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FRED GRAY AND THE ROLE OF CIVIL RIGHTS LAWYERS

Jonathan L. Entin[†]

In this concluding Article, let me pick up on some themes that Len Rubinowitz has explored¹ and offer a few comments on the role of civil rights lawyers in general and on Fred Gray in particular. Mr. Gray's epic career can shed important insight into our thinking about what civil rights lawyers do and how much their work matters.

First, Professor Rubinowitz has focused on the work of Fred Gray, Arthur Shores, and Clifford Durr—lawyers based in Alabama who constantly found themselves on the line by doing civil rights work in a dangerous time.² He also discusses Robert Carter and Constance Baker Motley, who were based in New York but put themselves at risk when they traveled to the South in connection with their work.³ This aspect of the article illustrates that lawyers do not have a cloistered existence and can face harassment, ostracism, and worse simply for doing their job.

In honoring the lawyers, we also should remember the courage of their clients. This reflects both the doctrinal rules relating to standing⁴ and the reality that litigation is not an end but a means to achieve broader goals. So let us take a moment to think about the clients—people like Barbara Johns, who at the age of sixteen organized a strike against segregated schools in Prince Edward County, Virginia, in the spring of 1951.⁵ That strike led to the filing of one of the lawsuits that was decided as part of *Brown v. Board of Education*.⁶

And to connect this point to our Symposium, let me say a few words about Anthony Lee. I met him during the summer after my first

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1. See Leonard S. Rubinowitz, *The Courage of Civil Rights Lawyers: Fred Gray and His Colleagues*, 67 CASE W. RES. L. REV. 1227 (2017).
2. *Id.* at 1232.
3. *Id.*
4. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); *Sierra Club v. Morton*, 405 U.S. 727 (1972).
5. See CHRISTOPHER BONASTIA, *SOUTHERN STALEMATE* 31–35 (2012); RICHARD KLUGER, *SIMPLE JUSTICE* 468–71 (1976); BOB SMITH, *THEY CLOSED THEIR SCHOOLS* 36–39 (1965); JILL OGLINE TITUS, *BROWN'S BATTLEGROUND* 5–6 (2011).
6. 347 U.S. 483 (1954), *rev'g inter alia* *Davis v. Cty. Sch. Bd. of Prince Edward Cty.*, 103 F. Supp. 337 (E.D. Va. 1952) (three-judge court). For further discussion of Barbara Johns, see *infra* notes 36–39 and accompanying text.

year of college, when we were working on a civil rights project in California. We got to talking about our high school experiences, mine in Greater Boston and his in Tuskegee, Alabama. He casually mentioned that he had attended three high schools. Because Alabama's public schools were segregated, he had started in the local black high school. Then, he said, there was a lawsuit, and he got to attend the white school briefly. But die-hard segregationists bombed that school so he wound up at yet a third high school. It was only years later that I learned that Anthony Lee was in fact the lead plaintiff in that lawsuit and that Fred Gray had been his lawyer.⁷

Second, focusing on lawyers might imply that those lawyers do only one thing: litigate on behalf of clients. This raises several complex issues. For example, there is the question about whether the lawyer or the client controls the litigation (what Derrick Bell famously called the interest-convergence dilemma⁸ and what segregationists called barratry—Fred Gray faced such baseless charges during the Montgomery bus boycott,⁹ and the Supreme Court later rebuffed similar claims in *NAACP v. Button*¹⁰).

More important, the focus on the lawyer only as litigator buys into an oversimplified distinction between litigation and mobilization (or direct action) that lies at the root of some critiques of civil rights lawyering. We see this distinction most clearly in Gerald Rosenberg's influential work.¹¹ Rosenberg argues that the judiciary is constrained by the conventions of legal reasoning, their lack of independence from the political branches, and their limited resources.¹² Courts, therefore, can serve as effective agencies of social reform only under extremely limited conditions, such as when other actors are able to provide benefits for compliance or impose costs for noncompliance, when market-oriented implementation is feasible, or when court decisions provide leverage or protection for officials and private persons or entities that are willing

