

Garland's Million; or, the Tragedy and Triumph of Legal History: American Society for Legal History Plenary Lecture, New Orleans, 2021

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For longer than I'd like to admit, I've been writing a book occasioned by an unusual Harvard undergraduate named Charles Garland, who upon turning 21 in June 1920, refused his share of his wealthy father's estate. The inheritance amounted to about \$1,000,000, which would be about \$14,000,000 today, adjusted for inflation. "Private property is the principal cause of our unrest and unhappiness," Garland told the papers. Garland became a press sensation. Observers asked (some ironically, others hysterically) whether the Russian Revolution was coming to Boston.¹

Roger Baldwin, who had founded the American Civil Liberties Union (ACLU) earlier the same year, had a different idea of what Garland should do with the money. So did Upton Sinclair, the gadfly radical and author of *The Jungle*. Baldwin and Sinclair wrote to Garland. Accept the money, they told him, and donate it to a board of advisors who would use it to undo unrest and unhappiness.²

1. "Garland's Sons Turn Down Million Each," *Boston Daily Globe*, November 23, 1920, 1. The standard and very serviceable account is Gloria Garrett Samson, *The American Fund for Public Service: Charles Garland and Radical Philanthropy, 1922-1941* (Westport, CT: Greenwood Press, 1996). An unpublished but now publicly available manuscript by the late Richard Cowen offers unending and fascinating detail about Garland and the circumstances of the inheritance and donation. Richard Cowen, *The Garland Book* <http://documents.law.yale.edu/sites/default/files/garland%20unpublished%20bio.pdf> (accessed March 15, 2022).

2. Reminiscences of Roger Baldwin, 1953-1954, Oral History Research Office, Columbia University, 326-28; Upton Sinclair to Charles Garland, January 10, 1922, The Papers of

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Law and History Review February 2022, Vol. 40, No. 1

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doi:10.1017/S0738248022000013

Over the course of the next year, Baldwin successfully persuaded Garland to do just that. In 1922, Baldwin incorporated the American Fund for Public Service (AFPS), known better then and now as the Garland Fund, with a mandate to make contributions “for the benefit of mankind.” The board, recruited by Baldwin, resolved to use its money primarily to support producers’ movements of organized labor, on the one hand, and “the protection of minorities,” on the other. Over the next 7 years, the Fund’s resources would grow in the booming stock market of the 1920s to become nearly \$2,000,000.³

Here then, in our terms, was the question that they faced every month: How would *you* invest \$28,000,000 dollars to change the world today?

To be clear, this amount was a drop in the ocean. By the early 1920s, Andrew Carnegie and his estate had donated some \$350,000,000. Rockefeller foundations had already given away \$575,000,000. Big philanthropy was a phenomenon, as it is again today. The Garland Fund was not.⁴

The Garland Fund grant, however, occasioned a distinctively generative set of conversations. The directors asked a fundamental question about how to make change. They wanted to know what levers might alter the basic operations of an exploitative and oppressive world. The goal as they put it was no less than to “free[] people’s minds from the bonds of old institutions.”⁵

Roger N. Baldwin, Firestone Library, Princeton University, box 13, folder 9, reel 13; and Samson, *The American Fund for Public Service*, 2.

3. Charles Garland to Roger N. Baldwin, July 15, 1922, AFPS Records, reel 2; American Fund for Public Service, Inc., *Report for the First Year of Operation Ending July 31, 1923* (New York: AFPS, 1923), 5; American Fund for Public Service, *Report for the Second Year Ending June 30, 1924* (New York: AFPS, 1925), 19; and *Report of the American Fund for Public Service for the Three Years July 1, 1938 to June 30, 1941, and Summary of Nineteen Years, 1922-1941* (New York: AFPS, 1941) (hereafter *Final Report*), 1.

4. Olivier Zunz, *Philanthropy in America: A History* (Princeton: Princeton University Press, 2012); Maribel Morey, *White Philanthropy: Carnegie Corporation’s An American Dilemma and the Making of a White World Order* (Chapel Hill: University of North Carolina Press, 2021); Rob Reich, Chiara Cordelli, and Lucy Bernholz, eds. *Philanthropy in Democratic Societies: History, Institutions, Values* (Chicago: University of Chicago Press, 2016); Jonathan Levy, “Altruism and the Origins of Nonprofit Philanthropy,” in *Philanthropy in Democratic Societies*, 20–43; Olivier Zunz, “Why is the History of Philanthropy Not a Part of American History?” in *Philanthropy in Democratic Societies*, 44–64; and Raymond Fosdick, *The Story of the Rockefeller Foundation* (New York: Routledge, 1952).

5. Roger N. Baldwin to Charles Garland, May 17, 1922, in American Fund for Public Service Records, 1922–1941, New York Public Library, microfilm reel 1; and Samson, *The American Fund for Public Service*, 20.

The Fund spent down its resources at a rapid clip. By the end of the decade the directors decided on one last big effort. Over considerable internal dissent—more about that later—they announced a final substantial gift in 1930: a grant to the National Association for the Advancement of Colored People (NAACP), initially proposed at more than \$300,000, although soon reduced to \$100,000. The money would launch a campaign of lawsuits against Jim Crow, especially in the public schools of the American South.⁶

In the end, the money was never fully forthcoming. The Wall Street crash took away what the boom market of the 1920s had given. Ultimately the grant amounted to barely \$30,000. Nonetheless, for a quarter-century, lawyers like Charles Hamilton Houston, Thurgood Marshall, Constance Baker Motley, and Jack Greenberg carried forward the campaign, dedicating to that effort the resources and energies of the NAACP and later the Legal Defense Fund. In 1954, of course, the effort culminated in the famous decision in the Supreme Court in *Brown v. Board of Education*, ruling that state-compelled segregation in public schooling is unconstitutional. It is the most famous moment, arguably, in the last century of American law.⁷

Nearly 70 years later, that campaign and its outcomes deliver the cruel disillusionment about law's failures and limits. For decades, America's schools have been growing more segregated, not less. Economic inequality is still nakedly distributed along racial lines. Black lives are at risk from violence and health inequities and poverty. *Brown's* glow has dimmed.⁸

6. Morris L. Ernst, Lewis S. Gannett, and James Weldon Johnson, To the Directors of the American Fund for Public Service, October 18, 1929, AFPS Records, reel 2, 9; and Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 2005).

7. American Fund for Public Service, *Report for the Four Years, 1930-1934, Summary of Twelve Years* (New York: AFPS, 1934), 12; American Fund for Public Service, *Report of the American Fund for Public Service, Inc., for the Two Years July 1, 1934 to June 30, 1936* (New York: AFPS, 1936), 1; Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (New York: Basic Books, 1994), 55.

8. The classic works critiquing *Brown* in legal scholarship are Derrick A. Bell, Jr.'s two early articles, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," *Yale Law Journal* 85 (1976): 470-516, and "*Brown v. Board of Education* and the Interest Convergence Dilemma," *Harvard Law Review* 93 (1980): 518-33. See also James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford: Oxford University Press, 2002); Jack Balkin, ed. *What Brown v. Board of Education Should Have Said* (New York: NYU Press, 2002); Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2006); Michael Klarman, "How *Brown* Changed Race Relations: The Backlash Thesis," *The Journal of American*

What do we do with tarnished idols? What to do when ideals fail?

This evening I want to persuade you that the flawed projects of the Garland Fund and *Brown v. Board* are tragedies and triumphs of a kind characteristic to legal history. They are quintessential examples of the kind of broken success that law makes available and that legal history helps us see.

As a social practice, law lies in the space—to draw on the brilliant political theorist Brandon Terry—between irony and romance, a space that Terry associates with a desperate mix of tragedy and possibility.⁹

We should not be surprised to see the failure of idealistic visions or the undoing of righteous conceptions of justice in the history of the law. We should expect tragedy. And not just because the world is full of evil, although it is, but because the compromise, the tarnish, and the

History 81 (1994): 81–118; Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: Chicago University Press, 1991); Erica Frankenberg, Jongyeon Ee, Jennifer B. Ayscye, and Gary Orfield, *Harming Our Common Future: America's Segregated Schools 65 Years After Brown* (Los Angeles: Civil Rights Project/Proyecto Derechos Civiles & Center for Education and Civil Rights, 2019); Sean Reardon and Ann Owens, “60 Years After *Brown*: Trends and Consequences of School Segregation,” *Annual Review of Sociology* 40 (2014): 199–218; and LaToya Baldwin Clark, “Stealing Education,” *UCLA Law Review* 68 (2021): 4, 9–11. This scholarly literature underlies the empirical reality: between 2000 and 2014, the number of American public schools serving only poor Black and Brown students nearly doubled. U.S. Government Accountability Office, *K-12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination*, GAO-16-345 (Washington, D.C.: General Post Office, 2016). On continuing and worsening school inequality, see Ansley T. Erickson, *Making the Unequal Metropolis: School Desegregation and its Limits* (Chicago: University of Chicago Press, 2016), and for COVID-19-era examples, see Paul M. Ong, *COVID-19 and the Digital Divide in Virtual Learning* (Los Angeles: UCLA Center for Neighborhood Knowledge, 2020); Sonya Douglass Horsford, Leana Cabral, Cami Touloukian, Siettah Parks, Phillip A. Smith, Chy McGhee, Fawziah Qadir, Dominique Lester, and Jade Jacobs, *Black Education in the Wake of COVID-19 & Systemic Racism* (New York: Black Education Research Collective, Teacher's College, Columbia University, 2021); and Emily Oster, Rebecca Jack, Clare Halloran, John Schoof, Haisheng Yang, Julie Roche, and Dennis Roche, *Disparities in Learning Mode Access Among K-12 Students During the COVID-19 Pandemic* (Washington, DC: United States Center for Disease Control, 2021).

9. Brandon M. Terry, “MLK Now,” *Boston Review Forum*, September 10, 2018, <https://bostonreview.net/forum/brandon-m-terry-mlk-now/>, last visited March 15, 2022; Tommie Shelby and Brandon M. Terry, “Introduction: Martin Luther King, Jr., and Political Philosophy,” in *To Shape a New World: Essays on the Political Philosophy of Martin Luther King, Jr.*, ed. Tommie Shelby and Brandon M. Terry (Cambridge, MA: Belknap Press, 2018), 1–18; and Brandon M. Terry, “Irony and the Politics of Pessimism in African American History” (paper presented at the Yale Law School Legal Theory Workshop, September 23, 2021).

at-best-tragic realization of ideals is built into the mechanisms of the law. It is what the law does.

I. A Star-Crossed Target of Critique

For nearly 100 years now critics have lambasted the American Fund.

Upon the Fund's opening in 1922, the *New York Times* called it a criminal enterprise. The American Federation of Labor (AFL) soon denounced its "out-and-out revolutionary . . . , pro-Soviet, [and] pro-Communist character." The Chamber of Commerce gleefully took up labor's cudgel to bash the Fund's efforts. Government got into the act, too. The House Military Affairs Committee warned in 1926 that the Garland Fund was made up of "communists" and "pacifist plotters." Congressman Martin Dies blasted the Fund as part of the dangerous world of Soviet-inspired radicalism. The House Un-American Activities Committee carried on a campaign against what it called "the red Garland Fund." Anticommunist culture warriors bashed the Fund as the central node in a nefarious "red network" aimed at the destruction of "free government, religion, the home, and all the institutions of American civilization."¹⁰

We need not listen only to the detractors on the right. The Fund's own directors had little good to say about it. Baldwin bemoaned the Fund as mostly having given "blood transfusions" to organizations "already headed for the grave"; his unpublished autobiography openly proclaimed the Fund a failure. At mid-century, board members remembered the experience as "largely negative." One recalled the Fund as "an object lesson in . . . futility," and even during the Fund's operations, another director observed a "total lack of enthusiasm" on the Fund's board. Black labor organizer A. Philip Randolph—who received money from the Fund—privately and uncharitably called the entire project "irrefutable evidence of a mental

10. "Criminals to Share in Garland's Fund," *The New York Times*, July 29, 1922, 3; "Gompers Says Fund Proves Itself Red," *The New York Times*, April 14, 1923, 15; Merle Curti, "Subsidizing Radicalism: The American Fund for Public Service 1921-4," *Social Science Review* 33 (1959): 274, 292 (discussing the role of the chamber of commerce); Hearings Before the Committee on Military Affairs on H.R. 8538 Prohibiting any Course of Military Training from Being Made Compulsory . . . , U.S. Congress, House, 69th Cong., 1st Sess. (1926), 189; Martin Dies, *The Trojan Horse in America* (New York: Dodd, Mead & Co., 1940), 255; Special Committee on Un-American Activities, House of Representatives, *Investigation of Un-American Propaganda Activities in the U.S.* (Washington, D.C.: Government Printing Office, 1938), 1: 574; Elizabeth Dilling, *The Red Network: A Who's Who and Handbook of Radicalism for Patriots* (Chicago: Self-Published, 1934), 163; and Walter S. Steele, "Subsidizing Red Radicalism," *The National Republic*, November 1930, 16–17.

nut.” Those whose grant applications failed were, unsurprisingly, more scathing.¹¹

And Charles Garland himself? Garland (who had little involvement in the Fund’s operations) could only bring himself to say that its grants didn’t in the end “cut much ice”; he objected in particular to its gifts to the NAACP as insufficiently radical.¹²

Scholars have not had much good to say about the Fund either. An older generation of liberal historians lauded its efforts. Richard Kluger saw in the Fund the beginnings of “simple justice.” Merle Curti portrayed the Fund as a notable chapter in the “long effort” of liberal progress. More recently, the Fund’s historians have been less generous. Risa Goluboff and Mark Tushnet cite it as “a cautionary example” and charge it with imposing undue limits on conceptions of race equality. The incisive political scientist Megan Francis asserts that the lure of Garland Fund money captured the mainstream of the civil rights movement and turned it away from lynching and racial violence. Leading scholars like Kate Andrias, Ken Mack, and Ben Sachs echo Francis. They follow in the footsteps, too, of W.E.B. Du Bois, who left the NAACP soon after the inception of the *Brown* campaign, declaring famously that black children needed “neither segregated schools nor mixed schools,” but instead “an education.” Du Bois’s view stands in for generations of black critics, ranging from Du Bois’s contemporary the sociologist Ralph Bunche, to founding critical race theorist Derrick Bell, to a host of critical race scholars and historians today.¹³

11. Reminiscences of Roger Baldwin, 332; Roger Nash Baldwin, “Autobiography” ms., Papers of Roger Nash Baldwin, reel 20, box 20, folder 12, 338; Curti, “Subsidizing Radicalism: The American Fund for Public Service 1921-4”; Scott Nearing, *The Making of a Radical: A Political Autobiography* (New York: Harper & Row, 1972), 48–49; Morris Ernst to Members of the American Fund for Public Service, May 4, 1929, box 1, folder 2, Clarina Michelson Papers, Tamiment Library, New York University; Samson, *The American Fund for Public Service*, 2.

12. Cowen, *The Garland Book*, 923; Roger Nash Baldwin to Charles Hamilton Houston, July 7, 1937, AFPS Records, reel 3; and Charles Garland to Roger Nash Baldwin, March 17, 1936, box 3, reel 2, AFPS Records.

13. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (New York: Knopf, 1974); Curti, “Subsidizing Radicalism: The American Fund for Public Service 1921-4”; Risa Goluboff, *The Lost Promise of Civil Rights* (Cambridge, MA: Harvard University Press, 2010); Tushnet, *The NAACP’s Legal Strategy against Segregated Education, 1925-1950*; Megan Ming Francis, “The Price of Civil Rights: Black Lives, White Funding, and Movement Capture,” *Law & Society Review* 53 (2019): 275–309; Kate Andrias and Benjamin Sachs, “Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality,” *Yale Law Journal* 130 (2021): 546–635; Kenneth Mack, “Rethinking Civil Rights Lawyering and Politics in the Era Before *Brown*,” *Yale Law Journal* 115 (2005): 256–354; W.E.B. Du Bois, “Does the Negro Need Separate Schools?” *Journal of Negro Education* 4 (1935):

II. The Story

A. The Fund Directors

Who were the much-maligned directors of the Fund?

Meeting monthly in Greenwich Village beginning in late 1922, the board consisted of about a dozen people at any one time. Its composition changed modestly during the Fund's main decade of operation, but there was a core cast of characters. In addition to Baldwin, who was the Fund's dominant figure throughout its life, the board included NAACP leader and man of arts and letters James Weldon Johnson, former Wobbly and iconoclastic labor radical Elizabeth Gurley Flynn, and perennial Socialist Party presidential candidate Norman Thomas. New Deal power broker Sidney Hillman of the Amalgamated Clothing Workers of America and later the Congress of Industrial Organizations served on the board in its early years. So did two editors at the liberal magazine *The Nation*—Lewis Gannett and Freda Kirchwey—as well as Chicago social worker Mary McDowell. Crusading labor lawyer Frank Walsh was one of the Fund's incorporators, and lawyer Morris Ernst—most famous for his civil liberties work in defense of James Joyce's *Ulysses*—sat on the board. There was a small cadre of communists and sometimes-communists on the Fund board, too, including labor organizer William Z. Foster, American Communist Party founder Benjamin Gitlow, and Boston heiress Clarina Michelson.¹⁴

328–35; Ralph Bunche, “A Critical Analysis of the Tactics and Programs of Minority Groups,” *Journal of Negro Education* 4 (1935): 308–15; Derrick Bell, “Law, Litigation, and the Search for the Promised Land,” *Georgetown Law Journal* 76 (1988): 229–36; Brian K. Fair, “Still Standing in the Schoolhouse Door: Deconstructing *Brown*'s Bias and Reconstructing its Remedy,” *Indiana Journal of Law and Social Equality* 2 (2013): 137–65; Darrell D. Jackson, “Help! The Supreme Court Gave Me Bad Directions: Rethinking *Brown* and Affirmative Action in the Wake of *Schuetz*,” *Michigan State Law Review* (2014): 647–76; Atiba R. Ellis, “Reviving the Dream: Equality and the Democratic Promise in the Post-Civil Rights Era,” *Michigan State Law Review* (2014): 789–851; Steven L. Nelson, “Still Serving Two Masters? Evaluating the Conflict Between School Choice and Segregation Under the Lens of Critical Race Theory,” *Boston University Public Interest Law Journal* 26 (2017): 43–74; and Najarian R. Peters, “The Right to Be and Become: Black Home-Educators as Child Privacy Protectors,” *Michigan Journal of Race and Law* 25 (2019): 21–59.

14. The membership of the Board is traceable in the AFPS annual reports. See also Samson, *American Fund for Public Service*, 34–35. The biographical literature on the leading figures is vast. See, for example, Robert Cottrell, *Roger Nash Baldwin and the American Civil Liberties Union* (New York: Columbia University Press, 2001); Helen C. Camp, *Iron in Her Soul: Elizabeth Gurley Flynn and the American Left* (Pullman: Washington State University Press, 1995); Lara Vapnek, *Elizabeth Gurley Flynn: Modern American*

Influential liberal and progressive advisors circled around the Fund's board, including Harvard's Felix Frankfurter, the philosopher John Dewey, birth control advocate Margaret Sanger, Unitarian minister and pacifist John Haynes Holmes, public health activist Alice Hamilton, and essayist Walter Lippmann.¹⁵

Some will recall the venerable historians' question: Where did progressivism go? Here's part of an answer: many of its leaders and some of its energy wound up in and around the Garland Fund conference table. For a decade these members argued and fought, sometimes productively and sometimes bitterly, over what kind of change to make and how to accomplish it.¹⁶

B. Failure and Critique? (Undoubtedly)

Change, of course, is hard. And given the number and intensity of the critics, perhaps it is no surprise that many of the Fund's projects were abject failures. Maybe even most of them were.

Right out of the box, the Fund gave \$55,000 to a socialist paper, the *New York Call*, which folded within months. The Fund made big loans

Revolutionary (New York: Routledge, 2015); Harry Fleischman, *Norman Thomas: A Biography* (New York: Norton & Co., 1964); Raymond F. Gregory, *Norman Thomas: The Great Dissenter* (Sanford: Algora Publishing, 2008); Stephen Fraser, *Labor Will Rule: Sidney Hillman and the Rise of American Labor* (New York: New York Press, 1991); Samantha Barbas, *The Rise and Fall of Morris Ernst, Free Speech Renegade* (Chicago, University of Chicago Press, 2021); Brett Gary, *Dirty Works: Obscenity on Trial in America's First Sexual Revolution* (Palo Alto: Stanford University Press, 2021); Joel Silverman, "Pursuing Celebrity, Ensuing Masculinity: Morris Ernst, Obscenity, and the Search for Recognition" (PhD diss., University of Texas, 2006); James R. Barrett, *William Z. Foster and the Tragedy of American Radicalism* (Champaign: University of Illinois, 2001); and Theodore Draper, *The Roots of American Communism* (New York: Routledge, 1957).

15. Michael E. Parrish, *Felix Frankfurter and His Times: The Reform Years* (New York: New York Free Press, 1982); Robert Westbrook, *John Dewey and American Democracy* (Ithaca: Cornell University Press, 1991); Jean Baker, *Margaret Sanger: A Life of Passion* (New York: Hill & Wang, 2011); Alice Hamilton, *Exploring the Dangerous Trades: The Autobiography of Alice Hamilton, M.D.* (Boston: Little, Brown and Co, 1943); and Ronald Steel, *Walter Lippmann and the American Century* (New York: Routledge, 1999).

16. A.S. Link, "What Happened to the Progressive Movement in the 1920s," *American Historical Review* 64 (1959): 833–51; Daniel T. Rodgers, "In Search of Progressivism," *Reviews in American History* 10 (1982): 113–32; David P. Thelen, "Where Did Progressivism Go? A Search Around the South," *Georgia Historical Quarterly* 68 (1984): 60–70; William Allen White, "Where are All the Pre-War Radicals?" *The Survey* (1926), 556–566; Frederick C. Howe, "Where are all the Pre-War Radicals?: A Rejoinder," *The Survey* (1926): 33 ff.

for strike relief; strikes failed, and the Fund's money disappeared. Labor organizers fled to the Soviet Union rather than appeal criminal convictions, costing the Fund nearly \$40,000 in bail money. At least one completely fraudulent enterprise absconded with tens of thousands of dollars. Any number of other funding efforts came to no good end.¹⁷

What of the charges that the Fund was a communist plot? The Fund was by any measure an organization of the left. Its resources typically went to the left wing of the American labor movement, sponsoring eclectic socialist- and industrial-union-leaning efforts. Its debates featured the usual left-sectarian infighting, although Baldwin's charisma and the Fund's initially ample resources allowed it to let a thousand flowers bloom and to avoid the worst internecine conflict. It made some grants to sectarian party organizations. And in the Fund's waning days, when Charles Garland reasserted influence over the Fund and when the other directors had lost interest, the last few thousand dollars of funding fell largely under the control of a Soviet spy named Harold Ware, most famous as Whittaker Chambers's handler, who directed money to late 1930s Communist efforts at agricultural radicalism.¹⁸

But the internal organization of the Fund was actually carefully designed to limit and constrain the influence of the Communist Party. Baldwin, Johnson, and others fought from early on against certain kinds of Communist tactics on the board itself; Baldwin aimed (not always successfully) to ensure that there was never more than one Party member on the board at any one time. The big grant decision in 1930 to award funds to the NAACP was made by self-consciously circumventing subversive tactical efforts by the Communist Party elements of the board.¹⁹

17. Samson offers a serviceable recounting. See Samson, *American Fund for Public Service*, 174–75.

18. Curti, "Subsidizing Radicalism"; Roger Nash Baldwin (RNB) to Board, February 28, 1934, Reel 4, AFPS Records; Charles Garland (CG) to RNB, December 6, 1935, CG to [Board?], December 13, 1935, RNB to CG, January 24, 1936, CG to RNB, March 17, 1936, CG to RNB, March 15, 1937, and CG to RNB December 28, 1937, all in Board of Directors Correspondence, box 3, reel 2, AFPS Records; Sam Tanenhaus, *Whittaker Chambers: A Biography* (New York: Random House, 1997), 91–103.

19. Baldwin, *Reminiscences*, 329; Memorandum for the American Fund for Public Service, May [March?] 1930, Original Copy with Corrections (Mr. Ernst), National Association for the Advancement of Colored People Records, 1842-1999, box I-C196, folder 4 (February–May 1930), Library of Congress; Curti, "Subsidizing Radicalism," 287–88; and Committee on Negro Work, Memorandum to the Directors of the American Fund For Public Service [n.d., 1930], James Weldon Johnson Papers, b. 1, f. 14: American Fund for Public Service, 1930–38, Beinecke Library, Yale University.

C. The Legalism Charge

What, then of the charge that the Garland Fund and the NAACP campaign were unduly legalistic? Versions of this critique have circulated in evaluations of the Fund's work from the 1920s to the present. Today they form one of the most powerful criticisms of the *Brown* decision itself. In this view, a formal, lawyers' conception of equal protection asserted itself and suppressed deeper, substantive efforts at practical equality.²⁰

As it happens, few in the 1920s were more skeptical of change through the courts than members of the Fund board. The Supreme Court had put Eugene Debs in prison—not once but twice!²¹

People like Flynn, Baldwin, Foster, Scott Nearing, and Gitlow had long preached about the dangers of working through state institutions of any kind, let alone courts. Baldwin had been disillusioned a decade earlier, when his efforts at democratic reform in Progressive-Era St. Louis helped produce racial segregation ordinances and race riots. Courts in particular seemed like implausible pathways to revolutionary change, since for so long they had seemed to be partisans of capital and white supremacy. These were the institutions that had delivered *Plessy v. Ferguson* and *Lochner v. New York* and *Hitchman Coal & Coke Co. v. Mitchell*. Courts had produced the labor injunction and wielded antitrust law against unions.²²

20. The literature is vast. Leading scholarly examples include Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (Oxford: Oxford University Press, 2004); Goluboff, *Lost Promise*; Rosenberg, *Hollow Hope*; Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," *Stanford Law Review* 49 (1997): 1111–48; Aryeh Neier, *Only Judgment: The Limits of Litigation in Social Change* (Middletown: Wesleyan University Press, 1982); Paul D. Butler, "Poor People Lose: *Gideon* and the Critique of Rights," *Yale Law Journal* 122 (2013): 2176–204; Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (Ann Arbor: University of Michigan Press, 2004 [2nd edition]); see also Tushnet, *The NAACP's Legal Strategy*, 164–66 (describing 1920s critique of the courts). This assertion resembles Lorde's admonition that "the master's tools will never dismantle the master's house." Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House," in *Sister Outsider: Essays and Speeches* (Berkeley: Crossing Press, 1984): 110–14.

21. *In re Debs*, 158 U.S. 564 (1895); *United States v. Debs*, 249 US 211 (1919); Nick Salvatore, *Eugene V. Debs: Citizen and Socialist* (Champaign: University of Illinois Press, 2007).

22. *Plessy v. Ferguson*, 163 US 537 (1896); *Lochner v. New York*, 198 US 45 (1905); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917); Roger N. Baldwin, "East St. Louis – Why," *The Survey*, August 18, 1917, 447–48; Roger N. Baldwin "The Myth of Law and Order," in *Behold America!* ed. Samuel D. Schmalhausen (New York: Farrar & Rinehart, 1931), 657–71; and Roger N. Baldwin, "Free Speech for Nazis?" *World Tomorrow*, November 1933, 613.

And so it should be no surprise that the Fund's efforts were directed almost entirely toward sources of transformative change outside the courts and indeed outside the state entirely.

The Fund's first award? Strike relief for the United Mine Workers District No. 2 in Western Pennsylvania in August 1922.²³

Over the next years, the largest category of funding—constituting more than a quarter of the Fund's grants—went to periodicals and publications such as the New York publishing house Vanguard Press and the labor-oriented news service Federated Press. The Fund gave large sums to the ill-fated *New York Call* and another socialist weekly, the *Oklahoma Leader*; grants went to the *Daily Worker*, to A. Philip Randolph's monthly, *The Messenger*, and to the magazine *Labor Age*, which was affiliated with the League for Industrial Democracy, a kind of American version of the British Fabian Society, to which Baldwin, Dewey, