VIRGINIA LAW REVIEW
IN BRIEF

VOLUME 93 JUNE 4, 2007 PAGES 85–103

BOOK EXCERPT

THE LOST PROMISE OF CIVIL RIGHTS

Risa L. Goluboff[*]

The Lost Promise of Civil Rights. By Risa L. Goluboff. Cambridge, Mass.: Harvard University Press. 2007.

> *In this groundbreaking book, Risa L. Goluboff offers a provocative new account of the history of American civil rights law. The Supreme Court's decision in* Brown v. Board of Education *has long dominated that history. Since 1954, generations of judges, lawyers, and ordinary people have viewed civil rights as a project of breaking down formal legal barriers to integration, especially in the context of public education. Goluboff recovers a world before* Brown*, a world in which civil rights was legally, conceptually, and constitutionally up for grabs. Then, the petitions of black agricultural workers in the American South and industrial workers across the nation called for a civil rights law that would redress economic as well as legal inequalities. Lawyers in the new Civil Rights Section of the Department of Justice and in the NAACP took the workers' cases and viewed them as crucial to attacking Jim Crow. By the time NAACP lawyers set out on the path to* Brown*, however, they had eliminated workers' economic concerns from their litigation agenda. When the lawyers succeeded in* Brown*, they simultaneously marginalized the host of other harms—economic inequality chief among them—that afflicted the majority of African Americans during the mid-twentieth century. By uncovering*

[*] Associate Professor of Law, University of Virginia School of Law.

the lost challenges workers and their lawyers launched against Jim Crow in the 1940s, Goluboff shows how Brown *only partially fulfilled the promise of civil rights.*

LETTERS came to the United States Department of Justice (DOJ) and the central office of the National Association for the Advancement of Colored People (NAACP) from across the nation. They came from the North and the South, rural areas and urban ones. Each reported the violation of constitutional rights. Each begged, asked, or demanded that lawyers take action. Telegrams, phone calls, and personal visits to Federal Bureau of Investigation (FBI) field offices and NAACP branch secretaries reinforced the urgency of the pleas.

One whole series of complaints—postmarked Memphis, Birmingham, Mobile, and a small south Florida town called Clewiston—described the situation of hundreds of young African American men who had traveled from cities across the South to work for the United States Sugar Corporation during World War II. The men described flyers produced by the United States Employment Service (USES), a federal agency that linked unemployed workers with available work. The flyers enticed "colored farm workers" to "enjoy the Florida sunshine during the winter months." Workers would cut cane for high wages of between $3 and $8 per day. Transportation to Florida was free, as was rent. Food would be provided on the journey there, but workers would have to pay for their board at the sugar plantations.[1]

As workers and their concerned relatives later told FBI agents and Justice Department lawyers, the journey to Florida did not go as expected. After long train and bus rides with little food, young men arrived at the sugar camps to learn that the "free" transportation cost between $6 and $20. That debt to the company increased with the required purchase of necessary implements: board, blanket, identification badge, sharpening file, cane knife. At the surprisingly paltry salary of $1.80 per day, earning enough to pay such debts would take some time. Company supervisors warned the

[1] Corwin Johnson, FBI Report, Memphis, Tenn., July 27, 1942, 2, file 50 – 18 – 15, RG 60, National Archives (hereafter cited as DOJ files). U.S. Employment Service, flyer advertising Unites States Sugar Corporation employment, DOJ Files, 50 – 18 – 15. James H. Morrow, Jr., FBI Report, Birmingham. Ala., Nov. 20, 1942, 4, 5, DOJ Files, 50 – 18 – 15.

workers not to leave without paying their debts. "[I]f you do you'll be put in jail and kept there until we come after you. That [is] if we don't kill you. You're liable to be found in one of those lakes." Guards would not allow letters in or out, "locked the hands up at night," carried blackjacks and pistols, and even killed men for asking for their wages or trying to leave.[2]

Conditions at what some workers described as "slave camps" were so bad that many tried to escape despite the threats. The men complained about long days of brutal work pervaded by fear and punctuated by violence. Sleeping facilities were so "filthy" that some preferred sleeping around an outdoor campfire. Meals of "cabbage and beans out of a bucket" that "aint fitting to eat" added to the sense that workers were "being treated like dog[s]." Even so, escaping without money, maps, or knowledge of the landscape was not easy. Canals surrounded several camps, and "men with sticks would hang out" by the bridges that connected the camps with the rest of Florida. All apparent avenues of escape held peril: one superintendent warned "that we would be shot if we tried to catch a ride on the sugar train and that we would be arrested for hitch-hiking if we tried to get away on the highway." Making enough money for a bus or train ticket was almost impossible. And the men had heard that sugar officials not only had convinced the bus company to refuse tickets to the farmworkers but also monitored the railroad station to ensure that no one left by train.[3]

Against the odds, some of the men did manage to escape. Swimming canals, hiding in cane fields, finding assistance from locals, and receiving money from home, migrants trickled back to the cities from which they had come. Rumors about the horrors of the plantations had preceded them home. Relatives and friends—and ultimately the workers themselves—called upon the FBI and the

[2] Ousley Perkins to J. Edgar Hoover, Feb. 16, 1942, DOJ Files, 50 – 18 – 15.

