

UVA LAW | McCorkle Kennedy

SPEAKER: Welcome, everyone, to the 2022 McCorkle lecture. It's wonderful to see you here. This is one of the first large in-person events that we are having at the law school, and we are just thrilled to be here with all of you.

This lecture is in memory of Claiborne Ross McCorkle, who was born in 1982-- sorry, in 1882-- and graduated with high honors from the law school in 1910, where he was a member of the Raven Society. For 18 years, he was a respected member of the Wise County Bar, and was active in civic and political affairs, serving two terms as Commonwealth attorney. In 1920, in the midst of Jim Crow and racial violence, he prosecuted two leaders of a lynch mob, at some risk to himself. He secured their conviction, which was a notable and unusual outcome at the time in the Commonwealth of Virginia and across the South. And this was considered to be a severe blow to mob violence in Southwest Virginia.

Mr. McCorkle later participated in the writing of the American Jurisprudence Treatise, and he had a long career in legal research and editing until 1965. He died in 1977, at the age of 94. His son, George McCorkle, who, along with his mother, Hazel Webb McCorkle, funded this lecture in Claiborne's name, described how his father equated law with justice. We are thrilled to honor Mr. McCorkle with this lecture, which seems particularly apt to me, and to have several members of the McCorkle family here tonight. So welcome to you.

The McCorkle lecture was established to bring, quote, "leading scholars and practitioners to Charlottesville to speak on areas of the law undergoing development and of general concern to the profession." Our speaker this afternoon has spent his career exploring every facet of race in American law, from criminal justice to family law to affirmative action to electoral politics and beyond. His penetrating analysis and unique perspective have made his an important voice, both within the academy and outside of it.

I am speaking, of course, of Randall L. Kennedy. Mr. Kennedy, Professor Kennedy, is the Michael R. Klein Professor of Law at Harvard Law School, where he teaches courses on contracts, criminal law, and the regulation of race relations. He is a graduate of St. Albans School and Princeton University, and he also studied as a Rhodes scholar at Oxford University. He received his law degree from Yale, and clerked afterwards for Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit and for Justice Thurgood Marshall of the United States Supreme Court.

Professor Kennedy is the author of eight books, and countless book chapters and scholarly articles. And his work also frequently appears in outlets like the Washington Post, the New York Times, and the Chronicle of Higher Education. One book reviewer called him, quote, "one of our most important and perceptive writers on race and the law." His book *Race, Crime and the Law* in 1997 won the 1998 Robert F. Kennedy Book Award, which is given each year to the book that most faithfully and forcefully reflects Robert Kennedy's purpose. I mention that honor, in particular, because it's an award close to our hearts, Robert F. Kennedy being a graduate of our class of 1951.

The book probes a highly complex area in new ways, engaging issues like the history of race discrimination, jury nullification, and crime control. The New York Times called it admirable, courageous, and meticulously fair and honest. Professor Kennedy's most recent book is *Say It Loud! On Race, Law, History and Culture*, which collects new and previously published essays and revisits his former work with a new eye, weighing in on a range of issues at the nexus of race, history, politics, and law. It was described in the New York Times as the latest contribution to his sophisticated body of work documenting the race problem of the United States.

For his incredible contributions to scholarship, Professor Kennedy has been inducted as a member into the American Law Institute, the American Academy of Arts and Sciences, and the American Philosophical Association. I was so pleased that Professor Kennedy spoke at the law school virtually in our national faculty workshop in the summer of 2020, in the midst of a national reckoning with race that had begun that spring. And I am so pleased that he is able to be here today in person, as we continue to grapple with the important questions that gained such salience that summer, and at the same time are also watching the confirmation hearings of the first Black woman to be nominated to the Supreme Court.

As we look backward and forward at this moment, assess soberly just how much work remains to be done, and celebrate important milestones, it is hard to imagine someone I would rather hear from than Professor Randy Kennedy, from who I always learn new things. I learn to see what I already know in new ways, and I find myself continuing to try to answer the questions he raises long after he has finished speaking. So with that, I am delighted to hear Professor Kennedy speak on *From Protest to Law-- Triumphs and Defeats in Struggles for Racial Justice, 1950 to 1970*. Please join me in welcoming Professor Randall L. Kennedy.

[APPLAUSE]

**RANDALL
KENNEDY:**

Thank you so much for the gracious introduction and for inviting me here. This is really a great honor for me, and I really appreciate it. Before I begin, I'd like to salute the McCorkles. I'd also like to salute a person who is not here with us, but whose spirit is very much with me.

I grew up playing tennis, tournament tennis. And one of the people with whom I practiced a lot in Washington, DC was a wonderful man by the name of Wilbur Jenkins. Wilbur Jenkins, a very courtly, very gracious, tough competitor, but a wonderful sportsman. I learned a lot from him.