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7. For the first installment in this long-running case, see *Lee v. Macon Cty. Bd. of Educ.*, 221 F. Supp. 297 (M.D. Ala. 1963) (three-judge court). See generally FRED D. GRAY, *BUS RIDE TO JUSTICE* 203–13 (rev. ed. 2013).
 8. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); see also Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).
 9. See GRAY, *supra* note 7, at 81–83; Rubinowitz, *supra* note 1, at 1262–64.
 10. 371 U.S. 415 (1963).
 11. GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991) (2d ed. 2008). The relevant portions of the two editions that are cited below have the same pagination, see Preface to the Second Edition at xi, so those citations do not distinguish between the two editions.
 12. *Id.* at 10–21.

to act.¹³ He further contends that none of those conditions existed in connection with civil rights litigation and that, if anything, *Brown v. Board of Education* was counterproductive by stimulating resistance in the white South.¹⁴ Instead, Rosenberg urges, racial progress arose from political developments and direct action that had nothing to do with *Brown* and other civil rights litigation.¹⁵ The Civil Rights Act of 1964¹⁶ and the Voting Rights Act of 1965¹⁷ resulted from activism that was unrelated to *Brown* and other lawsuits: the sit-ins, Freedom Rides, and protest demonstrations in Birmingham and Selma that were inspired by the Montgomery bus boycott, which had its roots in earlier organizing efforts.¹⁸

Rosenberg's analysis has generated intense debate. Some critics challenge some of his factual claims. For example, Michael Klarman, who agrees that *Brown* had limited direct impact on desegregation, observes that the massive resistance to the Supreme Court ruling in much of the South actually hastened the demise of segregation.¹⁹ He maintains that *Brown* drove southern politics so far to the right that the rest of the nation had no choice but to confront white defiance.²⁰ This so-called backlash accelerated the social, economic, and cultural trends that would have led to the end of segregation, albeit several decades later.²¹ Other scholars dispute Rosenberg's contention that *Brown* did not inspire activists like Dr. Martin Luther King, Jr., Ralph Abernathy, and other less celebrated figures who took leading roles in major civil rights protests.²² And more recent scholarship suggests that preoccupation with the Supreme Court risks overlooking the diversity of approaches to addressing racism and discrimination, particularly local and grass-roots strategies.²³

13. *Id.* at 30–36.

14. *Id.* at 155–56.

15. *Id.* at 42–49, 70–71.

16. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2012)).

17. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10702 (2012)).

18. ROSENBERG, *supra* note 11, at 120–21, 134–50.

19. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 441–42 (2004).

20. *Id.* at 388, 392, 394–408, 441–42.

21. *Id.* at 385–442.

22. See, e.g., David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151, 151–52, 154–57 (1994).

23. See, e.g., TOMIKO BROWN-NAGIN, COURAGE TO DISSENT (2011) (focusing on Atlanta in the second half of the 20th Century); KENNETH W. MACK,

We need not resolve the debate between Rosenberg and his critics to recognize that he addressed only one, albeit very important, question: whether courts in general and the Supreme Court in particular can effect “policy change with nationwide impact.”²⁴ But many aspects of the judicial process suggest the inherent contingency of reliance on litigation as a method of social reform. First is the challenge of finding suitable plaintiffs and making the necessary legal and factual showings to win a lawsuit. Then it is necessary to frame an appropriate remedy, which as we will see was particularly daunting in *Brown*. Yet even if defendants implement the remedy in good faith, officials in other jurisdictions might claim not to be bound by the ruling and refuse to follow it. That is what happened in Little Rock, where Arkansas Governor Orval Faubus tried to prevent the desegregation of Central High School,²⁵ and in many other communities that chose not to desegregate until directly required to do so.²⁶ Regardless of whether Rosenberg’s general claims about the lack of connection between *Brown* and later civil rights developments are correct, he properly focuses on the difficulty of using litigation as a means for creating large-scale social change.

Beyond the inherent limitations of the Supreme Court, however, there are other ways to think about using the judicial process to promote reform. Those who are dissatisfied with the status quo might find litigation useful as a means of political mobilization or as a catalyst for change in particular communities or sectors of society. For instance, advocates of higher pay for women used the prospect of litigation as an effective means of organizing workers and obtaining favorable contracts even without a sweeping Supreme Court ruling on comparable worth.²⁷

Let me illustrate this point with some examples from the civil rights context. Consider the work of Harry Moore, a longtime activist in Florida who was killed when his house was bombed on Christmas night in 1951.²⁸ A teacher and principal in segregated schools, he organized a local branch of the NAACP in 1934 and helped to create an association of black teachers.²⁹ Moore played a leading role in litigation challenging

REPRESENTING THE RACE (2012) (focusing on local activism during the period between World War I and World War II).

24. ROSENBERG, *supra* note 11, at 4 (emphasis omitted).

25. *See Cooper v. Aaron*, 358 U.S. 1 (1958).

26. By 1964, a full decade after *Brown*, only 1.2% of African-American children in the South were attending school with whites; the figure was dramatically lower in the Deep South. ROSENBERG, *supra* note 11, at 50, 52.

27. *See generally* MICHAEL W. McCANN, *RIGHTS AT WORK* (1994).

28. BEN GREEN, *BEFORE HIS TIME* 1–11 (1999).

29. *Id.* at 35–38.

racial disparities in teacher salaries. Those cases had mixed success.³⁰ Meanwhile, in response to *Smith v. Allwright*,³¹ which outlawed the Texas Democratic Party's white primary, Moore also organized the Progressive Voters League.³² That organization launched a statewide registration drive that tripled the number of black voters by the time of the 1946 primary election.³³ In the 1948 gubernatorial primary, the PVL-endorsed candidate won a narrow victory.³⁴ By 1950, the number of registered black voters was about six times the 1944 figure, and Moore's group was largely responsible for the increase.³⁵

Harry Moore's work illustrates the connection between litigation and activism. The teacher salary cases directly challenged racially discriminatory pay scales. It took time to find willing plaintiffs, and the lawsuits had mixed success. But litigation was the only practical alternative in the years before *Smith v. Allwright*, when the all-white Democratic Party controlled Florida politics. But when the Supreme Court outlawed the white primary, Moore responded by organizing the Progressive Voters League. That organization had some impact on state and local politics, but it could not have attained its limited but occasionally crucial political influence in the absence of the *Smith* ruling.

We can see this relationship even more directly in connection with Barbara Johns and the events in Prince Edward County. When the African-American students at Robert Moton High School in Farmville, Virginia, went on strike, Barbara Johns contacted Oliver Hill and Spottswood Robinson, who were NAACP cooperating attorneys in Richmond, asking them to represent the students in obtaining better schools.³⁶ Hill and Robinson initially dismissed the idea of taking a case

30. *Id.* at 38–42; see also Jonathan L. Entin, *Litigation, Political Mobilization, and Social Reform: Insights from Florida's Pre-Brown Era*, 52 FLA. L. REV. 497, 506 (2000).

31. 321 U.S. 649 (1944).

32. Entin, *supra* note 30, at 500.

33. GREEN, *supra* note 28, at 54, 59; STEVEN F. LAWSON, *BLACK BALLOTS* 133–34 (1976).

34. GREEN, *supra* note 28, at 74–75; Entin, *supra* note 30, at 500–01 & nn.25–26.

35. GREEN, *supra* note 28, at 117.

36. The precise nature of the original contact is unclear. Some accounts say that the students, led by Barbara Johns, drafted a letter to Hill and Robinson on the first day of the strike. KLUGER, *supra* note 5, at 470–71. Others say that Barbara Johns telephoned Hill. BONASTIA, *supra* note 5, at 35. Student leaders who were interviewed some years later by journalist R.C. Smith say that a letter was written, but Smith also found telephone records documenting that someone called Hill and Robinson's office from Moton High School on the first day of the strike. SMITH, *supra* note 5, at 43. Resolution of this factual matter is irrelevant to the discussion here.

from Prince Edward County because they regarded the area as so hostile that litigating there would be too dangerous for potential plaintiffs.³⁷ But they agreed to consider the request if Barbara Johns and her fellow students could show that their parents and the African-American community supported the request and if they were willing to seek integrated schools rather than improved segregated facilities.³⁸ After extensive discussion in two community meetings, broad support for a lawsuit directly challenging the constitutionality of segregated schools emerged, and Hill and Robinson took the case.³⁹

The story of Prince Edward County is quite complex. For our purposes, it suffices to say that the events of 1951 show the interaction between litigation and direct action. The lawsuit challenging segregated schools arose as a direct result of the student strike, but that lawsuit would not have occurred without broad-based support among black parents and the African-American community. Still, the situation in Prince Edward County remains ambiguous. Local authorities closed the public schools in the face of a desegregation order; those schools remained closed for five years until the Supreme Court ordered them reopened; virtually all of the white students in the county went to a new private, whites-only school that was staffed by white teachers and administrators who previously worked in the white public schools; the segregation academy litigated for years to keep its tax exemption and only grudgingly admitted students of color as part of that effort, then tried unsuccessfully to invalidate a whites-only restriction in a trust that was set up for the academy's benefit.⁴⁰ These are important and messy aspects of the story, but they should not obscure the larger point about the relationship between litigation and direct action.

We can see yet another, and especially clear, illustration of the amorphous distinction between litigation and social mobilization in connection with the Montgomery bus boycott. Some scholars have suggest-

37. BONASTIA, *supra* note 5, at 35–36; KLUGER, *supra* note 5, at 471, 475–76; SMITH, *supra* note 5, at 44.

38. BONASTIA, *supra* note 5, at 36; KLUGER, *supra* note 5, at 476; SMITH, *supra* note 5, at 48; TITUS, *supra* note 5, at 6–7.

39. BONASTIA, *supra* note 5, at 36–38; KLUGER, *supra* note 5, at 476–78; SMITH, *supra* note 5, at 48–60; TITUS, *supra* note 5, at 7.

40. For discussion of the closure of the public schools, see generally BONASTIA, *supra* note 5, at 21–217; SMITH, *supra* note 5, at 151–259; TITUS, *supra* note 5, at 11–159. On the Supreme Court ruling, see *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218 (1964). For discussion of the evolution of the public schools since their reopening in 1964, see BONASTIA, *supra* note 5, at 225–61; TITUS, *supra* note 5, at 160–217. On the segregation academy, see Jonathan L. Entin, *Defeasible Fees, State Action, and the Legacy of Massive Resistance*, 34 WM. & MARY L. REV. 769, 773–81 (1993).

ed that the desegregation of public transportation in the Alabama capital resulted from the litigation that culminated in the Supreme Court's decision in *Gayle v. Browder*,⁴¹ which invalidated Montgomery's bus-segregation ordinance.⁴² Other scholars emphasize the primary role of the protest itself and treat the legal aspects of the episode as secondary at best.⁴³ In fact, however, litigation and activism played symbiotic, mutually reinforcing roles in Montgomery.⁴⁴ What became the boycott was originally conceived as a one-day action to show support for Rosa Parks when she appeared in court after her arrest that soon morphed into a long-term challenge to segregation on the buses.⁴⁵ Even then, the Montgomery Improvement Association's original demands did not directly include eliminating the color line on the buses, but only more courteous treatment of African-American passengers and more flexible administration of the areas where black and white passengers could sit.⁴⁶ Only when the all-white city government proved to be completely intransigent did the movement demand an end to segregated seating.⁴⁷

To reinforce the attack on segregated seating, Fred Gray filed a lawsuit in the United States District Court for the Middle District of Alabama challenging the constitutionality of the Montgomery bus-segregation ordinance.⁴⁸ A divided three-judge court struck down the ordinance,⁴⁹ and the Supreme Court summarily affirmed that decision

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41. 352 U.S. 903 (1956) (per curiam), *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956) (three-judge court).
 42. CATHERINE A. BARNES, *JOURNEY FROM JIM CROW* 124 (1983); Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957*, 9 L. & HIST. REV. 59, 89-90 (1991).
 43. ALDON MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* 63 (1984); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 305 (1994).
 44. Much of this discussion relies heavily on one of Professor Rubinowitz's earlier works. See Christopher Coleman, Laurence D. Nee & Leonard S. Rubinowitz, *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY 663 (2005).
 45. GRAY, *supra* note 7, at 54, 60-62; Coleman, Nee & Rubinowitz, *supra* note 44, at 673-74.
 46. GRAY, *supra* note 7, at 63-64; Coleman, Nee & Rubinowitz, *supra* note 44, at 674, 681-82, 708 n.52.
 47. GRAY, *supra* note 7, at 70-71; Coleman, Nee & Rubinowitz, *supra* note 44, at 681.
 48. He deliberately did not include Rosa Parks as a plaintiff in the federal case because her criminal case was still pending in the state courts. GRAY, *supra* note 7, at 70.
 49. *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956) (three-judge court). This ruling came down on June 5, 1956, six months to the day after the bus boycott started.

nearly a year after the boycott began.⁵⁰ Indeed, the Supreme Court ruling came in the midst of a state court proceeding that was intended to shut down the car pool that had been a vital part of the bus protest.⁵¹

But that ruling did not by itself assure that segregation on the buses would end. This was November 1956, a time when Massive Resistance was the norm in much of the South. Earlier that year, the University of Alabama had expelled its first black student, Autherine Lucy, after litigating all the way to the Supreme Court in an effort to remain a whites-only institution.⁵² And George Wallace was still a relatively obscure county judge rather than the die-hard resister who vowed to maintain “segregation now, . . . segregation tomorrow, . . . segregation forever” when he became governor in January 1963.⁵³

The Montgomery authorities might have tried to defy the Supreme Court, but they had to reckon with the bus boycott, which already had gone on for over a year and might have continued even longer if the white power structure held firm.⁵⁴ At the same time, the boycotters were in peril from the local authorities’ efforts to enjoin the car pool that provided transportation to protest participants.⁵⁵ But even more important, the boycotters themselves looked to the courts as an important asset in their campaign. They persisted, ultimately for 382 days,⁵⁶ in large measure because they hoped for and expected vindication from the legal system.⁵⁷

In short, the Montgomery bus boycott in which Fred Gray played such a prominent role—as lawyer for Rosa Parks, as lawyer for Martin Luther King, as lawyer for the Montgomery Improvement Association, and as advisor to the protest leaders—illustrates the symbiotic relationship between litigation and mobilization.

50. *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam).

51. GRAY, *supra* note 7, at 91–93; Coleman, Nee & Rubinowitz, *supra* note 44, at 684–85.

52. *Lucy v. Adams*, 134 F. Supp. 235 (N.D. Ala. 1955), *aff’d per curiam*, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1956). *See generally* E. CULPEPPER CLARK, *THE SCHOOLHOUSE DOOR* 71–113 (1993). More than three decades later, the university overturned Ms. Lucy’s expulsion, and she received a graduate degree in 1992, a full forty years after she first applied. *Id.* at 260; GRAY, *supra* note 7, at 55 n.4.

53. *See* GRAY, *supra* note 7, at 130–43 (recalling Mr. Gray’s interactions with Judge George Wallace during this period).

54. *See* Coleman, Nee & Rubinowitz, *supra* note 44, at 687.

55. *See id.* at 684–85.

56. GRAY, *supra* note 7, at 37 & n.3.

57. *See* Coleman, Nee & Rubinowitz, *supra* note 44, at 700.

And Fred Gray himself illustrates that a lawyer can be more than a litigator. He played an important role in the proceedings that culminated in Judge Frank Johnson's order that the Selma–Montgomery march take place with protection from law enforcement,⁵⁸ and the march was pivotal to the adoption of the Voting Rights Act later that year. A few years later, Fred Gray was elected to the Alabama House of Representatives, one of the first two African-Americans elected to the state legislature since Reconstruction.⁵⁹

Fred Gray's career shows us that a great lawyer—and especially a great civil rights lawyer—does more than win cases. A great lawyer like Fred Gray lives with the aftermath of a case and helps to make sure that a win in court is more than a symbolic victory. We have a long way to go, but Fred Gray has understood and helped to define what a great civil rights lawyer does.

58. *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965).

59. GRAY, *supra* note 7, at 264–65. That successful campaign took place in 1970. *Id.* In 1966, he lost a runoff in the primary. *Id.* at 255–60.