Brown's Reflection

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Just one week separated the Supreme Court's announcements of its decisions in *Brown II*[1] on May 31, 1955, and *Williams v. Georgia*[2] on June 6, 1955. Del Dickson's fascinating account of *Williams* reveals the two decisions to be mirror images. Through his reconstruction of the Justices' deliberations in *Williams*, Professor Dickson shows the Court struggling with the same jurisprudential issues as in *Brown II* and reaching a virtually identical resolution—one that was novel, confusing, and ultimately misunderstood.

The conventional account today of *Brown II* is that the Justices were so acutely aware of the political vulnerability of their 1954 decision in *Brown I*—so fearful about the prospects of Southern resistance to school desegregation and the Court's practical impotence in forcing compliance—that they retreated from the high ground of constitutional principle by endorsing the "deliberate speed" implementation formula. Some critics have maintained that the Court committed a strategic error in *Brown II*; they argue that the white Southern elite would have accepted a clear-cut desegregation order and obtained at least grudging popular acquiescence among its constituents, but the Court's pronounced tolerance for delay opened the way for successful demagogic appeals to massive popular resistance.[3] Others have faulted the Court, regardless of its strategic sense, for allowing its fear of popular resistance to lead it to compromise and thereby abandon constitutional principle.[4] These critics have readily invoked such honored aphorisms as "justice delayed is justice denied" or "fiat justicia ruat caelum," the Latin formula which, as Dickson has ironically observed, is inscribed in marble above the Georgia Supreme Court's bench. Even Alexander Bickel, who praised *Brown II* as a proper acknowledgement by the Justices of the tensions between "principle"

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1. Brown v. Board of Educ., 349 U.S. 294 (1955).

2. 349 U.S. 375 (1955).

3. Justice Hugo Black expressed this view in a 1968 public recantation of *Brown II*. *Black Believes Warren Phrase Slowed Integration*, N.Y. TIMES, Dec. 4, 1968, at A1; *see also* JENNIFER HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 46-91, 146-49 (1984).

4. *See, e.g.*, Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 827-28 (1987); Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243-44 (1968).

and "expediency" in a democratic polity, seemed to undermine his own approbation by his very terminology.[5]

But the Court's decision in *Williams v. Georgia* provides a different perspective on the Justices' contemporaneous deliberations in *Brown II*. Whatever the Justices might have feared regarding elite or popular reception of any order for immediate school desegregation, they had no remotely comparable reason to anticipate resistance to an order for a new trial for Aubry Williams. Just two years earlier, in *Avery v. Georgia*,[6] the Supreme Court had ruled that the jury selection process later at issue in *Williams* was unconstitutional; and the state court had acquiesced, setting aside James Avery's death sentence and imposing a prison term instead based on his guilty plea.[7] The next year, the Georgia Supreme Court—though affirming Williams' death sentence on procedural grounds—openly, and apparently ungrudgingly, acknowledged that the racially discriminatory jury selection practice used in Williams' case had "been condemned by this court and the Supreme Court of the United States."[8] The Georgia Court issued its opinion, with this recognition of the constitutional guarantee against race discrimination and the Supreme Court's role in its effectuation, on May 10, 1954—just ten days before the Supreme Court announced its decision in *Brown I*.

If the Supreme Court thus had no reason to fear that a decision invalidating Aubry Williams' conviction based on race discrimination would be met by Southern white resistance, why nonetheless did the Court hesitate to reach this result? The Court adopted virtually the same approach in *Williams v. Georgia* as it had in *Brown II* one week earlier: pointing to the antidiscrimination principle that the state had violated, implying that the Court itself had clear authority to order immediate redress of this violation, but nonetheless declining to exercise this authority while at the same time clearly expressing its hope and expectation that the state would voluntarily repent. If the unusual resolution in *Williams* was prompted by some motive other than a fear of noncompliance, other than "political expedience" in this sense, that motive might suggest an explanation for the Justices' similar resolution in *Brown II*.