And the reason why I mention him here is because Wilbur Jenkins was the father of Kimberly Jenkins Robinson. I know that Professor Robinson would be here, but Professor Robinson is in Washington, DC, supporting a classmate who's up for a quite considerable job. But maybe she'll hear this. Maybe she'll see this. I want I want to salute Professor Kimberly Jenkins Robinson in her own right, because it's just wonderful to see her career blossom so wonderfully, so fabulously, really. And I want to remember her great father.

Finally, I want to salute another McCorkle. I don't know if there's any relationship, but with us today is Pope McCorkle the Third, known by his friends as Mac McCorkle. Mac McCorkle is a professor at Duke. He drove up to be here. Mac and I, we've known one another since 1973. We've argued over and over and over, countless hours spent arguing about Charles Beard and Richard Hofstadter and Daniel Boorstin, Arthur Schlesinger Junior, C. Wright Mills. Hours and hours. And my life has been deeply enriched by Mac McCorkle. And I'm very appreciative, Mac, that you've driven up to see me give these remarks. Thank you.

I'm going to share with you for the next few minutes the introduction to a book on which I've been working for a good long time. And one of the wonderful things about a setting like this is that-- I mean, it's tremendously flattering to be here, it's a tremendous honor, but it also has another very important function. I'm going to offer remarks, and then I'm going to subside. And there will be a period of time during which I can field comments, questions, corrections, and by all means objections. And one of the wonderful things about an educational setting like this is I'm sure that I'm going to learn a lot. And I look forward to that period after my remarks, when I can get the benefit of your reactions to what I have to say.

So here, I'm going to describe a book on which I've been working. This book explains how struggles against racial injustice in the mid-20th century changed American law. It describes legislatures, agencies and courts responding to the civil rights movement that ushered in the second Reconstruction. The first Reconstruction, which transpired between approximately 1863 and 1877, transformed the legal order pursuant to three constitutional amendments.

The 13th Amendment abolished slavery. The 14th Amendment made all persons born within the jurisdiction of the United States federal citizens, and prohibited states from abridging the privileges and immunities of citizens, depriving any persons of due process of law, or denying any person the equal protection of the laws. The 15th Amendment prohibited the United States and all states from denying the right of citizens to vote on account of race, color, or previous condition of servitude. Each of these amendments also authorized Congress to implement the new provisions with appropriate legislation.

Racial dissidents propelled a second Reconstruction between approximately 1950 and 1970. This book that I'm writing delineates the perceived wrongs they targeted and the legacies they bequeathed. It also explains how and to what effect pugnacious demagogues, wily bureaucrats, impassioned commentators, obstructionist judges, calculating politicians, and millions of ordinary Americans opposed racial reform.

The story features a wide range of characters. Some are well-known-- Thurgood Marshall, Martin Luther King Junior, Earl Warren, Lyndon Baines Johnson. Others have been overlooked or forgotten. Harry and Harriet Moore were racial justice activists in Florida killed by white supremacists in a bombing on Christmas Eve 1951, their 25th wedding anniversary. Edwin W. Kenworthy was the executive secretary of President Harry Truman's Committee for Equality of Treatment and Opportunity in the Armed Service. His quiet but persistent advocacy helped to pave the way for desegregating the military.

Maurice Milgram was a homebuilder passionately committed to the construction of multiracial suburban developments. Hazel Palmer was the lead plaintiff in *Palmer versus Thomson*. A lowly maid, she became a racial justice activist out of solidarity with her son, a Freedom Rider. R. Jess Brown, one of only a handful of Black Mississippi lawyers in the Jim Crow era, pursued a career as a civil rights attorney after he was fired from his position as a school teacher when he joined a lawsuit seeking equal pay for Black educators.

In stark contrast was Jack Crenshaw, a white, Harvard-trained attorney who represented the bus company boycotted by the Black community in Montgomery in 1955-1956. Crenshaw played a paradoxical role. By refusing to compromise, he pushed the boycotters to take a bolder stand against segregation than they had initially envisioned, and thereby facilitated inadvertently the rise of Reverend King, the most celebrated protestor of the era.

Politicians such as Richard Russell and Howard Smith spent much of their time and talent trying to stymie the onrushing tide of racial change. Judges such as Sidney Mize and Benjamin Franklin Cameron also did what they could to impede reform, engaging repeatedly in judicial nullification. For one thing, they made factual findings that blatantly denied reality. Whether they were self-consciously lying or acting out of delusion is a puzzling subject to which I will recur time and again.

Another set of low-visibility, high-impact enemies of the racial justice movement were murderers and arsonists. Some of these racially motivated criminals were held to account, at least partially. But many escaped detection or punishment on account of popular local opposition to racial reform.

