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A Civil Rights Life: Nathaniel R. Jones. Answering the Call: An Autobiography of the Modern Struggle to End Racial Discrimination in America. New York: The New Press, 2016.

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— Book Review —

A CIVIL RIGHTS LIFE

NATHANIEL R. JONES. ANSWERING  
THE CALL: AN AUTOBIOGRAPHY  
OF THE MODERN STRUGGLE TO  
END RACIAL DISCRIMINATION IN  
AMERICA. New York: The New  
Press, 2016.

*Jonathan L. Entin*<sup>†</sup>

Nathaniel Jones has had an extraordinary career. Highlights include serving as the first African-American Assistant United States Attorney in the Northern District of Ohio; assistant general counsel of the National Advisory Commission on Civil Disorders (informally known as the Kerner Commission); general counsel of the National Association for the Advancement of Colored People; and, for nearly a quarter-century, judge of the United States Court of Appeals for the Sixth Circuit. Now, at the age of ninety, Judge Jones has written an engaging, often impassioned memoir.<sup>1</sup> This book should be of great interest to anyone interested in civil rights, especially in the North and West, after the passage of the Civil Rights Act of 1964<sup>2</sup> and the Voting Rights Act of 1965.<sup>3</sup> And it should be of special interest to readers of this journal

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1. Judge Jones is not the only distinguished civil rights lawyer to produce a memoir as a nonagenarian. William T. Coleman, Jr., who was Secretary of Transportation under President Ford and chaired the board of the NAACP Legal Defense and Educational Fund for many years, published his autobiography at the same age. *See* WILLIAM T. COLEMAN, JR. WITH DONALD T. BLISS, *COUNSEL FOR THE SITUATION: SHAPING THE LAW TO REALIZE AMERICA'S PROMISE* (2010).
2. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2012)).
3. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10702 (2012)).

because Judge Jones has had a long connection with Case Western Reserve University School of Law. He hired several of our graduates as law clerks; one of them, Judge Kathleen McDonald O'Malley of the United States Court of Appeals for the Federal Circuit and formerly of the United States District Court for the Northern District of Ohio, gets a specific shout-out (p. 236). So do two former faculty members.<sup>4</sup> Judge Jones also served for several years as a member of the law school's visiting committee, and he was one of the early speakers in the law school's Frank J. Battisti Memorial Lecture series that was endowed by friends and former law clerks of the late chief judge of the United States District Court for the Northern District of Ohio (p. 242).<sup>5</sup>

## I

The title, *Answering the Call*, has religious overtones,<sup>6</sup> but Judge Jones seems never to have been inclined to the ministry.<sup>7</sup> Rather, "The Call" was the title of a document that played a key role in the formation of the NAACP. Issued on the centennial of the birth of Abraham Lincoln, this document urged the nation to renew the struggle for racial

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4. My former colleague Roger Abrams (p. 193), who went on to serve as dean of three other law schools, filed the complaint and played an important role on the legal team in the Boston school case. *See infra* Part II.C.1. My late colleague Ted Mearns (p. 178) served as the district court's expert in the long-running Cleveland school case. *See infra* Part II.C.2. *See generally In Memoriam: Professor Edward A. Mearns, Jr.*, 64 CASE W. RES. L. REV. 303 (2013).
  5. This reviewer is not entirely disconnected from the author of the book. One of the most nerve-racking moments of my first year on the faculty occurred while the visiting committee was on campus. Judge Jones walked into my Property class while I was teaching a housing discrimination case. I was sure that he had forgotten more about fair housing law than I would ever know. Happily, Judge Jones thought the class went fine. I also have been the faculty coordinator of the Battisti lecture series for many years, so I know Judge Jones from his talk in that series, too.
  6. As Evelyn Brooks Higginbotham, widow of Judge A. Leon Higginbotham, Jr., observes in the preface, "Reminiscent of a religious leader who answers God's call to preach, Jones answered the call of Justice" (p. xi).
  7. Judge Jones does point out the importance of the church he attended during his formative years but gives no indication that he ever was drawn to the clergy (pp. 28–32). By contrast, Fred Gray—whose clients over the years have included Rosa Parks, Dr. Martin Luther King, Jr., and the victims of the infamous Tuskegee syphilis experiment—initially aimed to be a preacher of the gospel and was a part-time minister for nearly two decades after graduating from law school. FRED D. GRAY, BUS RIDE TO JUSTICE 269–74 (rev. ed. 2013); *see generally* Symposium, *In Honor of Fred Gray: Making Civil Rights Law from Rosa Parks to the Twenty-First Century*, 67 CASE W. RES. L. REV. 1025 (2017).

justice at a time when segregation seemed to be firmly entrenched (pp. 2–3).<sup>8</sup> Invoking the document that catalyzed the founding of the NAACP reflects Judge Jones’s long connection with the organization, which dates to his teen years when he came under the wing of J. Maynard Dickerson, a black lawyer and entrepreneur in his hometown of Youngstown, Ohio, who headed the local NAACP as well as the Ohio State Conference of Branches (pp. 34–35, 45, 61).

Dickerson got Jones involved in NAACP activities and made sure that the young man met national leaders, including executive secretary Walter White, assistant executive secretary Roy Wilkins (who later succeeded White in the top job), and other important figures (pp. 34, 59). Jones became president of the local NAACP youth council, helping to organize a series of protests against racial discrimination in parks, restaurants, swimming pools, and other establishments (pp. 38–39, 49–50, 54–55).<sup>9</sup> The group even engaged in sit-ins at least a decade before the iconic Greensboro demonstration on February 1, 1960, stimulated hundreds of similar protests (pp. 54–55).<sup>10</sup> All of these efforts achieved at least modest results. And as an undergraduate at what is now Youngstown State University after his service in the Army Air Corps during World War II, Jones organized a campus chapter of the NAACP that successfully challenged institutional discrimination (pp. 49–50). Along the way, he met an Antioch College student named A. Leon

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8. The issuance of “The Call” set in motion a series of events culminating in the creation of the NAACP. *See* ROBERT L. JACK, HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE 4–7 (1943); 1 CHARLES FLINT KELLOGG, NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE 12–45 (1967); PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 6–16 (2009).
  9. Dickerson also allowed Jones, while still in junior high school, to write a sports column for the *Buckeye Review*, a weekly newspaper that the lawyer-entrepreneur had established because the *Youngstown Vindicator*, the local daily newspaper, provided minimal coverage of the black community; Dickerson was unsparing in his criticism of his new writer but devoted enormous time and energy to mentoring the young man (pp. 40–41). Later, as a college student and for a time thereafter, Jones reported and wrote editorials for Dickerson’s *Buckeye Review* (pp. 48, 50, 55–57).
  10. The Youngstown sit-ins were by no means the first such demonstrations. The first sit-in took place in Chicago several years earlier, during World War II. *See* JAMES FARMER, LAY BARE THE HEART: AN AUTOBIOGRAPHY OF THE CIVIL RIGHTS MOVEMENT 105–08 (1985); AUGUST MEIER & ELLIOTT RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT, 1942–1968, at 13–14 (1973). Similar protests occurred elsewhere during the war. *See id.* at 14–15. And other NAACP youth councils engaged in sit-ins before 1960. *See* ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 188–93 (1984).

Higginbotham, Jr., who became a lifelong friend and distinguished judge, first on the United States District Court for the Eastern District of Pennsylvania and then on the United States Court of Appeals for the Third Circuit.<sup>11</sup>

Almost predictably, in light of his close relationship with Dickerson, Jones decided to go to law school. Especially influential in that decision was *Culver v. City of Warren*,<sup>12</sup> a successful challenge to the segregation of a municipal swimming pool in a community near Youngstown. The city leased the pool in early 1947 to a newly formed veterans group that refused to allow African Americans to use the facility. The Ohio Court of Appeals for the Seventh District concluded that the veterans group was “a mere agent” of the city, so the whites-only policy was unconstitutional.<sup>13</sup> Of particular importance, Jones had the opportunity to sit in on strategy sessions with the lawyers who were handling the case and also with Thurgood Marshall, who was not formally involved in the litigation but offered strategic advice to local counsel (pp. 62–65).

His deep roots in the community prompted Jones to stay in town and enroll in the now-defunct night law school that was started by the local YMCA many years earlier and since had become affiliated with his undergraduate college (p. 58). One of his teachers there was a young lawyer named Frank Battisti (pp. 98, 171). During his first year, the mayor—at Maynard Dickerson’s behest—appointed Jones as director of the city’s Fair Employment Practices Committee (p. 64). He remained in that position throughout his law school career and for a couple of years after he passed the bar exam, resigning in 1959 to open his own law office (pp. 77–78). After President John F. Kennedy took office, Dickerson began to lobby for Jones to get a job in the federal government. Those efforts paid off, and Jones became the first African American to serve as an Assistant United States Attorney in the Northern District of Ohio (pp. 82–84).<sup>14</sup>

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11. Judge Jones does not talk about his first meeting with Judge Higginbotham, but Judge Higginbotham’s widow, in the preface, mentions their close friendship (p. ix). Judge Jones does discuss their first meeting in a tribute that was published the year after Judge Higginbotham’s death. Nathaniel R. Jones, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1818, 1818 (1999).

12. 83 N.E.2d 82 (Ohio Ct. App. 1948).

13. *Id.* at 88, 93. For further details about this case, see JEFF WILTSE, *CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA* 159–62, 165–66 (2007).

14. The U.S. Attorney in the Northern District of Ohio during the Eisenhower years explained his all-white professional staff by saying that he could not find qualified black lawyers (p. 83). President Kennedy appointed Merle M. McCurdy, an African American who was Cuyahoga County’s first public

After six years as an AUSA, Jones became an assistant general counsel of the Kerner Commission, which was established in the wake of the 1967 Detroit riots and other urban violence. In that position, he coordinated field teams to go to cities around the nation to obtain information related to the urban violence that had occurred over the previous several years and to coordinate commission hearings (pp. 86–93).<sup>15</sup> The commission ultimately concluded that white racism was primarily responsible for the riots and urged public investment to improve social conditions (pp. 94–95).<sup>16</sup>

Following his time in the U.S. Attorney's office and with the Kerner Commission, Jones left federal service and returned to private law practice in Youngstown. There he resumed his leading role in local and state NAACP activities (p. 97). This period in Youngstown turned out to be a brief interlude.

## II

### A

In late 1968, Lewis Steel, a staff lawyer in the NAACP's national legal department, published an article in the *New York Times Magazine* that strongly criticized the Supreme Court's record in civil rights cases.<sup>17</sup> Steel contended that the Court historically had shown little sympathy for racial discrimination claims and continued to rule against such claims.<sup>18</sup> Although the Court had rejected segregation in public

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defender, as his U.S. Attorney. McCurdy briefly delayed finalizing Jones's appointment to discourage suggestions of racial favoritism (pp. 83–84).

15. One notable episode concerned an uneventful staff interview with the entertainer Eartha Kitt that took place in the morning before a White House luncheon at which she got into a highly publicized argument with President Lyndon B. Johnson (pp. 90–93).
16. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Bantam Books ed. 1968).
17. Lewis M. Steel, *Nine Men in Black Who Think White*, N.Y. TIMES, Oct. 13, 1968, § 6 (Magazine), at 56.
18. Among the cases Steel mentioned by name or alluded to were *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (upholding contempt convictions against Martin Luther King, Jr. and other activists who had defied an ex parte injunction prohibiting the Good Friday 1963 march in Birmingham); *Adderley v. Florida*, 385 U.S. 39 (1966) (upholding trespassing convictions of demonstrators protesting the arrest of fellow civil rights demonstrators); and *Swain v. Alabama*, 380 U.S. 202 (1965) (rejecting a challenge to race-based peremptory challenges to prospective jurors). Steel, *supra* note 17, at 113–14. Although this does not affect the validity of Steel's claim at the time he wrote, *Swain* was overruled more than two decades later by *Batson*

schools in *Brown v. Board of Education*,<sup>19</sup> it had remanded the cases to the lower courts to formulate local remedies “with all deliberate speed,”<sup>20</sup> which resulted in glacial progress toward desegregation.<sup>21</sup> Steel’s boss, NAACP general counsel Robert L. Carter, had reviewed the manuscript and found it “terrific.”<sup>22</sup> The board of directors disagreed. The next day, over Carter’s strenuous objection, the board fired Steel.<sup>23</sup> The entire legal staff resigned in protest.<sup>24</sup>

Soon afterward, Jones received an offer to succeed Carter as general counsel. This would be challenging for anyone, as Carter was something of a legend: he was a highly respected lawyer who had spent almost a quarter-century with the organization, where he played a major role in devising the legal strategy in the litigation campaign against segregation and argued *Brown* in the Supreme Court (pp. 99–100). To his surprise, his mentor Dickerson strongly discouraged him from taking the job, but not because of the daunting prospect of replacing Carter (pp. 98–99). Dickerson was concerned that Jones would find it difficult to navigate the complex internal politics of the national organization. Jones says relatively little about those complexities, although he does discuss the controversy surrounding the Steel article (pp. 100–01) and

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v. Kentucky, 476 U.S. 79 (1986). The other decisions retain their precedential status.

19. 347 U.S. 483 (1954).
20. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).
21. Steel also explained that the Court had declined to review several important racial discrimination cases. Steel, *supra* note 17, at 113, 115.
22. ROBERT L. CARTER, *A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS* 200 (2005).
23. *Id.* at 200–02; *N.A.A.C.P. Dismisses Lawyer Because of Article*, N.Y. TIMES, Oct. 15, 1968, at 53. Judge Jones, who was not present at these events in New York because they occurred while he was back in Youngstown, says that Carter refused the board’s order to fire Steel (p. 101). That statement is inconsistent with Carter’s account, but resolving the discrepancy is beyond the scope of this review.
24. CARTER, *supra* note 22, at 202. In the end, both Carter and Steel did fine. Carter spent a year at Columbia University and three years as a partner in a law firm before being appointed to the United States District Court for the Southern District of New York, where he remained until his death in 2012. *Id.* at 204, 207–08, 214–18; Roy Reed, *Robert L. Carter, 94, Leading Strategist Against Segregation and U.S. Judge, Dies*, N.Y. TIMES, Jan. 4, 2012, at A17. Steel went on to a successful career as a civil rights lawyer in his own firm, where he partnered with one of the other NAACP staff lawyers who quit in response to his dismissal. See Diane Cardwell, *City Agrees to Settlement in Parks Dept. Bias Case*, N.Y. TIMES, Feb. 27, 2008, at B4; Douglas Martin, *Richard Bellman, Lawyer, Dies at 74*, N.Y. TIMES, Apr. 30, 2012, at A17; Lynda Richardson, *For Civil Rights Lawyer, the Fight Is Far from Over*, N.Y. TIMES, July 5, 2002, at B2.

also mentions the long-running tensions between the NAACP and the NAACP Legal Defense and Educational Fund that eventually culminated in litigation between the two organizations (p. 99).<sup>25</sup>

Jones accepted the offer and spent the next ten years as the NAACP's general counsel. The best parts of the book chronicle this period. Some of the stories are offbeat, such as how the NAACP came into possession of the ashes of the writer Dorothy Parker (pp. 114–17);<sup>26</sup> others are moving, such as how Clarence Norris, the last surviving Scottsboro defendant, received a pardon from Alabama Governor George Wallace forty-five years after he and eight other young men were falsely accused of raping two white women and sentenced to death (pp. 117–23).<sup>27</sup>

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25. See *NAACP v. NAACP Legal Def. & Educ. Fund, Inc.*, 753 F.2d 131 (D.C. Cir. 1985) (holding that the NAACP's trademark-infringement suit against the LDF was barred by laches). For an NAACP perspective on the litigation, see BENJAMIN L. HOOKS WITH JERRY GUESS, *THE MARCH FOR CIVIL RIGHTS: THE BENJAMIN HOOKS STORY* 179–80 (2004). For an LDF perspective, see COLEMAN, *supra* note 1, at 321–22.

There were other internal political battles during Judge Jones's tenure as general counsel. One involved the departure of Roy Wilkins as executive secretary, a process that was complicated by his awkward relationship with board chair Margaret Bush Wilson, who assumed that role on the death of her long-time predecessor. See ROY WILKINS WITH TOM MATHEWS, *STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS* 340 (1982). And there was intense maneuvering during the process of selecting a new executive secretary after Wilkins retired. See HOOKS, *supra*, at 128.

After Judge Jones went onto the bench, board chair Wilson was involved in ongoing controversy. In addition to the tension with Wilkins, she had a difficult relationship with Benjamin Hooks, the new executive director, and early in 1983 she unilaterally suspended him. *Id.* at 132–34; Sheila Rule, *N.A.A.C.P. Officials Say Director Has Been Indefinitely Suspended*, N.Y. TIMES, May 21, 1983, at 1. The full board overturned the suspension and removed Wilson as chair. HOOKS, *supra*, at 134; Sheila Rule, *Board of N.A.A.C.P. Calls for Resignation of Unit's Chairman*, N.Y. TIMES, May 29, 1983, at 1. The following year, Thomas Atkins, who had succeeded Jones as general counsel, resigned that position. *N.A.A.C.P.'s Counsel to Leave Office in July*, N.Y. TIMES, Apr. 10, 1984, at B9. Wilson had named Atkins as acting executive director when she suspended Hooks. Douglas C. McGill, *Chairman of N.A.A.C.P. Says She Is 'Unaware' of Meeting*, N.Y. TIMES, May 25, 1983, at A24. For more on Atkins, see *infra* notes 74–84 and accompanying text.

26. Parker wrote for *The New Yorker* for many years. Among her best-known lines are: “Men seldom make passes at girls who wear glasses”; “Beauty is only skin deep, but ugly goes clean to the bone”; “Writing well is the best revenge”; and “If you want to know what God thinks of money, just look at the people he gave it to.” Her reaction to the death of the famously taciturn ex-President Calvin Coolidge reportedly was: “How can they tell?”
27. See *Norris v. Alabama*, 294 U.S. 587 (1935) (overturning Norris's second conviction and death penalty because African Americans had been excluded

## B

The heart of the discussion emphasizes the NAACP's litigation against segregated schools not just in the South but also in the North and West. Judge Jones succinctly discusses legal strategy and school desegregation cases. This section focuses on strategy; the next section addresses some of the cases, especially those in Boston and Cleveland.

The discussion of strategy effectively reviews how Charles Hamilton Houston and his disciple Thurgood Marshall conducted the legal attack on segregated schools. That discussion might have made explicit that Houston's early emphasis on "the failure to make 'separate' truly 'equal'" (p. 128) focused on southern and border states which provided no graduate or professional programs for African Americans.<sup>28</sup> The issue was not "separate but equal"; instead, it was "separate and nonexistent."<sup>29</sup> The first victories came in states that operated whites-only law schools and offered to subsidize African Americans who went to out-of-state law schools.<sup>30</sup> But by 1950, in *Sweatt v. Painter*,<sup>31</sup> one of the last of the pre-*Brown* graduate and professional school cases, the NAACP was attacking the constitutionality of segregation head-on (p. 129).<sup>32</sup> From that point onward, the organization steadfastly committed itself to promoting school desegregation (pp. 130–33).

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from the jury); *Powell v. Alabama*, 287 U.S. 45 (1932) (overturning the convictions and death penalties in the first Scottsboro trials because the defendants had been denied the right to counsel); *see generally* DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (rev. ed. 2007); JAMES GOODMAN, *STORIES OF SCOTTSBORO* (1994).

28. *See* MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 174 n.5 (1987).

29. *Id.* at 36.

30. *See* *Pearson v. Murray*, 182 A. 590 (Md. 1936); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). One minor quibble: Judge Jones says that Lloyd Gaines was admitted to the previously all-white University of Missouri Law School following the Supreme Court ruling in his case (p. 128). In fact, the Court ordered his admission "in the absence of other and proper provision for his legal training within [Missouri]." 305 U.S. at 352. The state responded by establishing a new law school at its all-black Lincoln University. Gaines disappeared before the trial court could conduct a hearing on whether the new school was substantially equal to the all-white law school at the University of Missouri. SULLIVAN, *supra* note 8, at 233; TUSHNET, *supra* note 28, at 73–74.

31. 339 U.S. 629 (1950).

32. At trial, Thurgood Marshall made a detailed record showing that the law school at the newly created Texas State University for Negroes was vastly inferior to the all-white University of Texas Law School. *See* Jonathan L. Entin, *Sweatt v. Painter, the End of Segregation, and the Transformation of Education Law*, 5 REV. LITIG. 3, 31–39 (1986).

This commitment to integrated schools generated controversy in later years. Judge Jones reviews the conflict between the NAACP's national office and its Atlanta branch when the local group endorsed a plan that provided for more black administrators and less desegregation of student bodies (pp. 136–43).<sup>33</sup> Meanwhile, Derrick Bell, the noted Harvard law professor and former staff lawyer with the NAACP Legal Defense and Educational Fund, began to question the wisdom of single-minded pursuit of integration.<sup>34</sup> Judge Jones responded to Professor Bell at the time and does so again in his memoir (pp. 143–46).<sup>35</sup>

This controversy reflected a long-running debate within the NAACP that dated back to the 1930s. After documenting massive disparities between white and black schools under segregation, the organization considered two different legal strategies: equalization of the separate schools and a direct attack on the constitutionality of segregated schools.<sup>36</sup> That conversation was part of a broader argument about whether segregation afforded opportunities to promote distinctive black institutions and provided means of social and economic mobility for black professionals, or whether segregation served to oppress and dehumanize African Americans.<sup>37</sup> The education debate specifically focused on the fate of black teachers and principals who might lose their jobs under desegregation because white parents almost certainly would object to black faculty and administrators for their children, and on the uncertain treatment that black children could expect in desegregated schools.<sup>38</sup> One notable skeptic, W.E.B. Du Bois, argued that “the Negro

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33. After protracted litigation, the so-called Atlanta Compromise was upheld in court. *See Calhoun v. Cook*, 522 F.2d 717 (5th Cir.), *reh'g denied*, 525 F.2d 1203 (5th Cir. 1975). For a detailed account of the controversy, see TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* 357–408 (2011).

34. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976); *see also* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518 (1980).

35. *See* Nathaniel R. Jones, *Correspondence, School Desegregation*, 86 *YALE L.J.* 378 (1976). For Professor Bell's reply, *see id.* at 382.

36. *See* GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 113–15 (1983); SULLIVAN, *supra* note 8, at 130–31, 156–57; TUSHNET, *supra* note 28, at 5–6, 13–14, 25–28.

37. *See* MCNEIL, *supra* note 36, at 116–17; SULLIVAN, *supra* note 8, at 198–202; TUSHNET, *supra* note 28, at 8–10.

38. *See* SULLIVAN, *supra* note 8, at 123–26, 128–31; TUSHNET, *supra* note 28, at 111–13.

needs neither segregated schools nor mixed schools. What he needs is Education.”<sup>39</sup>

To be sure, some of the early NAACP cases could be viewed as furthering an equalization approach. Those cases challenged, with mixed success, race-based salary disparities for public school teachers.<sup>40</sup> But, as noted earlier, the organization committed to the direct attack in the years leading up to *Brown*.<sup>41</sup> While there were some skeptics in the black community, the NAACP’s support of the direct attack reflected the clear majority view among African Americans.<sup>42</sup> Several decades later, the situation seemed more complicated when the Atlanta flap arose and Professor Bell questioned the presumptive valorization of integration. What would it mean to “integrate” a school system in which more than 85 percent of the students were African American?<sup>43</sup> Judge Jones and the national NAACP kept faith in integration; they sought a metropolitan remedy that would involve the overwhelmingly white suburban schools. Indeed, Judge Jones was arguing for precisely that remedy in Detroit and believed that the Atlanta dissidents were undercutting his position (pp. 137, 142). Although Jones substantially prevailed on that issue in the lower courts,<sup>44</sup> the Supreme Court reversed and rejected a metropolitan remedy in *Milliken v. Bradley*.<sup>45</sup> That ruling made it extremely difficult to include suburban districts in any desegregation remedy and profoundly shaped the scope of relief in other school cases.

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39. W.E. Burghardt Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935). For more on Du Bois’s skepticism about integration, which contributed to his resignation from the NAACP staff, see DAVID LEVERING LEWIS, W.E.B. DU BOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919–1963, at 330–44 (2000).

40. The salary-equalization litigation campaign won a few notable cases. *See, e.g.*, *Alston v. Sch. Bd.*, 112 F.2d 992 (4th Cir. 1940); *Mills v. Bd. of Educ.*, 30 F. Supp. 245 (D. Md. 1939). But many other cases failed because plaintiffs could not prove that salary disparities were race-based even though black teachers received disproportionately low compensation. *See TUSHNET, supra* note 28, at 92–93, 96–97.

41. *See supra* notes 31–32 and accompanying text.

42. *See TUSHNET, supra* note 28, at 151–55.

43. *See Calhoun v. Cook*, 522 F.2d 717, 718 (5th Cir. 1975).

44. *Bradley v. Milliken*, 484 F.2d 215, 250–52, 258 (6th Cir. 1973), *rev’d*, 418 U.S. 717 (1974).

45. 418 U.S. 717 (1974).

## C

When *Brown* was decided, segregation was required by law only in the South and some Border States.<sup>46</sup> In the early 1960s, the NAACP under Robert Carter began to argue that children in urban schools with overwhelmingly black enrollment suffered the same harms as black children in schools that were segregated by law.<sup>47</sup> But the courts recognized a distinction between *de jure* segregation and *de facto* segregation, racial imbalances that do not directly arise from discrimination by government.<sup>48</sup> Although Judge Jones regards the distinction as a “fiction” (p. 152), he points out that challenges based only on *de facto* segregation generally failed (pp. 152–53).<sup>49</sup> This meant that successful challenges would require proof of official actions or policies that sought to promote racial separation in education. And the Supreme Court

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46. Many jurisdictions elsewhere in the nation had required segregated schools in earlier times. A notable example is Massachusetts, where the state supreme court upheld school segregation in a notorious pre-Civil War ruling. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850). The Supreme Court relied on this case in *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), even though the legislature effectively overruled the decision shortly after it came down. See 1855 Mass. Acts 674 (prohibiting racially segregated schools). That legislation did not resolve the matter. See *infra* Part II.C.1.
47. CARTER, *supra* note 22, at 171–72, 191–92; J. ANTHONY LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* 234 (1985).
48. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17–18 (1971); *Offermann v. Nitkowski*, 378 F.2d 22, 24 (2d Cir. 1967); *Webb v. Bd. of Educ.*, 223 F. Supp. 466, 468 (N.D. Ill. 1963).
49. As representative examples, he cites cases from Cleveland and Cincinnati: *Craggett v. Bd. of Educ.*, 234 F. Supp. 381 (N.D. Ohio), *aff'd*, 338 F.2d 941 (6th Cir. 1964); and *Deal v. Cincinnati Bd. of Educ.*, 244 F. Supp. 572 (S.D. Ohio 1965), *aff'd*, 369 F.2d 55 (6th Cir. 1966), *appeal after remand*, 419 F.2d 1387 (6th Cir. 1969). The Supreme Court effectively rejected the notion that *de facto* segregation was unconstitutional. See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976) (explaining that school districts have no duty to respond to the “quite normal pattern of human migration” that affects the racial composition of their schools). Although *de facto* segregation claims ultimately failed, a demonstration against the phenomenon did lead to a Supreme Court decision that broadened First Amendment rights. Activist-comedian Dick Gregory led a peaceful march to the neighborhood of Mayor Richard J. Daley demanding more aggressive policies to combat *de facto* segregation in the Chicago public schools. Confronted by hostile spectators, Gregory and his fellow marchers were arrested for disorderly conduct when they refused a police order to disperse. T. Rees Shapiro, *Dick Gregory (1932–2017): His Searing Punchlines Landed Hard*, WASH. POST, Aug. 21, 2017, at A1, A2. The Supreme Court unanimously reversed the convictions. *Gregory v. City of Chicago*, 394 U.S. 111, 113 (1969).

made clear in *Keyes v. School District No. 1*,<sup>50</sup> which arose in Denver, that a school district that never was required to operate segregated schools nevertheless could be held liable for running “a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system.”<sup>51</sup>

He chronicles many cases in which the NAACP brought *de jure* segregation claims in the North and West. These efforts had mixed success. The discussion includes lawsuits involving Detroit (pp. 156–65),<sup>52</sup> Dayton (pp. 165–69),<sup>53</sup> Grand Rapids (pp. 179–81),<sup>54</sup> and Youngstown (pp. 179–83).<sup>55</sup> The latter case, involving Judge Jones’s hometown school district, was especially frustrating because the district court “refused to recognize the cumulative effect of segregative acts” (p. 181) and the court of appeals accepted that “flawed analytical process” (p. 182).

This section focuses on two of the cases that Judge Jones addresses. The Boston case attracted widespread national—and even international—attention and is worthy of separate consideration for that reason alone. But the case also introduces Thomas I. Atkins, who played a prominent role in that litigation and, with Judge Jones’s enthusiastic support, succeeded him as NAACP general counsel. So the next section provides a somewhat broader background perspective on Boston than Judge Jones can provide in a memoir and also some additional details about Atkins.<sup>56</sup> Following the Boston discussion, attention turns to the Cleveland school case. That controversy never achieved the notoriety of the Boston situation, but it remains a subject of intense local interest and has several connections to this law school.<sup>57</sup>

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50. 413 U.S. 189 (1973).

51. *Id.* at 201.

52. *Milliken v. Bradley*, 418 U.S. 717 (1974), *appeal after remand*, 433 U.S. 267 (1977) (affirming remedy following the Court’s previous rejection of a metropolitan remedy).

53. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).

54. *Higgins v. Bd. of Educ.*, 395 F. Supp. 444 (W.D. Mich. 1973), *aff’d*, 508 F.2d 779 (6th Cir. 1974).

55. *Alexander v. Youngstown Bd. of Educ.*, 454 F. Supp. 985 (N.D. Ohio 1978), *aff’d*, 675 F.2d 787 (6th Cir. 1982).

56. I met Tom Atkins for the first time in May 1963, when he was introduced as the new executive secretary of the Boston branch of the NAACP, and worked on various projects in which he was involved over the next several years. We also remained in touch for a long time after both of us left the Boston area, although we had not spoken in quite a while when he died in 2008.

57. In addition to Professor Mearns’s role as the district court’s special expert in that case, *see supra* note 4, two longtime members of our adjunct faculty

No school desegregation lawsuit receives more space—nearly a dozen pages—than the Boston case (pp. 191–201). Judge Jones likens the resistance to desegregation in that bastion of liberalism to Little Rock (pp. 191, 197). Some readers might find it a bit difficult to follow the chronology of the litigation, because the discussion focuses only briefly on the ruling by Judge W. Arthur Garrity that found the Boston public schools to be unconstitutionally segregated (pp. 194–95). Most of the Boston section addresses the work of the legal team that litigated the case (pp. 192–93), the resistance to the Phase I remedy (pp. 196–97), and the opposition of President Gerald R. Ford and his administration to the so-called “forced busing” of students as part of that remedy (pp. 197–201).

After nearly two years of litigation, Judge Garrity issued a comprehensive ruling on liability in June 1974. In *Morgan v. Hennigan*,<sup>58</sup> he found that school authorities had deliberately segregated the system by maintaining overcrowded, predominantly white schools while also operating underutilized, predominantly black schools;<sup>59</sup> changed attendance zones to perpetuate segregation;<sup>60</sup> manipulated the factors used to assign students to high schools;<sup>61</sup> implemented transfer policies that pro-

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clerked for Judge Battisti at different stages of the litigation. Dan McMullen and Dennis Terez later published articles in this review that addressed in broader terms some issues that arose during the case. See Daniel J. McMullen & Irene Hirata McMullen, *Stubborn Facts of History—The Vestiges of Past Discrimination in School Desegregation Cases*, 44 CASE W. RES. L. REV. 75 (1993); Dennis G. Terez, *Protecting the Remedy of Unitary Schools*, 37 CASE W. RES. L. REV. 41 (1986). McMullen served as the court’s school desegregation monitor following his clerkship and, after Battisti’s death, as special master. See RONNIE A. DUNN ET AL., *BOYCOTTS, BUSING, AND BEYOND: THE HISTORY AND IMPLICATIONS OF SCHOOL DESEGREGATION IN THE URBAN NORTH* 142 (2016); McMullen & McMullen, *supra*, at 75 n.†; Richard B. Saphire, *Bringing Brown to Cleveland*, in *JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO* 127, 157 nn.78 & 88 (Paul Finkelman & Roberta Sue Alexander eds., 2012). Terez later served for more than a decade as the Federal Public Defender for the Northern District of Ohio; for nearly two years, he also was the Acting Federal Public Defender for the Southern District of Ohio.

58. 379 F. Supp. 410 (D. Mass.), *aff’d sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

59. *Id.* at 425–27. School authorities refused to assign students in overcrowded white schools to available seats in black schools. *Id.* at 427–32.

60. *Id.* at 432–41.

61. *Id.* at 441–49.

motated segregation;<sup>62</sup> assigned African-American teachers to predominantly black schools that also had less experienced teachers and greater faculty turnover than predominantly white schools;<sup>63</sup> and intentionally segregated the city's specialized high schools and vocational programs.<sup>64</sup> The Phase I remedy called for cross-busing between Roxbury, the heart of Boston's black community, and South Boston, the city's most self-consciously Irish neighborhood. The highly publicized violent resistance during Phase I took place in South Boston (p. 196). Judge Garrity devised a more comprehensive Phase II remedy that applied to the entire city and went into effect the following year.<sup>65</sup> Phase II elicited even more resistance than Phase I; the case went on for another two decades.<sup>66</sup>

Because he is writing a memoir rather than a comprehensive account of the Boston school litigation, Judge Jones understandably elides many of these details. But it is important to recognize that this dispute actually arose nearly a dozen years before Judge Garrity's ruling on liability and his Phase I order in 1974. This is especially significant because Thomas Atkins, whose role in the Boston case and others comes in for high praise (pp. 192–93, 194), was a principal actor in the earlier events.

The path to *Morgan* began in June 1963, when the local NAACP asked the Boston School Committee to address the problem of *de facto* segregation. The Committee, chaired by Louise Day Hicks, refused to do so.<sup>67</sup> Civil rights advocates responded by picketing school headquarters and organizing a one-day boycott of junior and senior high schools.<sup>68</sup> Matters further deteriorated over the next several months. Mrs. Hicks won an overwhelming victory in the November city election, receiving more votes than every other candidate for local office, including a popular incumbent mayor who easily won reelection.<sup>69</sup>

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62. *Id.* at 449–56.

63. *Id.* at 459–66.

64. *Id.* at 466–69.

65. *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied sub nom. White v. Morgan*, 426 U.S. 935 (1976).

66. *See Morgan v. Gittens*, 915 F. Supp. 457 (D. Mass. 1996) (awarding attorneys' fees following entry of final judgment).

67. RONALD P. FORMISANO, *BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S*, at 28–29 (1991); LUKAS, *supra* note 47, at 124–26; JIM VRABEL, *A PEOPLE'S HISTORY OF THE NEW BOSTON* 51–52 (2014).

68. FORMISANO, *supra* note 67, at 29; LUKAS, *supra* note 47, at 127; VRABEL, *supra* note 67, at 53–54.

69. FORMISANO, *supra* note 67, at 31; LUKAS, *supra* note 47, at 129; VRABEL, *supra* note 67, at 57. Mrs. Hicks, the daughter of a prominent lawyer, judge, and business figure for whom a major thoroughfare in South Boston is

Two years later, the legislature approved the Racial Imbalance Law,<sup>70</sup> which sought to force Boston to address the issue of *de facto* segregation. The School Committee strenuously opposed the measure. In November 1965, Mrs. Hicks and her allies swept to another strong victory; the only member who had expressed any sympathy for the NAACP's position was defeated.<sup>71</sup> The Committee resisted the law for the next nine years, losing millions of dollars in both state and federal education money.<sup>72</sup> The *Morgan* lawsuit was filed in March 1972 as a *de jure* segregation claim.<sup>73</sup>

Thomas Atkins, whom Judge Jones effusively praises as “one of the brightest and most courageous individuals” he dealt with during his

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named, had been elected to the School Committee as a reformer in 1961. FORMISANO, *supra* note 67, at 30; LUKAS, *supra* note 47, at 116–17, 123. Despite her persistent hostility to claims of *de facto* segregation, she had belonged to a law school study group that included three African-American members. *Id.* at 119. Although widely regarded as a bigot based not only on her rejection of the NAACP's position but also on her campaign slogan—“You know where I stand,” *id.* at 134—Mrs. Hicks never made the sort of racially charged statements that some of her School Committee colleagues did. *See id.* at 132. And she rebuffed Alabama Governor George Wallace during his insurgent campaign for the 1964 Democratic presidential nomination and his independent run for the presidency in 1968. *Id.* at 128, 135.

Wallace also might have operated in part out of political opportunism. He began as an active supporter of the liberal Big Jim Folsom. DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 69, 81–82 (1995); MARSHALL FRADY, *WALLACE* 98–99, 106–07 (enlarged and updated ed. 1976). He served as a trial judge for several years during this period. Civil rights lawyer Fred Gray, who had many subsequent run-ins with the man, reports that Judge Wallace treated him with courtesy and respect. GRAY, *supra* note 7, at 131, 137. Wallace broke with Folsom in 1956 over civil rights. CARTER, *supra*, at 84–85; FRADY, *supra*, at 108–09. But after he lost the 1958 gubernatorial primary to a hard-core segregationist, Wallace vowed never again to be outflanked on racial issues. CARTER, *supra*, at 96 & n.\*; FRADY, *supra*, at 127. Years later, in his last campaign, Wallace sought forgiveness from civil rights activists who generally accepted his repentance. CARTER, *supra*, at 460–62; GRAY, *supra* note 7, at 350.

70. Ch. 641, 1965 Mass. Acts 414 (codified as amended at MASS. GEN. LAWS ANN. ch. 71, §§ 37C–37D (West 2009)).

71. FORMISANO, *supra* note 67, at 39; LUKAS, *supra* note 47, at 130–31; VRABEL, *supra* note 67, at 57.

72. FORMISANO, *supra* note 67, at 44–47, 49, 53; LUKAS, *supra* note 47, at 132; *Morgan v. Hennigan*, 379 F. Supp. 410, 420–21 (D. Mass.), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

73. FORMISANO, *supra* note 67, at 53–54; LUKAS, *supra* note 47, at 219.

NAACP career (p. 194), played a significant role in Boston throughout these events.<sup>74</sup> A Phi Beta Kappa graduate of Indiana University, where he was the first African-American student body president, Atkins entered a Ph.D. program at Harvard in 1961.<sup>75</sup> He wrote a seminar paper that severely criticized the Boston branch of the NAACP; the branch responded by hiring him as executive secretary in May 1963, shortly before the organization raised the *de facto* segregation issue with the School Committee.<sup>76</sup> He briefly served as business manager for Boston Celtics star Bill Russell, whose enterprises included a popular Roxbury restaurant and a rubber plantation in Liberia, before enrolling at Harvard Law School in the fall of 1966.<sup>77</sup> In June 1967, shortly after the end of his first year, Atkins played a key role in tamping down Boston's first significant racial violence but got into an altercation with a white police officer while trying to protect a black reporter who was covering the events.<sup>78</sup>

That episode did not prevent him from running for office later in the year. In November 1967, during his third semester in law school, Atkins became the first African American ever elected to an at-large seat on the Boston City Council.<sup>79</sup> Soon after taking office, Atkins bro-

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74. Judge Jones also notes Atkins's deep involvement in other desegregation lawsuits, especially the Cleveland case (pp. 173–74). *See infra* Part II.C.2.
75. HILLEL LEVINE & LAWRENCE HARMON, *THE DEATH OF AN AMERICAN JEWISH COMMUNITY: A TRAGEDY OF GOOD INTENTIONS* 100 (1992); VRABEL, *supra* note 67, at 54; Eric Moskowitz & Mark Feeney, *Civil Rights Trailblazer Atkins Dies at 69*, BOS. GLOBE, June 29, 2008, at A1, A16. Atkins not only was the first black student body president at Indiana University, he was the first African American to hold that office at any Big 10 university. VRABEL, *supra* note 67, at 54; Moskowitz & Feeney, *supra*, at A16.
76. LEVINE & HARMON, *supra* note 75, at 100; VRABEL, *supra* note 67, at 54.
77. LEVINE & HARMON, *supra* note 75, at 100–01.
78. *See id.* at 98–99, 102–03; Editorial, *Thanks to Thomas Atkins*, BOS. GLOBE, Nov. 7, 1997, at A26.
79. Moskowitz & Feeney, *supra* note 75, at A1. Judge Jones suggests that Atkins was the first black person ever elected to council (p. 192), but one African American briefly represented Roxbury in 1951. Here is what happened: For most of the twentieth century, members of the Boston City Council were elected at large. For a time, however, members were elected from wards. *See* EDWARD C. BANFIELD & JAMES Q. WILSON, *CITY POLITICS* 94 (1963). In 1949, a black lawyer named Lawrence Banks won a close vote in his ward. Because of a protracted contest of the result, Banks served only the last few months of his term. *See* *Banks v. Election Comm'rs*, 99 N.E.2d 755 (Mass. 1951); LEVINE & HARMON, *supra* note 75, at 107. At that 1949 election, the voters also abolished district-based seats and returned to an at-large City Council that remained all-white until Atkins won his seat in 1967. *See* BANFIELD & WILSON, *supra*, at 94; LUKAS, *supra*

kered a complex deal that allowed a James Brown concert to go on the night after Martin Luther King's assassination and to have the concert televised in a successful effort to minimize violence in the city.<sup>80</sup> He was easily reelected in 1969, finishing second behind only Louise Day Hicks in an eighteen-candidate field.<sup>81</sup> In 1971 he ran for mayor but lost in the primary; the governor of Massachusetts then appointed him Secretary of Communities and Development.<sup>82</sup> He went on to operate his own civil rights law firm and was president of the Boston branch of the NAACP from 1974 until he succeeded Judge Jones as general counsel of the national NAACP in 1980.<sup>83</sup> Meanwhile, he served as lead counsel in the Cleveland case.<sup>84</sup>

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The Cleveland school case, *Reed v. Rhodes*,<sup>85</sup> also receives substantial attention from Judge Jones (pp. 169–79). Here he provides

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note 47, at 60; ALAN LUPO, *LIBERTY'S CHOSEN HOME* 89 (2d ed. 1988); JAMES Q. WILSON, *NEGRO POLITICS* 32 (1960).

80. LEVINE & HARMON, *supra* note 75, at 143–45; LUKAS, *supra* note 47, at 32–35; Moskowitz & Feeney, *supra* note 75, at A16.
81. LEVINE & HARMON, *supra* note 75, at 271. Mrs. Hicks had narrowly lost the 1967 mayoral election and was defeated by a wider margin when she sought the position again in 1971. LUKAS, *supra* note 47, at 136–37; LUPO, *supra* note 79, at 113, 115.
82. Moskowitz & Feeney, *supra* note 75, at A16.
83. *See id.* As a private lawyer before his tenure as NAACP general counsel, Atkins substantially participated in school desegregation cases around the nation. *See, e.g.*, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 451 (1979); *United States v. Bd. of Sch. Comm'rs*, 637 F.2d 1101, 1103 (7th Cir. 1980); *Adams v. United States*, 620 F.2d 1277, 1279 (8th Cir. 1980); *Bradley v. Milliken*, 620 F.2d 1143, 1144 (6th Cir. 1980); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 307 (7th Cir. 1980), *overruled in part by Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998); *S.F. NAACP v. S.F. Unified Sch. Dist.*, 484 F. Supp. 657, 659 (N.D. Cal. 1979); *Berry v. Sch. Dist.*, 467 F. Supp. 630, 632 (W.D. Mich. 1978); *Alexander v. Youngstown Bd. of Educ.*, 454 F. Supp. 985, 986 (N.D. Ohio 1978), *aff'd*, 675 F.2d 787 (6th Cir. 1982).
84. *See infra* Part II.C.2.
85. 422 F. Supp. 708 (N.D. Ohio 1976), *remanded mem. for reconsideration*, 559 F.2d 1220 (6th Cir. 1977), *adhered to on remand*, 455 F. Supp. 546 (N.D. Ohio) (reaffirming finding of liability), *relief ordered*, 455 F. Supp. 569 (N.D. Ohio 1978), *aff'd and remanded*, 607 F.2d 714 (6th Cir. 1979). This case, like *Morgan* in Boston, went on for another two decades. The parties entered into a consent decree in 1994, *Reed v. Rhodes*, 869 F. Supp. 1274 (N.D. Ohio 1994), and the district court—over the plaintiffs' objections—concluded that the Cleveland Metropolitan School District had attained unitary status several years later, *Reed v. Rhodes*, 1 F. Supp. 2d 705 (N.D. Ohio 1998), *aff'd per curiam*, 215 F.3d 1327 (6th Cir. 2000).

more background than for Boston and the other school cases, although the main focus remains on legal strategy rather than on the events that led to the filing of the lawsuit. He explains that *Reed* was filed several years after a failed challenge to *de facto* segregation in Cleveland, *Craggett v. Board of Education*,<sup>86</sup> and that this affected the legal strategy that the NAACP would pursue in the later lawsuit (pp. 169–70). But a more detailed account of the *Craggett* dispute can put *Reed* into broader perspective.

That dispute arose from the official response to overcrowding in predominantly African-American schools. Beginning in 1955, the board of education operated so-called relay classes, or double sessions, at those schools: half the pupils attended school in the morning, the other half in the afternoon; none of the children received a full day's worth of instruction.<sup>87</sup> Under pressure from protesting parents, in January 1962 the board began to bus black children from their overcrowded neighborhood schools to nearby, overwhelmingly white schools that had space. But this arrangement was correctly described as “intact busing”: the African-American children were almost completely separated from the white pupils at the receiving schools.<sup>88</sup>

Meanwhile, the board of education authorized a crash program to build three new schools to relieve overcrowding in the predominantly black buildings. That would reinforce existing patterns of racial isolation and led to the emergence of the United Freedom Movement, a broad civil rights coalition, in the summer of 1963.<sup>89</sup> UFM tried unsuccessfully to negotiate with the board through the fall to integrate the schools.<sup>90</sup> Beginning in January 1964, UFM staged demonstrations at district headquarters, white schools that were receiving black children under the intact-busing program, and sites of the proposed new schools.<sup>91</sup> Tragedy struck on April 7, when Bruce Klunder, a young white minister who was vice-chair of the Cleveland chapter of the Congress of Racial Equality, was killed when he was accidentally run

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86. 234 F. Supp. 381 (N.D. Ohio), *aff'd*, 338 F.2d 941 (6th Cir. 1964); *see supra* note 49 and accompanying text.

87. *Reed*, 422 F. Supp. at 782–83; DUNN ET AL., *supra* note 57, at 58, 108, 137; NISHANI FRAZIER, *HARAMBEE CITY: THE CONGRESS OF RACIAL EQUALITY IN CLEVELAND AND THE RISE OF BLACK POWER POPULISM* 82 (2017).

88. *Reed*, 422 F. Supp. at 783; DUNN ET AL., *supra* note 57, at 60–63, 108, 138; FRAZIER, *supra* note 87, at 83–84.

89. DUNN ET AL., *supra* note 57, at 64–65, 108; FRAZIER, *supra* note 87, at 80–81.

90. DUNN ET AL., *supra* note 57, at 65–66; FRAZIER, *supra* note 87, at 84–85.

91. DUNN ET AL., *supra* note 57, at 66–69, 108–09; FRAZIER, *supra* note 87, at 87–91; MEIER & RUDWICK, *supra* note 10, at 248–49.

over by a bulldozer while protesting at the site where one of the new schools was under construction.<sup>92</sup> *Craggett* was filed soon afterward and sought a preliminary injunction to block construction of the three schools. The district court denied relief, finding that the board did not seek to promote segregation but simply was adhering to longstanding policies favoring neighborhood schools.<sup>93</sup>

The Cleveland branch of the NAACP continued to press for school integration over the next several years, but both the board of education and Superintendent of Schools Paul Briggs insisted that the racial concentration in enrollment reflected neighborhood housing patterns rather than a deliberate policy of segregating children by race (p. 171).<sup>94</sup> Jones and local counsel tried unsuccessfully to negotiate a plan for desegregating the schools, but when the talks broke down the NAACP filed the *Reed* complaint in December 1973 (pp. 170–71).

The case was assigned to Chief Judge Frank J. Battisti of the United States District Court for the Northern District of Ohio. Two details about Judge Battisti are worth noting. First, Judge Battisti also had some other high-profile civil rights matters on his docket (p. 171): a housing discrimination case that the United States Department of Justice had filed against the virtually all-white suburb of Parma several months earlier,<sup>95</sup> and a dispute over the location and operation of public

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92. DUNN ET AL., *supra* note 57, at 70, 109; FRAZIER, *supra* note 87, at 95–96; MEIER & RUDWICK, *supra* note 10, at 249. For more on Klunder's involvement with CORE and the civil rights movement, see FRAZIER, *supra* note 87, at 64–65, 68–71; MEIER & RUDWICK, *supra* note 10, at 242.
93. *Craggett v. Bd. of Educ.*, 234 F. Supp. 381, 386–87 (N.D. Ohio 1964). The district court also observed that the plaintiffs had not filed suit until “many months” after the board of education had approved the construction program, *id.* at 385, a point emphasized by the court of appeals in affirming the denial of injunctive relief, 338 F.2d 941, 941–42 (6th Cir. 1964).
94. Superintendent Briggs had taken office several months after Rev. Klunder's death. See DUNN ET AL., *supra* note 57, at 84; *supra* note 92 and accompanying text. Briggs enjoyed broad support for most of his fourteen-year tenure, but his performance came in for notable criticism after he resigned in 1978. William D. Henderson, *Demography and Desegregation in the Cleveland Public Schools: Toward a Comprehensive Theory of Educational Failure and Success*, 26 N.Y.U. REV. L. & SOC. CHANGE 457, 502–03 (2001).
95. See *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio), *relief granted*, 504 F. Supp. 913 (N.D. Ohio 1980), *aff'd in part and rev'd in part*, 661 F.2d 562 (6th Cir.) (reversing only the district court's appointment of a special master but affirming the judgment on liability and remedy in all other respects), *rehearing en banc denied*, 669 F.2d 1100 (6th Cir. 1981). See generally W. DENNIS KEATING, *THE SUBURBAN RACIAL DILEMMA: HOUSING AND NEIGHBORHOODS* 140–51 (1994); Saphire, *supra* note 57, at 145–48. The filing of the complaint in 1973 generated satellite litigation that delayed the resolution of the case by several years. See, e.g., *Cornelius v.*

housing in and around Cleveland.<sup>96</sup> Second, as noted above, Judge Battisti had taught Jones in law school two decades previously (pp. 98, 171).<sup>97</sup> This prompted baseless accusations that Judge Battisti should have recused himself.<sup>98</sup>

Of greater significance, Jones recounts the skepticism with which the *Reed* lawsuit was greeted by some influential local African-Americans (pp. 173–74). Shortly before the trial began, the publisher of the *Call and Post*, Cleveland’s venerable black newspaper, organized a meeting at which Jones and his legal team could discuss the case with African-American community leaders. That group refused to speak with the white members of the legal team; the *Call and Post* publisher declared: “This is a black meeting” (p. 173). The black lawyers, including Jones and lead counsel Thomas Atkins, reluctantly accepted this condition and, after their white colleagues departed, faced a deeply skeptical audience. Judge Jones says only that, in the end, at least some of the initially hostile community leaders were persuaded not to oppose the lawsuit (p. 174). He does not speculate about why the leaders refused to meet with the white lawyers, nor does he explain the basis for the group’s skepticism about the litigation. The latter point is particularly intriguing, because that skepticism about seeking integration of the Cleveland schools seems quite similar to the black opposition to school desegregation in Atlanta that was unfolding at about the same

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City of Parma, 374 F. Supp. 730 (N.D. Ohio), *vacated and remanded*, 506 F.2d 1400 (6th Cir. 1974), *vacated and remanded*, 422 U.S. 1052 (1975); City of Parma v. Levi, 536 F.2d 133 (6th Cir. 1976).

96. See *Mahaley v. Cuyahoga Metro. Hous. Auth.*, 355 F. Supp. 1245 (N.D. Ohio) (three-judge court), *on remand to single judge*, 355 F. Supp. 1257 (N.D. Ohio 1973), *rev’d and remanded*, 500 F.2d 1087 (6th Cir. 1974); *Cuyahoga Metro. Hous. Auth. v. City of Cleveland*, 342 F. Supp. 250 (N.D. Ohio 1972), *aff’d sub nom. Cuyahoga Metro. Hous. Auth. v. Harmody*, 474 F.2d 1102 (6th Cir. 1973); *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff’d in part and rev’d in part*, 473 F.2d 910 (6th Cir. 1973) (mem.). See generally Saphire, *supra* note 57, at 144–45.

97. See *supra* text following note 13.

98. Henderson, *supra* note 94, at 501. It is difficult to take seriously any suggestion that a judge must recuse from a case in which a long-ago former student represents a party. This hardly qualifies as a circumstance in which the judge’s “impartiality might reasonably be questioned.” 28 U.S.C. § 455(a) (2012). A judicial clerk typically has a much closer connection with a judge than a law student has with any professor, but a judge is not expected to recuse when a former clerk participates in a case. For example, Chief Justice Rehnquist called one of his former clerks by her first name during oral argument in a high-profile case. See Transcript of Oral Argument at 34, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241). In the same case, Justice Stevens referred to an amici brief by the name of one of his former clerks who had written the brief rather than by reference to any of the amici. See *id.* at 19.

time.<sup>99</sup> It is possible that many of the leaders shared the view of Arnold Pinkney, the president of the board of education and one of the African-American influentials who attended the meeting, that improving the quality of the schools was more important than integrating them at that point.<sup>100</sup> But the book does not address this question.

Judge Jones does provide a detailed summary of Judge Battisti's findings, including more than 200 instances of intentional discrimination (pp. 175–76), and his remedial order (p. 177). He also alludes to the challenges that arose during the implementation phase of the case, notably the 1985 suicide of a relatively new superintendent of schools, Frederick D. Holliday, who shot himself on a Saturday morning in one of the city's high schools (p. 179). Indeed, so recalcitrant were the school authorities and much of the public that Judge Jones describes Cleveland as second only to Boston in terms of contention and bitterness (p. 171). Other than the Holliday suicide, he does not carry the discussion much beyond 1979, when the United States Court of Appeals for the Sixth Circuit affirmed Judge Battisti's rulings on liability and remedy;<sup>101</sup> he bowed out of the case after President Carter announced that he was nominating Jones for a seat on the Sixth Circuit (p. 179).

### III

Judge Jones devotes nearly a full chapter to describing the process that led to his ascension to the bench. The possibility of an appointment arose in June 1978, when he was contacted by a member of President Carter's judicial selection commission for the Sixth Circuit, as it happens on the day that the Supreme Court handed down its first major affirmative action decision in *Regents of the University of California v. Bakke* (pp. 210–11).<sup>102</sup> Nearly eleven months later, at a White House ceremony commemorating the twenty-fifth anniversary of *Brown*, President Carter announced his intention to nominate Jones (pp. 217–18). The confirmation process went uneventfully, and Judge Jones took the bench to hear his first set of cases on October 15, 1979, the day he took his oath (pp. 222–24).

He does not discuss many of his cases on the bench. Explaining why he wrote this memoir, he alludes to the Sixth Circuit's en banc decision in an affirmative action case that persuaded him that many of his judi-

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99. See *supra* note 33 and accompanying text.

100. On Pinkney's views, see DUNN ET AL., *supra* note 57, at 79, 80–81.

101. *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979). The case finally ended more than a quarter-century after it began. See *Reed v. Rhodes*, 1 F. Supp. 2d 705 (N.D. Ohio 1998), *aff'd per curiam*, 215 F.3d 1327 (6th Cir. 2000).

102. 438 U.S. 265 (1978).

cial colleagues lacked awareness of the nation's racial history (pp. xiv–xvi).<sup>103</sup> He devotes most of a chapter about his work on the bench to the death penalty, using a case arising from Ohio as the centerpiece (pp. 250–58).<sup>104</sup> But he does talk about his efforts to diversify the legal profession (pp. 230–36, 293–97). And he addresses two painful situations: a lawsuit relating to whether the House Judiciary Committee could obtain access to grand jury materials in connection with the impeachment of Judge Alcee Hastings, who had been acquitted of conspiracy charges at his criminal trial (pp. 237–40);<sup>105</sup> and the dispute that led to Frank Battisti's relinquishing the position of chief judge after more than twenty years in that position but remaining on the bench until his death in 1994 (pp. 240–42).<sup>106</sup>

Judge Jones retired from the bench in 2002, at age seventy-six, but he did not head for the golf course or a cruise ship. Rather, he became of counsel in the Cincinnati office of Blank Rome LLP, a Philadelphia-based firm (pp. 311–12). Retiring while still energetic and in good health would enable him to continue “to answer the Call” in ways that continued service on the bench would not (p. 314). Along the way, he has some pointed criticisms of the Supreme Court and some trenchant observations about current issues affecting African Americans.

Meanwhile, Judge Jones continues to receive accolades. Although he does not mention this fact, the federal building back home in Youngstown that houses the United States Bankruptcy Court for the Northern District of Ohio was named for him the year after he retired from the bench.<sup>107</sup> And shortly after this book went to press, the

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103. Judge Jones does not identify the case or the judges to whom he refers, but it is likely that he was talking about *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994) (en banc), in which he dissented at length, *id.* at 1169–79 (Jones, J., dissenting).

104. The issue in the case was whether the inmate could obtain a stay of execution, which the panel denied over a dissent by Judge Jones. *Byrd v. Bagley*, 37 F. App'x 94 (6th Cir. 2002). This was the final judicial installment in a long-running case. *See, e.g.,* *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000) (affirming denial of habeas corpus); *State v. Byrd*, 512 N.E.2d 611 (Ohio 1987) (affirming conviction and death sentence).

105. *In re Grand Jury Proceedings*, 841 F.2d 1048, 1054–57 (11th Cir. 1988) (Jones, J., dissenting).

106. Under current law, the chief judge of a district court may serve in that capacity for no more than seven years. 28 U.S.C. § 136(a)(3)(A) (2012). This provision was established by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 202(a), 96 Stat. 25, 52; it was adopted long before the controversy over Chief Judge Battisti's administration of his court arose.

107. *See Consolidated Appropriation Resolution, 2003*, Pub. L. No. 108-7, div. J, § 414, 117 Stat. 11, 456.

NAACP awarded Jones the Spingarn Medal, the organization's highest honor, in 2016.<sup>108</sup>

There is much more in *Answering the Call* than can be mentioned here. This memoir is an engrossing chronicle of the civil rights movement outside the South, and it should be a valuable source for years to come.

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108. See *Spingarn Medal Winners: 1915 to Today*, NAACP, [www.naacp.org/awards/spingarn-medal/winners/](http://www.naacp.org/awards/spingarn-medal/winners/) [<https://perma.cc/27UR-2ESQ>] (last visited Nov. 1, 2017).