Although Professor Dickson has not identified any single, clear-cut motive for the Court's action in *Williams*, some plausible speculations do arise from his account. It is evident from the Justices' deliberations that most of them were convinced that the Georgia courts had not invoked their procedural ground as a ruse to deny Williams' constitutional right against race

5. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 68 (1962); *cf.* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

6. 345 U.S. 559 (1953).

7. *See* BARRETT PRETTYMAN, JR., DEATH AND THE SUPREME COURT 294 (1961).

8. Williams v. State, 82 S.E.2d 217, 219 (Ga. 1954).

discrimination; accordingly, the Justices were troubled about the basis for their jurisdiction, in light of the apparently independent, adequate state procedural ground. At the same time, a majority of the Justices were unwilling to let the matter pass. This much is clear from their ultimate disposition. But why? What was it about Williams' case that nagged at the Court majority and made them unwilling to adhere to their own initial impulse to deny certiorari or to the persistent imprecations of successive squads of their (Harvard-trained) law clerks?

Although at various points in their deliberations several of the Justices spoke about the special force of the death penalty, it nonetheless seems likely that Williams' sentence was not the primary impetus for the Court's reluctance to decline intervention. In the opening paragraph of his dissent, Justice Clark set out the perspective that almost certainly was shared by most members of the Court at that time:

> While I, too, am not deaf to the pleas of the condemned, I cannot ignore the long-established precedents of this Court. The proper course, as has always been followed here, is to recognize and honor reasonable state procedures as valid exercises of sovereign power. We have done so in hundreds of capital cases since I have been on the Court, and I do not think that even the sympathetic facts of this case should make us lose sight of the limitations on this Court's powers.[9]

There was no Court majority in 1955 pressing against the existence of capital punishment; whatever distaste the Justices might have had for it, they were not then intent on combating the legitimacy of the death penalty.[10]

In 1955 there was a Court majority—indeed, unanimity—for a different proposition, unrelated to capital punishment as such: the *Brown I* proposition that race discrimination was a moral blight and a constitutional wrong that had been practiced in the South and tolerated in the North for too long.[11] By 1955, the Justices had struggled together for more than a decade about the relationship between the moral and the constitutional status of Southern race discrimination. Questions about the morality and constitutionality of racial subordination were of course as old as the American republic, but the Second World War had powerfully intensified their moral salience. In his influential study published in 1944, the War still raged, Gunnar Myrdal emphasized this changed context, drawing conclusions for American legal institutions specifically:

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9. Williams v. Georgia, 349 U.S. 375, 393 (1955).

10. For the emergence and subsequent collapse of this intent on the Court during the following three decades, see Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987).

11. Brown v. Board of Educ., 347 U.S. 483 (1954).

> [I]n this War the principle of democracy had to be applied more explicitly to race [than in the First World War]. Fascism and nazism are based on a racial superiority dogma—not unlike the old hackneyed American caste theory—and they came to power by means of racial persecution and oppression. In fighting fascism and nazism, America had to stand before the whole world in favor of racial tolerance and cooperation and of racial equality. It had to denounce German racialism as a reversion to barbarism. It had to proclaim universal brotherhood and the inalienable human freedoms.
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> . . . .
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> The world conflict and America's exposed position as the defender of the democratic faith is thus accelerating an ideological process which was well under way [before the War]. In this dramatic stage of the American caste struggle a strategic fact of utmost importance is this, that the entire caste order is extra-legal if not actually illegal and unconstitutional. The legal order of the land does not sanction caste but, on the contrary, is framed to guarantee equality and to suppress caste. The only important exceptions are the Jim Crow laws in the Southern states. But even they are written upon the fiction of equality . . . .[12]

In the succeeding decade, this exceptional legal recognition for the racial caste system became increasingly intolerable to the Supreme Court Justices; in a series of cases involving such matters as voting rights,[13] interstate transportation,[14] and graduate school education,[15] the Court gave clear indications that it disapproved of Southern segregation practices. But the Justices nonetheless hesitated from striking directly at the keystone of the Jim Crow regime: the "separate but equal" formula that *Plessy v. Ferguson*[16] had endorsed a half-century earlier as a constitutionally acceptable basis for the post-slavery perpetuation of the racial caste system.[17] Although the Justices' reluctance to confront *Plessy* was partly motivated by concern about the likelihood of Southern white resistance, they did not see this as the only—nor, I believe, the most important—impediment. In 1954, the fundamental barrier in the minds of the Justices to striking at the heart of Jim Crow and overruling *Plessy* was their concern about the lawfulness of such action.