Efforts to stymie reform arose not only from outside racially oppressed communities. They issued from inside those communities, as well. Black Southerners such as Percy Green and Reverend HH Humes campaigned against the civil rights movement. Segregationist authorities succeeded in enticing some Blacks to spy on their neighbors and sell their ill-gotten information to authorities dedicated to preserving white domination. Police agencies, including, most notably, the Federal Bureau of Investigation, proved themselves adept at inserting Black informants into racial justice organizations.

A trusted accountant at the Southern Christian Leadership Conference funneled information to the FBI for years. An esteemed civil rights photographer was a prized source for government authorities intent on keeping tabs on the Black Freedom movement. A man trusted with protecting the leader of the Black Panther Party in Chicago turned out to be an FBI plant, joining hundreds, perhaps thousands of other informants that riddled Black Panther ranks. Communities that showed remarkable capacity for self-sacrificing solidarity also showed vulnerability to mercenary treachery.

My interpretation of the second Reconstruction acknowledges important triumphs. Reformers persuaded judges and other law-givers to see racial discrimination that they had previously ignored or misunderstood. They demoted racial segregation from legal acceptability to constitutional damnation. Landmarks of this effort include *Brown versus Board of Education*, *Loving versus Virginia*, and other rulings that belatedly recognized the fictitiousness of the claim that racial segregation represented merely an innocuous separation of the races, which implied nothing about racial subordination.

Reformers enlarged the range of activities subject to federal constitutional standards of equality by challenging racist practices indulged in by political parties, individuals seeking to use restrictive covenants, unions endowed with closed shop authority, and private hospitals and businesses subsidized by the public. Reformers deployed the Constitution's Interstate Commerce Clause and Equal Protection Clause to clear away racial impediments in travel and commercial transactions. They enlisted the enactment of municipal and state anti-discrimination law addressing employment, housing, and public accommodations.

They often successfully lobbied for federal legislation, including the Civil Rights Act of 1957, 1960, and 1964, the Voting Rights Act of 1965, and the Open Housing Act of 1968. Reformers persuaded the Supreme Court to rehabilitate Reconstruction-era legislation that enabled plaintiffs to recover damages in lawsuits against officials deemed to have violated constitutional rights. The seminal case in this line of jurisprudence, *Monroe versus Pape*, arose from an egregious act of racism perpetrated by the Chicago Police in 1958.

Racial reformism is also in the background of the most famous criminal procedure case in American history, *Miranda versus Arizona*, in which the court required police to inform detained persons that they have a right to decline answering questions and to have access to a lawyer. The Miranda warning stemmed from efforts to counteract police overreaching that seemed almost customarily to attend the apprehension of racial minority suspects. Racial reformers even succeeded in winning recognition for the idea that cessation of invidious discrimination is insufficient to overcome the lingering effects of historical injustices. Our society has been doing something special against the Negro for hundreds of years, Martin Luther King Junior observed. How, then, can he be absorbed into the mainstream of American life if we do not do something special for him now in order to balance the equation and equip him to compete on a just an equal basis?

Lyndon Johnson gestured in the same direction. In a commencement address at Howard University in 1965, the president insisted that freedom is not enough. You do not take a person who for years has been hobbled by chains and liberate him, bring him to the starting line of a race, and then say you are free to compete with all the others, and still justly believe that you have been completely fair. It is not enough, the president continued, to open the gates of opportunity. All of our citizens must have the ability to walk through those gates. This is the next and the most profound battle for civil rights. According to Johnson, the proper goal was not just equality as a right and a theory, but equality as a fact and equality as a result.

The pleas of King and Johnson for positive discrimination in favor of the Negro were anathema to conservatives, and deeply controversial within the ranks of liberals. Proponents, however, did establish a beachhead for the idea, although it attained only grudging, fragmentary, contested acceptance.

Still, that policies pushing beyond anti-discrimination into affirmative action, reparations, diversity became important, albeit embattled features of American society is attributable largely to second Reconstruction reformism. Resistance to racism transformed not only race relations law, it also transformed civil liberties law. By fighting off repression, reformers helped to create a panoply of newly recognized rights.

To protect the National Association for the Advancement of Colored People, lawyers move the Supreme Court to recognize organizational privacy. To shield civil rights attorneys, lawyers nudged the court to understand litigation as a form of political expression warranting federal constitutional protection. To insulate news organizations, lawyers convinced the court to constitutionalize the law of libel. To shelter protesters, lawyers got the court to craft rules that inhibit the authoritarian squelching of massed dissent.

To safeguard inmates, lawyers convinced judges to recognize constitutional rights behind prison walls. To defend campus-bound dissidents, lawyers persuaded judges to cloak students with some degree of constitutional protection.

Racial justice activists succeeded for a time in winning the esteem of powerful arbiters of public opinion. Announcing his intention to introduce voting rights legislation in the spring of 1965, President Johnson invoked the Civil Rights movement's anthem, "We Shall Overcome," and declared that the real hero of the moment was the American Negro. Dissidents, especially Black ones, became briefly the beneficiaries of flattering publicity, foundation largesse, idolization on college campuses, and favorable attention from celebrities and other affluent folk.