[3] Johnson, FBI Report, Memphis, Tenn., July 27, 1942, 5 (statement of James Moffett), 17 (statement of Harvey Lee Branner), DOJ Files, 50 – 18 – 15; John E. Keene, FBI Report, Memphis, Tenn., Mar. 11, 1942, 11 (statement of Vernon Lawhorn), DOJ Files, 50 – 18 – 15; Corwin Johnson, FBI, Report, Memphis, Tenn., July 27, 1942, 17. DOJ Files, 50 – 18 – 15; William Gerard Bedell, FBI Report, Birmingham, Ala., May 8, 1943, 6 (statement of Ollie Rogers, Jr.), DOJ Files, 50 – 18 – 15.

Civil Rights Section (CRS) of the Justice Department to stop the "virtual slavery" in Florida's sugar camps.[4]

Around the same time the Florida workers contacted the federal government for legal help, hundreds of other African American workers telegrammed, wrote, and called upon lawyers in the NAACP. These workers too traveled long distances for jobs USES recommended. They too were outraged by the treatment they received. According to the Employment Service, the Kaiser Shipbuilding Company in Portland, Oregon, like other shipyards on the West Coast, desperately needed skilled or trainable workers to work as machinists, welders, burners, pipe fitters, and the like. Hundreds of black workers had boarded trains in New York City in response to Kaiser's call.

Just as the sugar workers had found, the recruiters' rosy picture began to fade even before the workers had reached their destination. On board the train, Kaiser representatives assigned the black workers positions as general laborers, whereas they upgraded some of the white men to skilled jobs. Upon arrival, the black recruits learned that the company was not their only, or even their primary, problem. The International Brotherhood of Boilermakers, a union affiliated with the American Federation of Labor, had recently established closed-shop agreements with Kaiser and other West Coast shipyards. These agreements required the companies to hire only union members. If the new African American workers wanted skilled work in the shipyards, they would have to join segregated locals of the boilermakers' union. But those locals deprived African Americans of virtually all of the rights of union membership. As a brief for the black workers later put it, "The only matter in which there is entire equality, without discrimination, is with reference to dues. *The dues are equal*."[5]

Some African American workers joined the segregated locals in order to keep the jobs for which they had traveled across the country. Justifying his membership, one worker explained that "of

---

[4] Letter from Robert S. Glasgow, Jr., Mar 4, 1942, DOJ Files 50 – 18 – 15.

[5] Herbert R. Northrup, "An Analysis of the Discrimination against Negroes in the Boilermakers Union" [Draft Brief] at 2, Hill v. Int'l Bhd. Of Boilermakers (R.I. Super. Ct. filed Dec. 16, 1943), file 6 – 7333 of 18 – BU – COS – WP, in *Papers of the NAACP*, ed. August Meier (Frederick, Md., 1982), microfilm, pt. 13C, rl. 2:23 – 40, 24 (hereinafter cited as *NAACP papers*). NAACP, "NAACP Aids Coast Shipyard Workers," news release, Dec. 3, 1943, in *NAACP Papers*, pt. 13C, rl. 1:42.

course the babies have got to eat." Skilled work had never been readily available to black workers, and if union membership, even segregated union membership, opened doors, then some were willing to pay the price. Others refused to join, either because they objected to the segregated auxiliaries on principle or because they saw no point in joining auxiliaries that provided no benefits and no power. Many lost their jobs. Black shipyard workers up and down the West Coast organized in opposition to exclusionary and discriminatory boilermakers' unions. And like the sugar workers, they turned to lawyers for help.[6]

As civil rights lawyers took on these and other black workers as clients, the legal practices they created played a critical role in challenging Jim Crow in the 1940s. But they have played a negligible role in subsequent understandings of constitutional law and history. Although scholars of African American and labor history have recently unearthed a labor-based civil rights movement during the decade, their attention to African American workers has largely failed to penetrate legal histories of civil rights.[7]

In part, this is a consequence of the way *Brown v. Board of Education* has captured our cultural, legal, and constitutional imaginations since it was decided in 1954. When the Supreme Court declared segregation in public primary and secondary education unconstitutional, it achieved a great milestone for racial progress in the United States. In the half-century since *Brown*, scholars have unsurprisingly lavished attention on the case as the pivotal moment in the creation of modern civil rights doctrine. Focusing on *Brown*, conventional histories of civil rights law long viewed the 1940s as a period of relative stasis, important only for its contributions to the development of the *Brown* litigation. Although these narratives are slowly being replaced by a new understanding of the importance of

[6] Direct Examination of Sidney Wolf at 201, In re Or. Shipbuilding Corp. (F.E.P.C. Portland, Ore., Nov. 15 – 16, 1943) in *Selected Documents from Records of the Committee on Fair Employment Practice: RG 228, National Archives*, ed. Bruce Friend (Glen Rock, N.J., 1971), microfilm, rl. 13. See NAACP, "War Production Board: Labor Division," news release, Jan. 24, 1942, in *NAACP Papers*, pt. 13C, rl. 1:27.

[7] The canonical article is Robert Korstad and Nelson Lichtenstein, "Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement," *Journal of American History* 75 (1988): 786 – 811. For additional contributions to the literature see Chapter 1, note 48.

the 1940s to civil rights, *Brown* remains central to both the dominant historical narrative and the reigning legal canon.[8]

That centrality continues to obscure an important point: *Brown* represented only one possible form of modern civil rights doctrine. When NAACP lawyers succeeded in *Brown*, they realized a major victory over Jim Crow. They also largely eclipsed the other legal experiments in civil rights lawyers undertook in the 1940s. Although the Supreme Court's opinion did not fix in stone every detail of civil rights law, *Brown* served as a crystallizing moment that channeled legal energy toward some kinds of cases and legal theories rather than others. Because of *Brown*, psychologically damaged schoolchildren and the state-segregated school became the icons of Jim Crow. It was out of these particular and poignant materials that complainants, lawyers, and judges constructed subsequent civil rights doctrine. In the wake of *Brown*, that doctrine has

[8] Brown v. Board of Education, 347 U.S. 483 (1954). See, for example, Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (New York, 1977); James T. Patterson, Brown v. Board of Education: *A Civil Rights Milestone and Its Troubled Legacy* (New York, 2001); Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925 – 1950* (Chapel Hill, N.C., 1987); Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936 – 1961* (New York, 1994); Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York, 2004); Derrick Bell, *Silent Covenants:* Brown v. Board of Education *and the Unfulfilled Hopes of Racial Reform* (New York, 2004); Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, 1991); J. Harvie Wilkinson, *From* Brown *to* Bakke: *The Supreme Court and School Integration, 1954 – 1978* (New York, 1979); John Howard, *The Shifting Wind: The Supreme Court and Civil Rights from Reconstruction to* Brown (Albany, N.Y., 1999); David Armor, *Forced Justice: Schoole Desegregation and the Law* (New York, 1995); Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (New York, 1994); Andrew Kull, *The Color Blind Constitution* (Cambridge, Mass., 1992); Candace Baker Motley, *Equal Justice . . .under Law: an Autobiography* (New York, 1998); Jennifer Hochschild, *The New American Dilemma: Liberal Democracy and School Desegregation* New Haven, Conn. 1984). For new narratives on civil rights before *Brown*, see, for example, Kenneth Walter Mack, "Race Uplift, Professional Identity and the Transformation of Civil Rights Lawyering and Politics, 1920 – 1940 (Ph.D. diss., Princeton University, 2005); Tomiko Brown Nagin, "Black Ambivalence about Legal Liberalism: A Pragmatically Conservative Path to Civil Rights, Atlanta, 1895 – 1979" (manuscript, University of Virginia Law School, n.d.); Wendell E. Pritchett, "A National Issue: Segregation in the District of Columbia and the Civil Rights Movement at Mid-Century," *Georgetown Law Journal* 93 (2005): 1321 – 1333; Wendell E. Pritchett, "Working along the Color Line: The Life and Times of Robert Weaver" (manuscript, University of Pennsylvania Law School, n.d.).

primarily addressed questions of racial classification (as well as classifications on the basis of other personal characteristics like national origin and gender), focused on the stigmatic harm of such governmental classifications, and relied upon the equal protection clause of the Constitution's Fourteenth Amendment.

This book, by contrast, takes as its subject the varieties of civil rights complaints and legal practice in the era before *Brown*. The 1940s and early 1950s were not a relatively uneventful interlude between the New Deal's creation of the modern bureaucratic state and the Supreme Court's fulfillment in *Brown* of a long-immanent promise to protect the rights of racial minorities. Rather, during that decade and a half, the world of civil rights was conceptually, doctrinally, and constitutionally up for grabs. Those years were a signal period of ferment, in which the boundaries of the bureaucratic state, the form of individual rights, and the relationship between them were still unclear. Contemporaries saw how deeply uncertain were the contours of civil rights, their foundational constitutional texts, and the extent of public and private responsibility for their vindication. The political and social fundamentals of late-twentieth-century American liberalism remained deeply uncertain as the New Deal made way first for World War II and then for the Cold War.

In this era of instability and upheaval, civil rights law barely resembled the field as we now know it. In particular, both laypeople and legal professionals included not only the rights with which we associate the term today but also collective labor rights to governmentally provided economic security and affirmative rights to material and economic equality. Contemporaries saw an explicit connection between discrimination and economics, rights and reform, individual entitlement and government obligation. Lawyers who took the cases of black workers treated as civil rights issues labor-based and economic harms as well as racial ones, and they placed responsibility for rights protection within government as well as in opposition to it. Their constitutional imaginations were also more heterodox: they turned for constitutional authority to the antislavery imperative of the Thirteenth Amendment and the due process as well as the equal protection clause of the Fourteenth Amendment.

Taking the complaints of black workers as my starting point, I explore the construction of civil rights in the era before *Brown*. At heart, this book is a legal history, though one in which social history is inextricable. Legal change does not begin with the doctrines courts create or even the rhetorical strategies lawyers employ. It begins with the injuries individuals experience. When those individuals complain to lawyers, they invoke the machinery of the law on their behalf. (I thus leave the words of the complaints intact and unadulterated.) Understanding law creation as beginning with complaints illuminates the human, institutional, and doctrinal mechanisms of legal change. The process begins with the claims individuals assert. It continues with the choices of lawyers to recognize some lay claims and not others. It crystallizes with how lawyers manipulate, translate, and transform those claims through the legal process. And it culminates in the validation of some legal strategies over others.

In part, then, this book is a study of how social phenomena become legal problems, who sees them as such, and how they change once within legal channels. I reconstruct legal practice—rather than judicial doctrine—in order to illuminate both the world of civil rights possibilities in the 1940s and the extent of their later transformation. In particular, I explore the potential of black workers' claims to spur the creation of new civil rights doctrines, their eventual disappearance as a force for legal change, and the consequences of that disappearance for constitutional law today.[9]

---

[9] An extensive literature addresses the relationship between litigants, lawyers, and legal change. See, for example, Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago, 1994); Barbara Yngvesson, *Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court* (New York, 1993); Hendrik Hartog, "The Constitution of Aspiration and 'The Rights That Belong to Us All,'" in *The Constitution and American Life,* ed. David Thelan (Ithaca, N.Y., 1988), 353 – 374; Patrick Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago, 1988). On the relationship between lawyers, judges, and laypeople in constitutional law specifically, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York, 2005); Robert Post and Reva Siegel, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy," *California Law Review* 92 (2004): 1027 – 1043. Regarding the power of stories in the law generally, and of victims' stories in particular, see Carol J. Greenhouse, "Citizenship, Agency, and the Dream of Time," in *Looking Back at Law's Century,* ed. Austin Sarat, Bryant Garth, and Robert A. Kagan (Ithaca, N.Y., 2002): 184 – 209, 196: Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative," *Michigan Law Review* 87 (1989): 2411 – 2441; Austin

From the standpoint of civil rights lawyers, the complaints of African American workers represented the emblematic civil rights claims of the 1940s. Throughout the decade, lawyers with a commitment to challenging Jim Crow pursued cases unrelated to labor. They challenged police brutality, lynching, and voting discrimination as well as segregation in education, transportation, and housing. But both the nature of the workers' claims and the larger political and intellectual currents that shaped the lawyers' responses to them made those claims central to developing legal practices and understandings of civil rights.

The claims of the workers who sought legal advice about the Florida cane fields and the West Coast shipyards differed from one another in many respects—they occurred in agriculture and industry, involved near slavery and modern forms of discrimination, reflected a lack of personal autonomy and opportunities for concerted protest—but they all traced their roots to the racial slavery as old as the colonies. For many southern whites, the abolition of slavery following the Civil War had spawned two related problems: a race problem and a labor problem. How, they asked themselves, would they prevent the newly freed African Americans from contaminating the white race and debasing white politics? And how would they find a replacement for the cheap labor black slaves had previously provided and on which the southern economy was largely based?

The answer to both questions was the complex of laws and customs that arose in the late nineteenth century and eventually came to be called Jim Crow. When southern states managed through both violence and legal chicanery to nullify the vote blacks had so recently won, they made it possible to inscribe Jim Crow into legal and political structures for generations. When railroads decided to segregate their railroad cars and local school boards decided to allocate fewer tax dollars to black schools than to white ones, they

---

D. Sarat and William L.F. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (New York, 1995); Kim Lane Scheppele, "Forward: Telling Stories," *Michigan Law Review* 87 (1989): 2073 – 2098; Vicki Schultz, "Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument," *Harvard Law Review* 103 (1990): 1749 – 1843.

helped create Jim Crow. When white planters preferred black to white farmhands and tenants because they could get more work out of black workers for less pay, they drew on and reinforced Jim Crow. When unions excluded black workers and companies refused to hire them, they perpetuated Jim Crow. When the Ku Klux Klan, often with the acquiescence of law enforcement officers, lynched black men and women, they enforced Jim Crow. Jim Crow existed because every day, in ways momentous and quotidian, governments, private institutions, and millions of individuals made decisions about hiring, firing, consuming, recreating, governing, educating, and serving that kept blacks out, down, and under.[10]

Outside the South, African Americans could usually vote, and social isolation and terror were less ubiquitous. But Jim Crow as a system of economic exploitation, if not complete segregation and political exclusion, was very much in evidence across the country during the first half of the twentieth century. For black workers trying to make a living, Jim Crow North and South meant job announcements addressed specifically to white or "colored" workers. It meant that whole swaths of industry, whole sectors of the workplace were off limits. It meant inadequate schooling, inaccessible labor unions, and unavailable government benefits. Black workers usually performed the worst work for the lowest pay. They could not eat in lunchrooms or use bathrooms on site. They worked in segregated gangs and were forced to join segregated unions or found themselves excluded from unions altogether. They had limited, and usually segregated, access to tolerable housing and other services.

By the time World War II began, Jim Crow as a system of both racial oppression and economic exploitation was well entrenched. The "virtual slavery" practiced on the sugar plantations of south Florida and the employment and union discrimination the black boilermakers faced on the West Coast were both products of the systematic and usually legal discrimination, segregation, disfran-

[10] In viewing Jim Crow as both a racial and an economic system, I draw on Robert Rodgers Korstad, *Civil Rights Unionism: Tobacco Workers and the Struggle for Democracy in the Mid-Twentieth-Century South* (Chapel Hill, N.C., 2003); Eric Arrnesen, *Brotherhoods of Color: Black Railroad Workers and the Struggle for Equality* (Cambridge, Mass., 2001); Thomas J. Sugrue, "Affirmative Action from Below: Civil Rights, The Building Trades, and the Politics of Racial Equality in the Urban North, 1945 – 1969," *Journal of American History* 91 (2004): 145 – 173.

chisement, and coercion of African Americans in Jim Crow America. When black workers brought these injuries to civil rights lawyers, they implicitly challenged the very crux of Jim Crow. Civil rights lawyers' positive responses to the workers' complaints reflected a political, intellectual, and legal climate that was increasingly hospitable to precisely such rights claims. Although all periods of history can be understood as indeterminate and contingent to some extent, the simultaneous revolutions in American legal, social, economic, and political life made the decade of the 1940s particularly so. Prior to that time, there was neither substantial space in constitutional doctrine for civil rights lawyers to construct frameworks that would break down Jim Crow nor much political will or institutional capacity to do so. By the time the Florida sugar workers contacted the Department of Justice and the West Coast boilermakers telegrammed the NAACP, the time was ripe for exactly the legal challenges the workers sought.

Before the late 1930s, federal civil rights litigation held out little promise for African Americans. In the late nineteenth century, the Supreme Court had largely undermined the power of the Civil War amendments to protect African Americans. It read narrowly the Thirteenth Amendment's prohibition on involuntary servitude, the Fourteenth Amendment's promise of due process of law and equal protection of the laws for African Americans, and the Fifteenth Amendment's protection of their right to vote. In two cases in particular, the Court gutted the Fourteenth Amendment's equal protection clause. In the 1883 *Civil Rights Cases*, the Court concluded that the amendment protected against rights violations only committed by governments, not those committed by private actors. In the 1896 case of *Plessy v. Ferguson*, it upheld state-mandated racial segregation as constitutional.[11]

Between the turn of the twentieth century and the 1930s, the Court had instead protected a very different set of individual rights under the due process clause of the Fifth and Fourteenth Amendments—the right to make and enforce contracts, the right to property, and the right to pursue one's livelihood and obtain the fruits of one's labor. Those rights came to be associated with the 1905 case of *Lochner v. New York*, which struck down a state law that

[11] Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896).

prohibited bakers from working more than ten hours per day. In the first third of the twentieth century, courts frequently viewed these due process rights as undermining the constitutionality of progressive social and economic regulation. African Americans' enjoyment of contract and property rights had been central to Reconstruction-era ideas of civil rights, but during the *Lochner* era the Court largely divorced due process rights from those of African Americans. Although the Court's protection of such rights sometimes redounded to the benefit of black workers in the first decades of the twentieth century, more frequently they redounded to the benefit of corporations at the expense of both black and white workers.[12]

By the Depression decade of the 1930s, the Court began to dethrone the right to contract and uphold New Deal and other legislative interference in the economy against constitutional challenges. The ensuing expansion of federal power and denigration of *Lochner* rights created what was widely perceived as a revolution in constitutional law. It was not apparent at the time how completely courts would eschew contractual rights or what, if anything, would replace *Lochner*. Legal professionals disagreed about what civil rights were, where in the Constitution courts could find authority to protect them, who exactly should provide that protection, and how they should do so.[13]

Nevertheless, with *Lochner* displaced, one particular type of rights did seem poised to serve as a replacement in the late 1930s. The political concerns of the Depression made workers' collective rights to organize into unions, bargain, and strike appear paramount. These rights were also a crucial component of the larger set of rights to economic security—to minimum subsistence, unemployment insurance, old-age assistance, housing, and education—that the New Deal aspired to provide. No single doctrinal approach to civil rights was yet entrenched, but the collective rights of work-

---

[12] Lochner v. New York, 198 U.S. 45 (1905). See Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (New York, 1970), 11 – 51; Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). For the argument that African Americans benefited from the Court's protection of contract and property rights, see David E. Bernstein, *Only One Place of Redress* (Durham, N.C., 2001).

[13] See, for example, Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York, 1998).

ers appeared the most likely to replace the *Lochner*ian right to contract within dominant legal discourse.

When World War II brought black protest to the fore, the civil rights issues with the most political traction became those that combined claims to racial equality with still-robust claims of labor and economic rights. In particular, the attempts of black workers to build on the labor and economic rights of the New Deal represented the most politically promising civil rights issues of the 1940s.

Within the context of both black workers' experience of Jim Crow and changing understandings of civil rights, then, the central civil rights dilemma of the era before *Brown* was whether and how civil rights lawyers would integrate the various strands of labor rights that survived the 1930s into civil rights practices largely focused on African Americans. In practical terms, this translated into the question of whether and how civil rights lawyers would take the cases of the black workers who sought their counsel. The answer to that question depended on the lawyers' own institutional, political, and doctrinal constraints and opportunities as much as on the contents of the complaints themselves. As clients interacted with their lawyers, their experience of Jim Crow had the potential to shape the lawyers' own understandings of the law and its possibilities.

In this book, I focus on how lawyers in two institutions responded to the complaints of black workers: those in the Department of Justice's Civil Rights Section and those in the legal department of the NAACP. Although a number of other public and private agencies devoted themselves either partially or exclusively to the problems of African Americans, these other organizations did not see themselves as essentially and fundamentally constructing a new legal and constitutional framework for American civil rights in the 1940s. The lawyers in both the CRS and the NAACP understood their professional projects and institutional roles in precisely that way. They were self-described civil rights lawyers at a time when civil rights was a marginal and unformed field of law. They took the challenge to Jim Crow seriously, and they hoped to play instrumental roles in the construction of modern legal doctrine.

Much as they shared, the lawyers in the two institutions were situated quite differently. One group of lawyers was white and one

largely African American, one public and one private, one electorally accountable and one increasingly membership driven. The CRS lawyers worked in the first federal agency in American history whose mission it was to offer legal protection for civil rights. Finding federal jurisdiction for such protection was not easy, but the very difficulty of the task spurred the lawyers to look to the complaints of black agricultural workers for insights. Those complaints offered the lawyers creative ways of balancing an initial mandate of protecting the rights of labor with the World War II imperative of responding to the rights claims of African Americans. In doing so, however, the lawyers had to contend with the politics of the Department of Justice, the Roosevelt administration, and the southerners in the Democratic Party.

For their part, the NAACP lawyers worked for an organization that took as its original mission the destruction of Jim Crow. But even into the 1940s, the association remained open to a number of understandings of that mission. In choosing among them, the NAACP lawyers too took seriously the complaints of black workers. Because of the lawyers' relatively elite social and economic status, however, their experience of Jim Crow differed from that of their clients. Those differences shaped the nature and extent of the legal assistance they would offer black workers, as did the institutional context in which they worked. The lawyers had to answer to the higher-ups in the NAACP as well as to the association's white funders and black members. They had to navigate between attacks on the association as Communist and attacks that it was too bourgeois.

Consequently, the CRS and the NAACP lawyers approached the complaints of black workers—and the larger project of formulating and establishing new civil rights doctrine—in very different ways. The lawyers' disparate strategies, and the implications of those strategies for the civil rights that eventually emerged, suggest an implicit confrontation between (at least) two contending views. On the one hand, the CRS lawyers understood civil rights in part through the lens of labor rights. They built the foundations of some of their cases on the claims of workers like those in the Florida cane fields, and they made the Thirteenth Amendment's prohibition on involuntary servitude central to their practice. The involuntary servitude cases the CRS lawyers pursued on behalf of black

agricultural workers, and the understandings of civil rights those cases suggested, neither monopolized the section's legal practice nor offered up a single, linear plan for a new civil rights doctrine. Nonetheless, the CRS used the Thirteenth Amendment to extend to some of the most destitute black workers affirmative New Deal protections for personal security, labor rights, and rights to minimal economic security. In part because the CRS took seriously the complaints of African American agricultural workers, its civil rights practice accepted an affirmative responsibility to challenge economic exploitation as well as racial discrimination.[14]

The NAACP lawyers' more complicated relationship with the black workers who would be their clients led their civil rights practice in a different direction. For much of its history, the NAACP had not seen itself as deeply concerned either institutionally or programmatically with the economic fortunes of black workers. The exigencies of the Depression and World War II finally convinced the NAACP and its lawyers to view black workers as institutionally, politically, and doctrinally promising clients. As the NAACP lawyers experimented with due process as well as equal protection frameworks in their wartime legal practice, their cases on behalf of black workers challenged both the public and the private, the stigmatic and the material harms of Jim Crow. Nevertheless, in the years after World War II ended, so too did the NAACP lawyers' pursuit of complaints like those of the West Coast shipyard workers. By 1950, when the NAACP's legal team embarked on the direct attack on segregation that would eventually lead to victory in *Brown*, it largely rejected the possibility that workers' complaints would shape its litigation agenda. The lawyers eschewed labor cases, the due process clause, private defendants, and material inequality in favor of a frontal attack on state-mandated educational segregation. They eventually came to regard as the essence of Jim Crow the stigma of governmental classifications, not the material inequality black workers experienced as a result of the interdependent public and private Jim Crow complex.

As a result of the NAACP's overwhelming success in the courts—NAACP lawyer Thurgood Marshall alone won twenty-

[14] On struggles between legal professionals over constitutional interpretation, cf. Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Judicial Field," *Hastings Law Journal* 38 (1987): 805 – 853.

nine cases before the Supreme Court—*Brown* and its progeny succeeded in establishing the NAACP's legal strategy as American constitutional law. The influence of black workers on the NAACP's earlier, labor-related cases and the Civil Rights Section's Thirteenth Amendment practice disappeared from view. That disappearance was in large part a function of the power of *Brown* itself. Once the Court decided *Brown*, the case, the image of Jim Crow it projected, and the civil rights doctrine it initiated captured, and thereby limited, the legal imagination. The Court's validation of the NAACP's litigation choices made the kinds of arguments the NAACP had constructed on the road to *Brown* more culturally available to future lawyers than the arguments the lawyers had discarded. [15]

By emphasizing the historically situated choices of lawyers more than the decisions of courts, this book aims to recreate the interwoven legal, political, and institutional cultures that informed the lawyers' decisions. How the lawyers in the CRS and the NAACP came to practice civil rights law in precisely the manner they did cannot be reduced to any single cause. Clients had the potential to shape legal strategies. But that potential was realized only insofar as those clients' complaints complemented the legal culture the lawyers inhabited, the larger political culture they imbibed, and the material realities they faced. To complicate matters further, the relationship between those influences was constantly in motion. Thus, the contours of legal doctrine alone—the doctrine the lawyers learned as students, the opportunities and constraints they saw in the Supreme Court's fluctuating decisions—are not enough to explain their choices or describe the process of historical change. By the same token, the social and institutional circumstances of the lawyers cannot wholly account for their litigation strategies. The forces at play in lawyers' construction of their civil rights practices in the 1940s instead reveal both less legal autonomy than doctrinal

[15] I am not claiming here that any particular argument became analytically unavailable. As an analytical matter, a variety or arguments is always available. See, for example, Duncan Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review* 28 (1979): 205 – 382; Mark Kelman *A Guide to Critical Legal Studies* (Cambridge, Mass., 1987). Rather, I am suggesting that historically, some arguments are more culturally available in a particular time and place. See, for example, Morton J. Horowitz, *The Transformation of American Law, 1870 – 1960:The Crisis of Legal Orthodoxy* (Oxford, 1992).

determinism would imply and more than economic or social determinism would allow.

In excavating the multiplicity of civil rights complaints and practices of the 1940s, *The Lost Promise of Civil Rights* reveals how much of Jim Crow the victory of *Brown* left unchallenged. My goal, however, is not to identify a particular lost alternative. Rather, it is to highlight the consequences of lawyers' strategic litigation choices about which cases to pursue and which to avoid, which harms to emphasize and which to ignore, which constituencies to address and which to disregard.

The legal and political upheaval of the 1940s—during both World War II and the Cold War that followed—offered several possibilities for a new civil rights. That upheaval also required lawyers to make critical doctrinal and strategic decisions. What aspects of Jim Crow should they target first—the poverty in which the worst-off black workers lived, the material inequality of the private market, the psychological stigma of state racial classifications? What would be the terms on which their clients sought equality, and how would the lawyers define racial progress so that their clients' harms would be remedied? Reconstructing the CRS's Thirteenth Amendment practice and the NAACP's labor-related cases in the 1940s shows how important these questions were—and how contingent the answers—in the decade and a half before *Brown*. During the 1940s, lawyers built on their clients' experiences of Jim Crow to challenge the idea of state action as well as state-sanctioned segregation itself. They fought for economic advancement within segregated workplaces even as they lodged principled objections to segregation. They relied on substantive right-to-work arguments rooted in due process as much as, if not more than, equal protection arguments about formal nondiscrimination. And they used the Thirteenth Amendment as well as the Fourteenth as constitutional authority. The civil rights doctrine we have today, the doctrine born in education cases and culminating in an anticlassification rule, was not inevitable. It was the product of the explicit and implicit judgments of historically situated actors and institutions—of lawyers who decided which clients to take on and how to create legal claims out of their complaints.

Reconstructing the civil rights practices of the 1940s also reveals how partial the NAACP's Supreme Court successes were. The cases that the NAACP eventually took to the Supreme Court in the 1950s and beyond sometimes involved poor and working-class African Americans. And sometimes they concerned material inequality as well as formal discrimination. In the end, however, the NAACP's lawyers did not allow the claims of working African Americans as working African Americans to influence their legal strategies. Had they done so, they might have seen that providing legal redress for black workers required an attack on more than state-mandated segregation. It required as well an attack on the private economic orderings that were equally a part of Jim Crow America. Answering the entirety of black workers' complaints meant not only establishing a norm of racial nondiscrimination but also shoring up the rights to work, to join a union, to participate in the labor market, to minimal subsistence.

As black workers and their complaints receded from both the NAACP's legal practice and *Brown*'s notion of civil rights, the distillation of racial classification as a harm in itself came to be expressed in terms of psychological injury. Once the NAACP had obtained its victories in the education realm, Thurgood Marshall began to think about how "to extend that doctrine to other areas," including labor. But the antidiscrimination paradigm had already begun to take hold of the legal imagination. It was a paradigm with little space for the kinds of claims African American workers and their lawyers in the NAACP and the CRS had made on their behalf a decade earlier. In opening the way for the attack on Jim Crow as formal, government-enforced segregation, *Brown* short-circuited lawyers' efforts in other realms. Whether an alternative strategy would have produced a different outcome is impossible to know. But the problems of African American workers disappeared from the most influential civil rights practice at a pivotal moment in civil rights history, and our civil rights doctrine has largely failed to address the kind of material inequality black workers endured.[16]

The Lost Promise of Civil Rights thus explores the implications of the cases that lawyers brought based on the workers' complaints, and the implications of the cases they did not. It suggests that by

[16] Thurgood Marshall, address, annual meeting of the NAACP, Jan. 3, 1956, in *NAACP Papers,* pt. 1, supp. 1956 – 1960, rl. 1:508.

uncovering historical alternatives to the civil rights law we know as our own, we can broaden our imagination about the possibilities for addressing the remnants of Jim Crow still facing the nation today.

Preferred citation: Risa L. Goluboff, Book Excerpt, The Lost Promise of Civil Rights, 93 Va. L. Rev. In Brief 85 (2007), http://www.virginialawreview.org/inbrief/2007/06/04/goluboff.pdf.