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12. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1004, 1009 (1944).

13. *E.g.*, Smith v. Allwright, 321 U.S. 649 (1944) (invalidating exclusion of blacks from primary elections).

14. Morgan v. Virginia, 328 U.S. 373 (1946) (overturning, as burden on interstate commerce, state law requiring segregation of passengers on interstate carriers).

15. Sweatt v. Painter, 339 U.S. 629 (1950) (declaring racially separate state law schools inherently unequal); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (holding segregation of black student from whites enrolled in same graduate school program inherently unequal).

16. 163 U.S. 537 (1896).

17. *See Sweatt*, 339 U.S. at 636 ("Nor need we reach petitioner's contention that *Plessy v. Ferguson* should be reexamined . . . ."); *cf.* Elman, *supra* note 4, at 821-22.

This apparent conflict between the mandates of morality and the commands of positively enacted law in general, and between the personal convictions and formal role obligations of state officials in particular, was not a new problem in the mid-1950's. Before the Civil War, American judges and lawyers had agonized over this conflict with regard to slavery, and most of them ultimately decided against acting on the basis of their "merely personal morality."[18] The experience of the Second World War, however, put new pressure upon this conventional lawyerly inclination. Justice Jackson felt this pressure in an intensely personal way during his leave from the Supreme Court from May 1945 to October 1946, when he served as United States prosecutor at the first of the Nuremburg trials for "atrocities and war crimes."[19] The central legal issue at these trials was the propriety of imposing judgment on German officials for conduct that was legally approved by the formally constituted state in which they had served. The force of the Nazi example, and the evident parallels between the Nazis' racism and Jim Crow, must have underscored this enduring tension between the obligations of personal morality and state authority—not only for Jackson, but powerfully (if less directly) for the other Justices as well. No one who witnessed the genocidal atrocities carried out by German state officials could view this tension as a question for merely academic or remote historical reflection.

On the one side, the Justices were pulled by a conviction that judicial invalidation of "separate but equal" could not easily be justified by positive law as conventionally conceived—that is, from such sources as longstanding judicial precedent and the original intent of the constitutional draftsmen.[20] On the other side, they were pulled by a heightened sense of moral urgency about the wrongfulness of Jim Crow. This was the tension posed in separate memoranda that Justices Frankfurter and Jackson wrote but never published, and perhaps never even circulated to their colleagues. In 1953, before the Court decided *Brown I*, Frankfurter wrote:

> [I]t is not our duty to express our personal attitudes toward these issues however deep our individual convictions may be. The opposite is true. It is our duty not to express our merely personal views. However passionately any of us may hold egalitarian views, however fiercely any of us may believe that such a policy of segregation as undoubtedly expresses the tenacious conviction of Southern States [is] both unjust and short-sighted, he travels outside his judicial authority

18. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

19. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBURG TRIALS 39, 45-46, 611 (1992). In 1954, Jackson wrote that this prosecutorial service was "the most important, enduring, and constructive work of my life." Robert H. Jackson, *Introduction* to WHITNEY R. HARRIS, TYRANNY ON TRIAL at xxxvii (1954).

20. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 11-14 (1992).