At least as important as elevating racial minorities in the eyes of others was elevating themselves in their own eyes. Negro History Week became Black History Month. Straightened hair gave rise to naturals. Dark skin attained a new prestige. Soul brother number one, James Brown, declared unambiguously, "Say it loud. I'm Black, and I'm proud." By the 1970s, Black caucuses were being created in every conceivable setting, from the Congressional Black Caucus to the National Association of Black Social Workers to the National Council of Black lawyers.

Reformers also succeeded in changing the consciousness of large sectors of other marginalized groups. In the 1940s and 1950s, the most prominent organizations dedicated to the defense and elevation of Mexican Americans insisted that they be designated as white. In the latter half of the 1960s, emergent cohorts of activists took to calling themselves Chicanos and championed brownness. Indians demanded red power, and people of Asian descent demanded, with increasing insistence, that they be afforded more respect, an upshot of their efforts were modifications in immigration law that contributed to demographic transformations that continue to reverberate.

Reformers also suffered many defeats. In much of white America, the Black freedom movement was shadowed by suspicion and disparagement. At no point during the 1950s and 1960s did it find overwhelming favor with White Americans. 60% of white Americans polled expressed disapproval of the 1963 March on Washington at which Martin Luther King, Jr. delivered his iconic "I Have a Dream" speech.

In May 1965, soon after the highly-publicized brutalization of peaceful voting rights dissidents in Alabama, only 48% of polled white respondents sided with the protesters. Although the prevalence and intensity of racism among whites during that era decreased, large numbers continued habitually to assess Blacks less favorably than others.

Although racial dissidents made notable headway judicially, especially in federal courts, they also suffered considerable frustration after *Brown versus Board of Education*, officials in the deep South openly thwarted desegregation in public primary and secondary schooling. In May 1964, the Southern Education Reporting Service estimated that of 287,000 Black students in Alabama, only 21 attended schools with whites. Of 258,000 Black students in South Carolina, only 10 attended school with whites. Of over 300,000 Black students in Mississippi, none attended schools with whites.

Prior to 1966, not a single Black teacher in Alabama, Mississippi, or Louisiana was assigned to a school to work alongside white teachers. Soon thereafter, pursuant to concerted effort on the part of activists, the Department of Justice, the Department of Education, and federal courts, widespread desegregation did emerge in locales where officials had once pledged never. And for a while, authorities permitted or required redress of ongoing discrimination and the effects of past wrongdoing with aggressive remediation, integrative busing being a controversial example.

But by the mid 1970s, white backlash had become so potent that Congress, the executive branch, and the Supreme Court took decisive steps to limit the extent to which integrative educational reform would be permitted to encroach upon further, upon established prerogatives. Thus, it was that *Brown versus Board of Education* became an Ozymandian landmark, remarkably influential, while soberingly diminished.

In other contexts too, racial dissidents encountered frustration. They failed to convince the Supreme Court that the 13th and 14th Amendments should be interpreted to prohibit private parties from engaging in invidious racial discrimination in places of public accommodation. That is why federal legislation was needed to prescribe racial mistreatment at restaurants, hotels, amusement parks, and the like in jurisdictions without local anti-discrimination laws.

Racial reformers also endured defeats in their campaigns to effectuate voting rights, even when reinforced by three federal laws between 1957 and 1964. Only with the passage of the Voting Rights Act of 1965 were Blacks in the most recalcitrant precincts in Dixie free to register to vote unencumbered by racist hindrances.

Moreover, while the Voting Rights Act succeeded dramatically in clearing a way for individual Blacks to register and vote, the legislation was far less successful in altering arrangements that accentuated the power of the white majority and debilitated the capacity of Blacks to exercise power commensurate with their share of the voting population. The Voting Rights Act increased individual participation in electoral politics. In terms, however, of shifting the distribution of power between racial groups, the upshot of the Voting Rights Act was considerably more modest.

Racial dissidents were often unable to prevent Black communities from being mangled by racially discriminatory highway construction or redevelopment projects. The Justices of the United States Supreme Court, along with many other officials complacently ratified governmental conduct that either purposefully or indifferently destroyed scores of Black communities in the service of programs that redistributed resources to favored sectors of the population, typically, affluent whites.

Reformers also largely failed to prevent the ongoing construction of Black ghettos pursuant to, among other policies, racially discriminatory citing decisions for public housing. The record of racial reform in the administration of criminal law was decidedly mixed. Previously noted were efforts to regulate police more closely, initiatives largely motivated by fears of racism in the implementation of criminal law.

In the mid-1960s, however, the Warren court rejected pleas from racial reformers in two cases that cast long shadows over the intersection of race relations and law enforcement. In 1965, in *Swain versus Alabama*, the court declined to subject peremptory challenges in jury selection to conventional anti-discrimination norms, thereby, authorizing prosecutors to select all white juries at will.

Two years later, in *Terry versus Ohio*, the court gave police constitutional blessing to stop and frisk individuals on less than probable cause, a choice that the NAACP legal Defense Fund warned against, presciently foreseeing that loosened constraints on police would redound with special force to the detriment of Black suspects.

The ambiguity of the record regarding race relations law also obtained with respect to the law of civil liberties. Although ramparts protecting political dissent were strengthened in some ways during the era of the second Reconstruction, subversion of civil liberties during that period have never been adequately acknowledged and rectified. The Federal Bureau of Investigation bugged, harassed, and threatened leading dissidents, infiltrated groups absent legitimate justification, and spread discord for the purpose of destroying organizations that J. Edgar Hoover deemed to be ideologically obnoxious.

The FBI did this with the complicity of presidents Kennedy, Johnson, and Nixon and pursued its nefarious missions with virtual impunity. Local and State law enforcement authorities also encroached upon civil liberties. Sometimes they did so through harassment and assaults, and sometimes they did so through half-hearted investigations and prosecutions of racist attacks.

Such crimes claimed among others-- Medgar Evers, Viola Liuzzo, James Reeb, and Vernon Dahmer. Not only were they killed by violent bigots, their families and supporters were forced to watch perpetrators succeed in delaying or avoiding appropriate punishments. Some wounds from which dissident suffered were self-inflicted. Trust was misplaced in the hands of people who turned out to be government informants. Prominent reformers made their movements vulnerable to blackmail on account of personal misconduct.

Reverend King's marital infidelity, for example, gave leverage to J. Edgar Hoover's incessant efforts to hurt the Black freedom movement. The Black Panther Party allowed itself to be undermined by criminality within its ranks. Internecine conflict ravaged groups that were putatively devoted to Black solidarity. Seduced by the allure of television, newspaper headlines, and adoring followers, some dissidents cultivated personal celebrity at the expense of organizational goals. The adoption of off-putting rhetoric and comportment limited the appeal of dissidents who succumbed to self-indulgence, telegraphed in the title of screeds such as Huey Newton's revolutionary suicide in Julius Lester's, *Look Out, Whitey! Black Power's Gon' Get Your Mama*.

In the NAACP, the Southern Christian Leadership Conference and other organizations, sexism diminished the contributions of women. Remarkable activists, such as Ella Baker and Daisy Bates assisted the movement despite patriarchal restrictions. But they and others like them could have contributed even more had they not been burdened by sexism.

Dissidents also succumb to self-destructiveness, with intermittent outbursts of anti-white resentments. The expulsion of whites from the Student Nonviolent Coordinating Committee and the Congress of Racial Equality, for example, were missteps that contributed significantly to the downfall of both organizations. Protesters tried occasionally to form coalitions of racially marginalized peoples in campaigns for social justice. In a few instances, African Americans, Latino Americans, Native Americans, and Asian Americans succeeded in acting cooperatively.

To a large extent though, they failed, stymied by widely divergent group positions and needs and the ever-present pulls of selfishness and prejudice. The record then of the mid-20th century crusade against racial oppression is mixed. Weeks after the passage of the Civil Rights Act of 1964, rioting in Harlem for six days, an explosion sparked by resentment against police brutality and fueled by a combustible mix of racial discrimination and social deprivation really showed the limits of the reforms that had been mobilized in this period.

The next year, similar ingredients fuel disturbances that engulfed Watts California after passage of the Voting Rights Act. Rioting there led to 34 deaths, hundreds of injuries, around 4,000 arrests, and some \$35 million in property damage. The next several years witnessed the recurrence of long, hot summers in which riots, rebellions, and uprisings inspired firebrands, embarrassed proponents of non-violent activism, chastened liberals, alienated moderates, animated reactionaries, and fed resentment in so-called middle America that conservatives effectively reaped for decades.

A presidential commission reported early in 1968 that America was increasingly moving toward two societies, one Black, one white, separate and unequal. The extent to which this was so surely qualifies the degree to which it can rightly be said that the Civil Rights movement succeeded.

The most dramatic failure on the part of racial dissidents was their inability to transform the political environment such that adversaries of racial reform were rendered unable to retain or attain significant influence. Strom Thurmond, Richard Russell, Sam Ervin, James O. Eastland, and other leading segregationist politicians held onto their electoral posts despite the second Reconstruction. George Wallace's blatant racism in Alabama did not prevent him from becoming an important national figure, and the popularity of Lester Maddox's notorious die hard opposition to the desegregation of public accommodations propelled him to gubernatorial victory in Georgia.

Segregationists, moreover, received key support or at least acquiescence from forces beyond their most devoted followers. William Harold Cox became predictably an obstructionist, segregationist federal judge. He was the first person appointed to the federal bench by President John F. Kennedy.

JP Coleman was the governor of Mississippi who oversaw the foundering of the Mississippi Sovereignty Commission, an agency expressly dedicated to the protection of white supremacy. He was nominated to the Fifth Circuit Court of Appeals by President Lyndon Johnson. Opposing his confirmation, Mrs. Victoria Gray complained that "Throughout Mr. Coleman's long career, he has held virtually every type of office in the State of Mississippi, all of which have been won only over the rights and often the bodies of Negro citizens of that State." Coleman however, was confirmed and eventually became the Fifth Circuit's chief judge.

As a politically active attorney in Arizona, Williams H. Rehnquist vocally opposed signature racial reforms in the 1950s and 1960s, but without having to show a genuine change of mind and heart, he won elevation to the Supreme Court, becoming eventually the nation's Chief Justice. Rehnquist's career shows that racial reformism did manage to exact some concessions even from recalcitrant foes. Rehnquist grudgingly embraced *Brown versus Board of Education* rhetorically when it became apparent that doing so might be required for him to obtain senatorial confirmation.

Other foes of the Civil Rights movement also altered their ways, abandoning derogatory language and adopting gestures signifying some accommodation to a new racial dispensation. Strom Thurmond hired Blacks to work in white-collar jobs in his congressional office and sent one of his children to a desegregated public school. But such alterations were often superficial, mere fronts behind which segregationists continued to fight to preserve as much of the old order as possible.

Racial justice dissidents never became sufficiently powerful to marginalize popular political figures, even if they had resisted pivotal advances of the second Reconstruction. Ronald Reagan opposed the Civil Rights Act of 1964 and the Voting Rights Act of 1965, yet that did not prevent him from becoming governor of California and president of the United States.

How should racial reformers be assessed? From some perspectives, their accomplishments were modest, even negligible. Detractors argue that the racial justice movement for all its splendor and sacrifice excavated superficially, leaving the essentials of pigmentocracy intact. Some even maintained that reformist triumphs entrenched racism by facilitating a narrative that attributed the continuation of poor social conditions to the faults of complainants, rather than the legacies of unrectified past and ongoing wrongs.

Viewed, however, from the perspective of demands made by leading dissidents between say, 1940 and 1960, the attainments of the second Reconstruction are impressive. In 1944, a spectrum of leading Black thinkers produced an anthology under the editorial direction of Rayford Logan titled *What the Negro Wants*. Contributors included WEB Du Bois, A. Philip Randolph, Roy Wilkins, and Mary MacLeod Bethune. Published by the University of North Carolina Press, the project came near to being scuttled by white Southern liberals who were alarmed by the contributors' uniform demand that segregation be abolished.

By 1970, every legal reform demanded in what the Negro wants had come to pass. A similar trajectory marks the history of proposals made to secure these rights. The report by President Truman's Committee on Civil Rights, the PCCR, which recommended a long list of anti-discrimination measures backed most strikingly by a plea for the elimination of segregation from American life.

It urged among other things, establishing a permanent Commission on Civil Rights, legislation to protect the rights of qualified persons to vote, modifying naturalization laws to permit the granting of citizenship without regard to race, ending racial discrimination in the armed forces, conditioning all federal assistance to public or private agencies on assurance of non-discrimination, and prohibiting racial discrimination in employment, restrictive housing covenants, transportation, and places of public accommodation. Although a few recommendations by the PCCR had yet to become law by the end of the second Reconstruction, activists succeeded overall in establishing reforms that exceeded what the PCCR had envisioned.

Even when one stretches, however, to confer appropriate recognition upon the achievements of the second Reconstruction, realities ought to temper triumphalism. In an illuminating article about the NAACP as a reform movement, historians August Meier and John H. Bracey, Jr. argued that the judicial and legislative victories of the 1950s and 1960s brought to a conclusion the struggle to achieve the original goals enunciated by the NAACP in 1909.

But the NAACP charter notes an aspiration to eradicate race prejudice among the citizens of the United States and to secure for African Americans complete equality before the law. That ambition had not been attained by 1970 and remains an elusive, likely distant aspiration today.

Still, the mid 20th century struggle against racial wrongs was an inspiring episode. Its champions have been emulated, and its tactics imitated. It provided schooling to dissidents who subsequently contributed to the free speech movement, opposition to the Vietnam War, the nuclear weapons disarmament movement, the women's liberation movement, anti-poverty campaigns, and LGBTQ emancipation. It provided a text, "Letter from Birmingham Jail," that has become a canonical justification for conscientious lawbreaking. It provided an anthem, "We Shall Overcome," that has become part of the universal soundtrack of protest. It prompted speeches that are among the most inspiring examples of oratory in America's history.

The dissidents whose handiwork this book will chronicle usually sought worthy ends, typically fought with high intelligence, generally demonstrated laudable ethics, and often succeeded in producing important beneficent, generative change. Their achievements were partial to be sure and subject to erosion, but world history discloses few, if any, analogs in which ostracized minorities and their allies were able absent massive bloodletting to institute reforms comparable to those of the second Reconstruction.

Given the sacrifices made on behalf of those efforts, the limitations of what they produced are anguishing to behold. But if there is one lesson above all that I want my book to impart, it is that improving society, even a little bit, is extraordinarily difficult.

There are methodological, ideological, and personal features of this book that might be useful for readers to consider. I invest a lot of space detailing and arguing with reasons given by decision makers for the conclusions they reach and the actions they take. This attentiveness to rationales will be most manifest in my handling of judicial opinions. I wrestle with the reasoning of judges, not because I think that the reasoning they offer describes their decision making. Judges are often unaware of their motivations or knowingly or unknowingly camouflage their purposes beneath boilerplate rhetoric that has been designed over time to obfuscate, misdirect, and anesthetize.

It is important though for readers to be familiar with judicial vocabulary and logics. Even when used disingenuously, those trappings offer revealing clues and sometimes exert significant pressure on their authors insofar as they wish to be seen as custodians of aspirations they have voiced. Frequently journalists, historians, sociologists, and other commentators declined to venture into the innards of judicial opinions because they feel inhibited by an absence of specialized legal knowledge. I hope to demystify judicial opinion making.

I have strong beliefs about the ideas, events, and personalities featured in the pages of this book. I applaud the decedents who challenged racism, disapproved of the many who languished in indifference, and condemned those who fought to preserve white supremacy. At the same time, I try to present fairly the self-understandings of those I deplore.

Defenders of racial hierarchy did not perceive themselves to be in favor of evil. They believed in the rightness of what they fought and did. To understand why they fought so hard, one must comprehend their perspective.

Previously, I said that I admire the decedents who challenged white supremacy. I do. And I am also thankful for their sacrifices. It is important to acknowledge though that neither victimization by bigotry nor resistance to it immunizes anyone from vices and foibles. Hence, I note without inhibition Martin Luther King Jr.'s obvious lying when he was charged criminally with leading an allegedly illegal boycott in the struggle against segregated buses in Montgomery.

Slip ups by conscientious civil rights attorneys, the racism of certain Black separatists, the vapidness of much Black Power posturing, and the undisciplined destructiveness of rioters often misportrayed nowadays as having engaged in rebellions and uprisings. I particularly stress two layers of difficulty that dissidents faced. One involved abandoning or confronting relatives, friends, and neighbors who thought it best to conciliate the old regime.

It took courage to risk jailing to protest against racial wrongs. It took a different even more remarkable bravery for dissidents to reject the advice or commands of people who viewed themselves as acting in the best interest of the protesters. When students engaged in sit ins and the like, they were often excruciatingly aware of defying mothers and fathers who had spent a lifetime sacrificing on behalf of their children.

A second difficulty was tedious repetition. From Hollywood films, to law school text, protesters are frequently portrayed as facing an issue, winning a victory, and then quickly moving on to new territory to conquer. Actually though, protesters confronted the same issues repeatedly, prevailing only to face the necessity of having to prevail again and again and again. Reformers were condemned to a sort of tedious trench warfare.

Lawyers played critical roles in these battles. Professor Harry Calvin, Jr. once quipped that the second Reconstruction was the first revolution in history conducted, so to speak, on advice of counsel. The defenders of the old regime also employed attorneys. A few of them were quite distinguished. John W. Davis, the attorney who represented South Carolina in *Brown versus Board of Education*, was recognized by his adversaries as one of the country's ablest advocates.

Notable too was the small cadre of attorneys who attracted notoriety representing white supremacists charged with committing terroristic murders. Matthew Hobson Murphy, Jr. who represented defendants who murdered Viola Liuzzo, styled himself a Ku Klux Klan attorney, dubbing himself the Imperial Clown-*cel*, Murphy sometimes donned Klan regalia in court. The lawyers who serviced racial reaction, however, came to be typically overshadowed by those who represented racial dissonance.

Thurgood Marshall, Mr. Civil Rights, the first Black Supreme Court justice, became the subject of plays and films. Robert L. Carter, Constance Baker Motley, and Spottswood Robinson became esteemed federal judges. Lawyers at the NAACP Legal Defense Fund, under the leadership of Jack Greenberg, became a core of legendary litigators widely admired for their skilled creative and effective appellate advocacy.

These specialists were dependent upon local counsel who initiated or defended cases before judges and juries that were often openly hostile. Local counsel typically handled civil rights work alongside conventional law practice. Many were Black attorneys who operated on the margins of bars that only grudgingly tolerated them.

The Civil Rights case law that emerged during the second Reconstruction owes much to the perseverance of Oliver Hill of Virginia, Julius Chambers of North Carolina, Matthew Perry of South Carolina, Donald Hollowell of Georgia, Grattan Graves of Florida, Fred Gray of Alabama, Wiley Brannan of Arkansas, Z. Alexander Looby of Tennessee, AP Tureaud of Louisiana, and Jack Young, Carsey Hall, and R. Just Brown of Mississippi.

A small but dedicated band of white lawyers also contributed. Laughlin McDonald of Winnsboro, South Carolina said that observing firsthand the pernicious effects of racial discrimination in all areas of life made him a civil rights lawyer. But that explanation, of course, is incomplete. Many white lawyers observe the pernicious effects of racial discrimination at firsthand, but nonetheless, avoided entanglement in civil rights cases that might alienate prospective clients, influential judges, and important politicians, people whose assistance typically helped to build careers.

What prompted the few to swim against the tide is a mixture of circumstances shrouded ultimately in mystery. Part though is the valuable case law generated by litigation that was shepherded by the likes of Chuck Morgan, Armand Derfner, and Richard Sobel, lawyers whom fellow jurists despised as race traitors. Yet another distinct corps of lawyers were leftists, whose main organizational platform was the National Lawyers Guild.

Unlike the American Bar Association, which long excluded Black attorneys, the National Lawyers Guild always featured a multiracial membership. Black civil rights advocates who were members of the National Lawyers Guild included Charles Hamilton Houston, Williams Hasty, Louis Redding, and Thurgood Marshall, though several dropped the organization when it declined to rid itself of communists in contrast to the ACLU and the NAACP and when State and federal authorities intensified efforts to ostracize individuals deemed to be red were even merely pink.

During the 1960s, a lingering alienation distanced influential liberals from the National Lawyers Guild. The NAACP Legal Defense Fund, for example, declined to collaborate with the National Lawyers Guild. That should not detract, however, from the fact that the National Lawyers Guild and other left-wing lawyers did important work on behalf of the Black freedom movement. With that in mind, I try to give due credit to Leonard Boudin, Morton Stavis, Thomas Emerson, and other left-wing lawyers who made significant contributions.

Contrary to some, I argue that courts played a central role in advancing progressive racial change during the second Reconstruction. On the day before the announcement of *Brown versus Board of Education*, federal constitutional laws interpreted by the Supreme Court permitted officials to separate pupils by race purposefully in public, primary, and secondary schools. By the day after *Brown* was announced, things had changed dramatically because officials no longer had lawful or authorization to separate pupils according to race.

In some places, segregation continued for a long time, but now, officials who had previously effectuated segregation with confident openness were shoved under a pall of illegitimacy and forced to resort to subterfuge and evasion. The Supreme Court deprives separate but equal of legal rightness, a blow from which segregation has never recovered.

My view of the second Reconstruction, however, is hardly sunny. One reason is sharp and attentiveness to the deficiencies of achievements, and it stemmed from compromise. It is commonplace, for example, to read the Title VII of the 1964 Civil Rights Act prohibited racial discrimination in employment. That description is way overbroad. Title VII initially covered private employers with 25 or more employees, a limitation extracted by Illinois Senator Everett Dirksen, whose support for the legislation was essential.

The number of workers excluded from coverage by that limitation ranged from 17 million to 18 million people. Title VII did not take effect at all until a year after it was signed into law. It unfurled with all deliberate speed. During the first year after Title VII took effect, it applied only to employers with 100 or more workers. It applied to employers with 75 or more workers during the second year and 50 or more workers during the third.

Title VII did not become completely effective, therefore, until July 2, 1968. Close readings of celebrated racial reforms of the period reveal other instances of highly consequential small print that diminished the reach of legislation and case law that is often over praised.

A second probably more impactful basis for the anti-triumphalism that has overtaken my interpretation of the second Reconstruction is the profoundly disturbing recent degradation of the American sociopolitical, legal environment. The authoritarianism, deceitfulness, and brutality that has long characterized racial mistreatment has seeped into national affairs more generally, causing profound damage in new ways.

I continue to affiliate myself with optimists who answered in the affirmative to the question, shall we overcome? But I do so now with a heightened sense of trepidation. Fundamental issues that had seemed to be settled, for instance, the political virtue of facilitating voting, are actually unsettled, throwing into question with new urgency the meaning of the second Reconstruction.

I cannot confidently say that the progress it mirrored and advanced is beyond retrogression. I can say, though, that many of the dissenters who brought that era of reform into being did remarkably much with what they had and bequeathed to the world an inspiring example of humane protest. One cannot for sure what history will do to the monuments they left. One can, however, glean solace from studying their conduct in that it often exemplified a magnificent heroism that appropriately brings to mind poetry from TS Eliot, "For us, there is only the trying. The rest is not our business." Thank you.