support because of the practical value of unanimity. Perhaps, instead, Reed made a deal, and extracted a price: he traded his vote in *Brown I* for some concession elsewhere.<sup>120</sup> If Reed and Warren actually made such a deal and kept it dark, then the trade might have been for anything, but the most likely transaction would surely have been within *Brown* itself. Reed might have traded his support for the unanimous decision in *Brown I* for Warren's agreement to make the remedy ordered in *Brown II* more palatable to the South.

Such a trade would hardly have been unprincipled. *Brown I* and *Brown II*, after all, were not separate cases but two phases of the same case, dealing with the same, single issue facing the nation. Reed would not have been trading injustice here for justice elsewhere, but rather seeking as much justice as he could achieve here, in this very case. He also would not have been misleading the public about the true state of the law in the way that justices engaged in a covert trade over unrelated cases might; instead, Reed joins in the

---

120. See *supra* note 55.

judgments in both *Brown I* and *Brown II*, and they state, perhaps with some degree of shading, the law that will in fact govern this field.<sup>121</sup> This is not, then, a case of lawmaking in the grand legislative mode of unprincipled dealmaking (to whatever extent unprincipled dealmaking really is part of our practice of legislation). I share the widespread intuition that Evan Caminker notes, that explicit vote trading by judges across unrelated cases truly is unacceptable,<sup>122</sup> but this is not what *Brown* would have featured.

In truth, it does not seem likely that *Brown* featured any fundamental trade as such. To be sure, Reed was very much in favor of avoiding an abrupt demolition of the practice of school segregation.<sup>123</sup> Other justices also made clear, as early as the Court's December, 1952 conference, that they might agree to declare school segregation unconstitutional, but the remedy would have to be a gradual one.<sup>124</sup> But still other justices, not so hesitant about the decision on the merits, also agreed even then that the relief would need to be gradual.<sup>125</sup> At the December, 1953 conference Earl Warren made the same point,<sup>126</sup> and so, before *Brown I* was handed down, six justices (Warren, Reed, Jackson, Clark, Douglas and Bur-

121. Evan Caminker has emphasized that vote-trading across different cases is both generally disapproved and probably rare. See Caminker, *supra* note 17, at 2331, 2380. Caminker carefully examines a number of possible bases for this disapproval, finding many of them less compelling than might have been thought. *Id.* at 2334-62. He notes, however, that vote-trading between unrelated cases differs from other forms of strategic judicial behavior because "decisions influenced by vote trading are arbitrary from the litigants' perspective in the sense that they cannot participate meaningfully, through reasoned argument, in the critical judicial determination"—the justices' unrevealed decisions about what to trade for what. *Id.* at 2343.

122. *Id.* at 2380.

123. See *supra* note 36 and accompanying text; THE SUPREME COURT IN CONFERENCE, *supra* note 3, at 649, 666-67 (conference comments of Justice Reed in *Brown I* in 1952 and *Brown II* in 1955).

124. Michael Klarman has emphasized this point to me. Jackson and Clark both spoke in this vein at the 1952 conference on *Brown I*. See THE SUPREME COURT IN CONFERENCE, *supra* note 3, at 652 (Jackson: "We should perhaps give them time to get rid of it, and I would go along on that basis."); 653 (Clark: "Our opinion should give the lower courts the opportunity to withhold relief in light of troubles. I would be inclined to go along with that. Otherwise, I would say that we have led states on to believe that separate but equal is O.K., and we should let them work it out.")

125. See *id.* at 652 & 653 (comments of Douglas and Burton at 1952 conference on *Brown I*).

126. *Id.* at 654-55. Douglas, Burton and Clark reiterated their view that adjustments and time would be needed at the remedy stage. *Id.* at 658-60.

ton) had expressed such sentiments in conference. Black had perhaps been less explicit at least in formal conference, but he had certainly conveyed his sense that the effects of outlawing segregation would be “serious and drastic,”<sup>127</sup> and Frankfurter had already emphasized in the Court’s December, 1952 conference that the state cases were “equity suits. They involve imagination in shaping decrees. I would ask counsel on re-argument to address themselves to the problems of enforcement.”<sup>128</sup> Only Minton sounds more uncompromising,<sup>129</sup> and at the conference on *Brown II* even he emphasizes that while “we must do something in the area,” “[w]e should be careful not to issue a futile decree that we cannot enforce.”<sup>130</sup>

Michael Klarman writes at one point that “an informal deal had enabled the Court to be unanimous in *Brown I*. The more ambivalent justices supported the result in exchange for a gradualist remedy.”<sup>131</sup> Philip Elman, who worked on the first brief to suggest such a course, filed by the Department of Justice in December 1952, offers an account that may suggest a similar view. He told an interviewer that what the Justice Department brief had done was to

---

127. *Id.* at 648 (Black’s comments at 1952 conference). In conference on *Brown II*, Black would make clear his view that enforcement must proceed very slowly and delicately, in some places “gradually – like a glacier.” *Id.* at 665-66. Mark Tushnet has characterized Black as expressing “an open acceptance of token desegregation.” TUSHNET, *supra* note 1, at 220-21.

128. THE SUPREME COURT IN CONFERENCE, *supra* note 3, at 651. Frankfurter made his gradualist views explicit in a memorandum he circulated prior to the next conference, see TUSHNET, *supra* note 1, at 220, and at the justices’ later conference on *Brown II*, THE SUPREME COURT IN CONFERENCE, *supra*, at 667, and was the source for the phrase “all deliberate speed” in the *Brown II* opinion, *id.* at 669; see *Brown II*, 349 U.S. at 301.

129. THE SUPREME COURT IN CONFERENCE, *supra* note 3, at 653 (at the 1952 conference, Minton says, “There will be trouble, but this race grew up in trouble. . . . Segregation is *per se* unconstitutional. I am ready to vote now.”) (emphasis in original). In December, 1953, he commented that “[t]here may be trouble in the offing, but I doubt it,” and then concluded by saying that “[a]s to possible remedies, I am inclined to let the district courts have their heads in this matter, and not merely see our opinion.” *Id.* at 660.

130. *Id.* at 668. Harlan, who joined the Court after Jackson’s death, commented in the *Brown II* conference that he was “deeply impressed by what Hugo Black said about the Deep South, and the importance of taking those factors into account.” *Id.* at 668-69.

131. KLARMAN, *supra* note 10, at 313. One might call this a tacit vote trade, and Caminker suggests that “while explicit vote trading seems to be shunned in word and deed, a softer form of tacit trading may well be commonplace.” Caminker, *supra* note 17, at 2332.

“offer[ ] the Court a way out of its dilemma, a way to end racial segregation without inviting massive disobedience, a way to decide the constitutional issue unanimously without tearing the court apart.”<sup>132</sup> But rather than an informal deal, it seems to me more likely that the justices, those who favored overturning *Plessy* and those who hesitated to take this step, were simply in agreement that if this step was taken, implementing it would have to be a careful, gradual process.<sup>133</sup> If that course had not been open to them, then the court might have fractured; but because it *was* available, the justices did not have to bargain over it in order to reach unanimity in *Brown I*. No doubt there was a lot of work to be done in fine-tuning this general strategy,<sup>134</sup> but Reed did not have to trade his vote on *Plessy* for a gradualist remedy, because that remedy was already in view.

One can still imagine Reed thinking that he needed to join the *Brown I* decision, not as the quid pro quo of some deal, but to preserve the influence that might come from being part of the Court's consensus, when the Court proceeded to apply that consensus to the issue of remedy. I would not rule out this possibility, for it is easy to see how this reasoning could have meshed with the other social policy reasons Reed may well have had for joining in this decision, from grudging acceptance of the inevitability and appropriateness of desegregation to a commitment to unanimity. There is no direct evidence of such an exchange, but that is only to be expected, precisely because such a trade would have been implicit. It might not even have been entirely conscious; the background sense of this potential might simply have shaded Reed's feelings as he approached decision.

Nevertheless, there are two reasons at least to question whether such a calculus would have been central to Reed's decisionmaking. First, the other members of the Court would have had reason to remain sensitive to his concerns even if he had not voted with them in *Brown I*; his vote would still have been needed in *Brown II*, unanimity there would still have been desirable, and in any event his

---

132. Elman & Silber, *supra* note 86, at 827.

133. On the justices' reasons for embracing this course, from a desire to protect the Court's institutional prestige to a hope of reaching out to moderate Southerners to their own racial sentiments, see KLARMAN, *supra* note 10, at 314-16.

134. See *supra* note 50 and accompanying text.

understanding of the South would still have helped shape the justices' thinking about the problems of remedy.<sup>135</sup>

Second, there is actually not much sign that Reed played a prominent role in the progress towards *Brown II*. Though his law clerk compiled files bearing on remedy, and Warren's clerks consulted them over the summer of 1954 in preparation for the *Brown II* argument,<sup>136</sup> Reed himself — after spending the summer of 1953 very much engaged in thinking about *Brown* — didn't take these files with him in the summer of 1954.<sup>137</sup> Reed certainly contributed to the Court's deliberations over *Brown II*, and his comments in the conference, such as his endorsement of remanding the cases with directions "that these schools are to be opened to the named plaintiffs with all convenient speed,"<sup>138</sup> may well have been influential. But the crucial moment for Reed seems to have been the decision in *Brown I*, and his concern seems to have been to do what was right in that case, rather than to trade what might have been wrong there for what would be right elsewhere, even in *Brown II*.

Justice Reed's decision in *Brown* thus does not require us to judge how far justices may legitimately go in trading, within one case or across multiple cases, explicitly or implicitly. The case does strongly confirm the importance of the trade-offs justices make in their own reasoning processes — here, in embracing gradualist remedies as a counterpart to *Brown's* dramatic declaration of rights. It reminds us as well of the role of emotion and personal connec-

---

135. Even if Justice Reed was not unqualifiedly admired by his colleagues, see *supra* note 86, Kluger also observes that "[t]o his brethren, Reed was anything but a petulant loner. On the contrary, he was an amiable, even-tempered colleague, and the rest of the Justices recognized that his position in the segregation cases stemmed from a deeply held conviction that the nation had been taking big strides in race relations and that the Court's decision to outlaw separate schools threatened to impede that march, if not halt it altogether." KLUGER, *supra* note 22, at 698. With this reservoir of respect, Reed could have felt confident that he would still be listened to on remedy even if he had dissented.

136. FASSETT, *supra* note 33, at 576-77.

137. *Id.* at 576. Fassett notes that Reed's files "contain no documents related to the 1955 hearing [on remedy] except" a memorandum he had written to Justice Reed while Reed was on summer vacation in 1954. *Id.* at 578. For Reed's far greater engagement with *Brown* issues in the summer of 1953, prior to the re-argument that led to *Brown I*, and as far back as 1945, see *id.* at 561-62; Fassett, *supra* note 16, at 49-54.

138. THE SUPREME COURT IN CONFERENCE, *supra* note 3, at 666. Klarman comments that Reed "apparently . . . persuaded a majority that '[t]hese are class suits but nothing should be said about it in the decree.'" KLARMAN, *supra* note 10, at 316.

tion in judging; no doubt the consensus on gradualism was attractive at least in part because it was a consensus that these nine men, facing considerable institutional and personal costs, could unite around.

But perhaps the most important trade-off issue raised by *Brown* is the fundamental question of whether the Court was right to endorse a gradualist remedy, one that might promote compliance in the long run but would certainly postpone the vindication of the black plaintiffs' constitutional rights in the short run (a "short run" that turned out to be very long indeed). Whether *Brown* should have demanded more from the American people, and whether such a demand would have been productive or destructive, are profound issues, but answering them is not my task here. What I do have to say, however, is that once we accept the kind of social policymaking, or kryptocratic, considerations that I have endorsed here, we cannot entirely exclude similar pragmatic calculations in the service of those objectives. *Brown* may have miscalculated, but the justices, Reed among them, were not wrong to attempt the calculation.

### C. *Conscience*

It is impossible to be certain, of course, but I think that when Reed joined the rest of the Court in the *Brown* decision he felt, on balance, that he was acting properly. He may have acted out of newfound conviction about the meaning of the Fourteenth Amendment, or out of a sense that in this case either the demands of social policy in general, or the institutional needs of the Court in particular called for his support. He may have arrived firmly at his convictions or edged to them only with the help of the warm persuasion of Earl Warren. But whether his eyes filled with tears as Warren read the decision to the world, or he exchanged a subtle nod with Thurgood Marshall, Reed seems to have arrived at his own decision and acted upon it. I admit, however, that I would *prefer* to think that Reed was at peace with his decision, because it seems so unfair for him to have suffered in his own eyes for a vote that seems so right.

If I have grasped Reed's feelings correctly, however, it is still possible that he believed that the right vote was one that violated at least some of his obligations as a judge. If he felt the judgment was

legally mistaken, or believed that it rested on a judgment of social policy that was not supposed to be made by judges, but still decided that it was his duty to help make the decision unanimous, then Stanley Reed might well have suffered a true crisis of conscience as he sought a resolution of *Brown*. I do not know if Justice Reed, “an amiable, even-tempered” justice,<sup>139</sup> experienced this moment in such piercing terms, but we can certainly imagine that judges might feel exactly this agony of decision.

If we now see the judgment as legally well justified, and believe that its social policy making was precisely what judges should, at least sometimes, undertake, we may not easily be able to feel the nature of Reed’s possible crisis of conscience. In a sense, though, the fact that we are so far from Reed’s own perspective reflects how significant the choices were that he and his colleagues made in *Brown*. Reed did in fact contribute to the evolution of a legal order whose tenets he himself might have substantially dissented from. The choices he made were significant, and if he foresaw their consequences, as he might have, he would have been troubled by them.

If we cannot easily revisit Reed’s moral world, however, we can take something from his situation. Judges today are no more immune than the judges of 1954 from the potential riptide of conflicting moral demands. To do justice for a nation is always demanding, and perhaps has become specially demanding again today, as we face perils and imagine futures graver and less free than we once had looked forward to. The potential for crosscutting demands, moreover, is not really confined to the most extraordinary cases. In less extreme terms, this potential is always with us and always calls on judges, and citizens, to reconcile conflicting, respected sources of obligation. Perhaps it is fair to say, then, that a central part of the rule of law is the difficult, and ambiguous, experience of those who seek to establish it — judges, certainly, but also lawyers and citizens. Perhaps it is in the end an integral part of the rule of law that some of the decisions that most affirm it rest on decisions made by individuals who experience themselves, as Justice Reed may have, as almost denying the very values they affirm.

---

139. KLUGER, *supra* note 22, at 698.

## CONCLUSION: LAW WITHIN, AND BEYOND, THE RULE OF LAW

I have offered here an account of the rule of law whose boundaries may seem surprisingly broad. Justice Reed's decision in *Brown* illuminates the human impact of emotions on legal judgment; the appropriate salience of social policy considerations in constitutional interpretation; the legitimacy of judges' choices to vote contrary to their own legal reasoning for the sake of the institutional strength of the Court; and the real possibility that even a justified vote may reflect a painful choice among multiple valid, yet conflicting, normative commands. All of this takes our description of the duties of judges a considerable distance from a simple prescription to state all and only what they believe to be correct. The distance we have traveled is not infinite, and I do not mean to suggest that each judicial choice that might be encompassed in these phrases would be wise or right. But it is probably impossible to state precisely the boundaries of the discretion that these considerations indicate judges should wield, and that imprecision is itself a part of the rule of law that we have shaped.

It is possible to go much further than this. Near the end of his "defense of judicial candor," David Shapiro takes up the only exception to the rule of candor that he finds "compelling."<sup>140</sup> He agrees with Ronald Dworkin "that when a judge is confronted with a conflict between legal and moral right, he may be compelled to lie."<sup>141</sup> I agree that such cases exist; Nazi Germany was one,<sup>142</sup> and the United States may have been another when the Constitution protected slavery.<sup>143</sup> South Africa, too, was a place where ethical lawyers could justifiably conclude that they had to violate their obligations as lawyers, to resist the shattering injustice of apartheid — although many anti-apartheid South African lawyers worked de-

---

140. Shapiro, *supra* note 5, at 739 & 749.

141. *Id.* at 749, citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 326-27 (1978); see also Idleman, *supra* note 17, at 1387-88.

142. See Stephen Ellmann, *To Resign Or Not to Resign*, 19 *CARDOZO L. REV.* 1047, 1051 (1997).

143. On the character of judging, and lawyering, in the face of slavery, see generally ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975). I contrast the American experience in this era with the course of the law in apartheid South Africa in STEPHEN ELLMANN, *IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* 231-44 (1992).

terminedly within the law.<sup>144</sup> One might say that *Brown* was another such case, and in fact essentially the same case as South Africa — segregation being America's apartheid. On that ground, Justice Reed might have breached his normal obligations as a judge, not because doing so was consistent with the rule of law, but because there was no rule of law deserving the name.

I would not make this argument here, and I think that we should in general be very reluctant to count injustice within a democracy as a sufficient justification for judges' breaching the bounds of law. Certainly if we treated each instance of profound injustice as trumping the bounds of the rule of law, we would find those bounds fading very frequently. We would also be ignoring a central point of having legal institutions, namely to achieve justice where the sheer clash of social force might not. Indeed, we would be ignoring the lesson of *Brown* itself, that injustice can be remedied within the bounds of the law. I must acknowledge, at the same time, that the question of when injustice is so intolerable and ingrained that ordinarily unjust methods are called for in response — like the question of the location of the normal boundaries of the rule of law — has no mechanical answer.<sup>145</sup> Whatever the force we

144. See Stephen Ellmann, *To Live Outside the Law You Must Be Honest: Bram Fischer and the Meaning of Integrity*, 17 S. AFR. J. HUM. RTS. 451 (2001).

145. One distinguished lawyer, in fact, did see *Brown* as a case justifying conduct outside the normal bounds of law. Philip Elman (no relation to the present author), Frankfurter's former law clerk who worked on *Brown* as a lawyer in the Solicitor General's office, has reported that he had "many conversations with him [Frankfurter] over a period of many months. He told me what he thought [about *Brown*], what the other Justices were telling him they thought. I knew from him what their positions were." Elman & Silber, *supra* note 86, at 828. Elman explained to his interviewer that "I never mentioned my conversations with Frankfurter to anyone. He didn't regard me as a lawyer for any party; I was still his law clerk. He needed help, lots of help, and there were things I could do in the Department of Justice that he couldn't do, like getting the support of both administrations, Democratic and Republican, for the position that he wanted the Court to come out with [in *Brown*]." *Id.* at 832. When his interviewer asked Elman if all this meant "that in a sense, Frankfurter was receiving a government brief all along, from you, to which [defendants' lawyer John W.] Davis never had a chance to reply," Elman responded:

Yes, I suppose there's a point there. I have no easy, snappy response to that. In *Brown* I didn't consider myself a lawyer for a litigant. I considered it a cause that transcended ordinary notions about propriety in a litigation. This was not a litigation in the usual sense. The constitutional issue went to the heart of what kind of country we are, what kind of Constitution and Supreme Court we have . . . I don't defend my discussions with Frank-

may give to moral claims over legal duties in some set of extreme cases, however, we do better to understand Justice Reed's vote in *Brown* as an illustration of the law's capacity to achieve moral ends. Justice Reed's vote, as I have interpreted it, reflects the complexity, but also the supple strength, of the rule of law.

It seems fair to add that both that complexity and that strength seem to grow out of the reality that the rule of law is not solely a law of rules but rather makes room for, if not embodies, a much wider range of decisionmaking considerations. Scott Idleman has recently called such decisionmaking "prudential";<sup>146</sup> another perspective would suggest that human decisionmaking reflects considerations of "care" as well as of "rights."<sup>147</sup> We need not simply equate legal decisionmaking with moral, or religious, or political decisionmaking to say that the rule of law ultimately encompasses the full range of concerns that we ourselves actually hold.

---

furter; I just did what I thought was right, and I'm sure he didn't give it much thought. I regarded myself, in the literal sense, as an amicus curiae. *Id.* at 843. Elman later maintained, however, that the conversations he was recounting had all taken place "prior to December 1952, during the period when the government was in no way involved in the cases before the Court" and its later decision to participate could not have been foreseen. Philip Elman, *Response*, 100 HARV. L. REV. 1949, 1956 (1987).

146. Idleman develops his "prudential theory of judicial candor" in Idleman, *supra* note 17, at 1395-1415.

147. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). I have argued elsewhere that the ethic of care plays a greater part in legal thinking than might have once been supposed. Stephen Ellmann, *The Ethic of Care As an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2726 (1993).