> if for this private reason alone he declares unconstitutional the policy of segregation.[21]

Similarly, in February 1954, Justice Jackson wrote:

> [W]e can not oversimplify this decision to be a mere expression of our personal opinion that school segregation is unwise or evil. We have not been chosen as legislators but as judges. . . . This Court must face the difficulties in the way of honestly saying that the states which have segregated schools have not . . . been justified in regarding their practice as lawful. And the thoughtful layman, as well as the trained lawyer, must wonder how it is that a supposedly stable organic law of our nation this morning forbids what for three quarters of a century it has allowed.[22]

The Supreme Court's decision in *Williams v. Georgia* was a microcosm of this tension. In ordinary times, the Justices would have had no difficulty in refusing federal relief to Aubry Williams, notwithstanding the clear constitutional violation at his trial. The Georgia court's affirmance rested on an "adequate, independent" state ground, and on this basis, as Dickson indicates, all of the Justices except Black and Douglas (and all of the law clerks) were prepared to deny certiorari.[23] But the fall of 1954 was not an ordinary time: in *Brown I*, the Court had just invalidated the core premise of Jim Crow, that separate could be equal. Moreover, unlike with school segregation, the constitutional fault found in the racially discriminatory practice in *Williams* was not based upon a novel interpretive turn; as early as 1879, the Supreme Court had held that racially biased jury selection violated the Fourteenth Amendment.[24] Accordingly, one could imagine a Supreme Court ruling that, in light of the moral urgency arising from *Brown I*, state courts were constitutionally obliged to strike down every instance of race discrimination wherever they had discretionary authority to do so, especially those instances where the racially discriminatory practice violated clear, longstanding constitutional imperatives, as was the case with racially biased jury selection.

Until the final three paragraphs of his opinion for the Court in *Williams*, Justice Frankfurter seemed to be headed toward this result. Frankfurter excavated Georgia precedents to demonstrate that the state courts had on occasion chosen to waive the procedural bar to the constitutional claim, and

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21. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 684 (1976) (second alteration in original) (quoting Frankfurter's memorandum).

22. *Id.* at 689 (quoting Jackson's memorandum of February 15, 1954).

23. Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority:* Williams v. Georgia *Revisited*, 103 YALE L.J. 1423, 1433 (1994).

24. Strauder v. West Virginia, 100 U.S. 303 (1879).

that as a matter of state law, Georgia courts had discretion to disregard such formal barriers in order to accomplish substantive justice. Frankfurter did not, however, draw the conclusion that because the state courts had discretion to waive the procedural impediment, they were obliged to do so in order to protect federal constitutional rights generally or rights against racial discrimination specifically. Frankfurter relied on the existence of state-law discretion only to conclude that the state court's decision against exercising its discretion was not an independent, adequate state ground for disposing of a federal constitutional claim that would deprive the Supreme Court of jurisdiction. But having reached this conclusion, Frankfurter then made his surprising turn—his turn toward *Brown II*. "[T]he fact," he stated, "that we have jurisdiction does not compel us to exercise it."[25]

As if to explain this manuever, Frankfurter quoted extensively from a 1935 Supreme Court ruling, *Patterson v. Alabama*.[26] In *Patterson*, the Alabama Supreme Court had refused to consider on procedural grounds a jury discrimination claim at the same time that it had dismissed on substantive grounds this same claim in a companion case; upon subsequent review, the U.S. Supreme Court upheld the substantive constitutional claim in the companion case[27] and remanded *Patterson* to the state court with the suggestion that it might wish to reconsider its procedural dismissal in light of the companion case's constitutional ruling. The Court noted that it was not disregarding the existence of the adequate, independent state ground; to remand for reconsideration, the Court said, "is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case."[28] On its face, however, *Patterson* did not seem applicable to *Williams*, as Justice Clark pointedly observed in his dissenting opinion. Clark correctly noted that, unlike in *Patterson*, the Georgia Supreme Court in *Williams* already knew about the prior constitutional ruling when it relied on the procedural ground to dismiss the present claim; Frankfurter's reliance on *Patterson*, Clark charged, showed "just how far the Court has 'stretched' here."[29]

If the Court had viewed *Williams* as an ordinary case, Clark's rebuttal of its reliance on *Patterson* would have been unanswerable. But there was an added aspect to *Patterson* itself that neither Clark nor Frankfurter mentioned—an aspect that showed why the Court majority viewed *Williams* as more than an ordinary case and implicitly revealed not only the aptness of

25. 349 U.S. at 389.
26. 294 U.S. 600 (1935).
27. Norris v. Alabama, 294 U.S. 587 (1935).
28. *Patterson*, 294 U.S. at 607, *quoted in Williams*, 349 U.S. at 390.
29. 349 U.S. at 393.

its citation to *Patterson* but also the linkage between the Court's dispositions in *Williams* and *Brown II*.

Haywood Patterson was one of the nine so-called Scottsboro Boys, who had been convicted in 1931 of raping two white women and sentenced to death. The case attracted national attention and was widely regarded as a travesty as well as a dramatic instantiation of the pervasive racial bias in the Southern criminal justice system. In *Powell v. Alabama*,[30] the Supreme Court reversed all nine convictions on the grounds that the indigent defendants had no attorney and that, in a capital case, the state was constitutionally obliged to appoint counsel. *Patterson v. Alabama* was the second act of this drama in the Supreme Court. On retrial, two of the original Scottsboro defendants, Patterson and Norris, were again convicted and sentenced to death, but the trial judge, James Edwin Horton, Jr., set aside the verdicts in an act of unusual personal courage. In a third trial before a different judge, these two were yet again convicted and sentenced to death; though both defendants had raised constitutional objections to the racial composition of the jury venire, Patterson's attorney had filed out of time, and it was on this basis that the state supreme court affirmed his conviction. After the U.S. Supreme Court reversed Norris' conviction based on the jury discrimination and remanded Patterson's case for reconsideration, the state set aside Patterson's conviction. In a fourth trial, he was convicted and sentenced to a prison term. This time, the state supreme court affirmed the conviction, and the U.S. Supreme Court denied certiorari.[31]

In retrospect, the first Scottsboro decision in *Powell v. Alabama* stands as the harbinger of the constitutional jurisprudence of the Warren Court. *Powell* was a striking innovation in constitutional doctrine and an encroachment by the federal judiciary into matters that had traditionally been regarded as state prerogatives; and although *Powell* was framed in universalist terms, it clearly appeared to be impelled by the Supreme Court's unwillingness to tolerate the indignities inflicted by the Southern racial caste system under the aegis of state sovereignty. So too for the Warren Court: by the mid-1960's, the expansionist federalizing propensity in *Powell*, initially driven by but not restricted to Southern racial practices, had spread across the entire face of the Warren Court's constitutional work, not only in criminal justice matters but more broadly in such doctrinal areas as free speech and voting reapportionment.[32]

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30. 287 U.S. 45 (1932).

31. Patterson v. State, 175 So. 371 (Ala.), *cert. denied*, 302 U.S. 733 (1937).

32. *See, e.g.*, HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 6 (1965) ("[A]s a thumbnail summary of the last two or three decades of speech issues in the Supreme Court, we may come to see the Negro as winning back for us the freedoms the Communists seemed to have lost for us."); JACK H. POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 209 (1979) (quoting Chief Justice Warren, "If *Baker v. Carr* had been in existence fifty years ago, we would have saved ourselves acute racial troubles. Many of our problems would have been solved . . . if everyone had the right to vote, and his vote counted the same as everybody else's.")

But this trend—which Frankfurter in particular would later resist on the ground that it was driven more by the Justices' "personal moral convictions" than by the "rule of law"—had not yet unfolded in 1955. In the early 1950's, the entire Court was still visibly struggling to maintain the coherence of this distinction in the face of the massive challenge to it raised by the palpably evil racial caste system, the longstanding substantive legitimation of this system in positive constitutional law, and its procedurally protected status behind the well established doctrines of state prerogative.

In both *Williams* and *Brown II*, the Court attempted to combat the racial caste system while acknowledging uncertainty as to whether such action was permitted by positive law. In these opinions, the Justices held fast to the distinction between their personal morality and legal authority and yet did not disclaim their responsibility to pronounce moral judgment on positive law. To put the matter in stark terms, if the Justices had simply bowed to the (considerable) force of conventional legal doctrine and disavowed responsibility for others' actions in maintaining school segregation or in affirming Aubry Williams' conviction, they would have been like "good Germans" who saw themselves bound to obey the law simply because it was the law; but as they had recently seen, thus had totalitarian evil triumphed. If, however, the Justices overturned the law simply because they found it morally repellent, without respect for their limited institutional authority, they would transform a "government of laws" into a "government of men"; also thus had totalitarian evil triumphed.

In *Williams* and in the two *Brown* decisions, the Justices embraced the same technique to balance the moral tension they felt from these two antithetical commands. They proclaimed the racial caste system immoral but did not purport to force this judgment on others; instead, they appealed to others' legal and moral capacities to reach independent judgments and at the same time emphatically urged them to reach the same conclusion regarding the evil of the caste system. The core problem for the Justices was not their fear that others would defy any command that they might impose. As the contemporaneous juxtaposition of *Williams* and *Brown* makes clear, the core problem was that their command, even if obeyed, would have been a dubious means toward a good result and would have compromised the integrity of the entire enterprise. This was not, as Alexander Bickel suggested, a preference for expediency over principle—it was exactly the opposite.

The Scottsboro Boys cases generally, and *Patterson v. Alabama* in particular, were especially appropriate precedents for the Court to invoke in order to signify these intentions. The Court in 1932 and again in 1935 had clearly indicated its disapproval of the racially discriminatory practices in these cases and both ratified and legitimated the public moral sentiments that had been widely expressed outside the South. But in *Patterson*, the Court visibly and even ostentatiously deferred to the independent authority, acknowledged

as such, of the Southern courts to consider whether specific remedial action would be taken and, by implication, whether the Southern courts were prepared to respond to the moral criticism that others had directed at them. The Alabama court did indeed respond as the Supreme Court had hoped it would in *Patterson*, granting the defendant a new trial notwithstanding the procedural error that would have formally justified affirming his death sentence.[33] State officials were, moreover, apparently responsive in the other Scottsboro cases as well. After the Supreme Court's first decision in *Powell*, four of the defendants were released without retrial.[34] Of those retried and again found guilty, only Patterson and Norris were sentenced to death; when both men were tried yet again after the second Supreme Court ruling on jury discrimination, Norris alone was sentenced to death, but the governor of Alabama commuted his sentence to life imprisonment.[35] In light of the powerful reasons to believe that all of the defendants were innocent of the rape charges, these results were hardly a clear vindication of the fairness of the American criminal justice system. But the responsiveness of the Alabama officials to the spirit as well as the letter of the Supreme Court decisions in the Scottsboro cases did make *Patterson* an apt example for the Justices to hold out to the Georgia Supreme Court in *Williams*.

The Georgia Supreme Court emphatically refused to follow this example. In its sharp response, the Georgia court charged that the Supreme Court had demanded that it "supinely surrender sovereign [state] powers" and expressed outrage that the Justices had sought to "influence or in any manner to interfere with the functioning of this court on strictly State questions."[36] Professor Dickson's research does not indicate whether Chief Justice Duckworth, who wrote the Georgia court's opinion, directly considered the implications of the Supreme Court's citation of *Patterson*. The case and its general background were so notorious in the South, however, that even twenty years later, it is hard to believe that the reference was lost on Duckworth. From the angry tone of Duckworth's rejoinder, it appears that, if he saw the allusion to the Scottsboro case as such, he was much more insulted than persuaded by it.

From one perspective, the Scottsboro case could be viewed as an egregious injustice promoted by the racial caste system but not as an indictment of the inherent wrongfulness of the entire system. By contrast, Aubry Williams' conviction was not an especially outrageous application of Jim Crow; unlike for the Scottsboro boys, there was no plausible suggestion in the trial record that Williams was innocent of the charged crime, and no specific harm to him

33. *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 324-29 (1969).
34. *Id.* at 375-77.
35. *Id.* at 383-84.
36. Williams v. State, 88 S.E.2d 376, 377 (Ga. 1955).

had been proven from the discriminatory jury selection process.[37] *Williams* was thus only a "garden variety" instance of the operation of the Southern caste system. The Supreme Court in *Patterson* had asked the Southern court to share its moral indignation at the unjust treatment of the Scottsboro Boys and act on its own independent authority to remedy that injustice; but a sympathetic Southern response to this moral appeal would not necessarily acknowledge the evil of the entire caste system. The Supreme Court in *Williams*, as well as in *Brown II*, was asking Southern courts to share its newly heightened sense of moral urgency about the wrongfulness of Jim Crow in its entirety, but in 1955, at least, Southern courts in particular and the white Southern polity in general were not open to this appeal.

Was it then wrong for the Supreme Court to make this appeal for the moral leaders of the white South to confess error? As a matter of tactical expedience, perhaps the Court was wrong. Perhaps the Southern elite would have acquiesced in a command for immediate school desegregation, just as Chief Justice Duckworth reportedly told his son that his court "would have complied quietly, if unhappily, with a Supreme Court order to grant Aubry Williams a new trial."[38] But in Williams' case, such an order would have had, at best, a dubious legal warrant in light of the well established principle that the Supreme Court had no authority to overturn a state decision resting on adequate, independent state grounds. Chief Justice Duckworth's "quiet, if unhappy" compliance would have been the obedience of the "good German" who ignores the moral status of the orders issued by hierarchically superior officers. In *Williams*, as in *Brown II*, the Supreme Court was not asking for that kind of submission.

The Justices' appeal to the white South in these two cases in 1955 was the same, though less eloquently stated, that Abraham Lincoln had issued in 1862 when, in the midst of the Civil War and four months before he issued his Proclamation, he proposed compensated, voluntary emancipation by the white slaveowners. "This proposal makes common cause for a common object," he wrote, "casting no reproaches upon any. It acts not the pharisee. The change it contemplates would come gently as the dews of heaven, not rending or wrecking anything. Will you not embrace it?"[39] Lincoln did not succeed in averting the terrible escalating destructiveness of the continuing war. The consequences of the adamant Southern white resistance to *Brown* may not have

37. In the decision immediately prior to *Williams*, the Georgia Supreme Court had itself acknowledged the racially discriminatory character of its jury selection process but nonetheless had affirmed the conviction on the ground that no actual discrimination had been shown in the defendant's case; the Supreme Court held the practice unconstitutional on its face, without requiring any demonstration of actual discrimination in particular applications. Avery v. Georgia, 345 U.S. 559 (1953).

38. Dickson, *supra* note 23, at 1458.

39. Abraham Lincoln, Proclamation Revoking General Hunter's Order of Military Emancipation of May 9, 1862 (May 19, 1862), *reprinted in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 222, 223 (Roy P. Basler ed., 1953).

had the same physical dimensions, but there was equivalent, terrible damage inflicted on the moral sensibility of our political life. Our generation again tasted and thus re-learned the bitter lesson of the Civil War: that our political associations with one another rested more fundamentally on coercion than on a shared moral vision based on mutual respect.

Southern white resistance to *Brown* was a moral evil, inflicting continued wrongful oppression on black people. But the common criticism today, in response to this evil, that the Court was wrong in principle to withhold its coercive mandate in *Brown II*, suggests an even deeper tragedy: we have lost the ideal—the very ideal on which our moral condemnation of the racial caste system is based—that social relations should not rest on force but on mutual respect among equals.

In my own work, most recently in *The Constitution in Conflict*, I have tried to reassert the jurisprudential meaning of this ideal. Before writing that book, I wish I had had Del Dickson's research about the *Williams* case for the added light it has cast on the Supreme Court's efforts at the beginning of the Second Reconstruction in 1955 to avoid the tragic outcomes of the First.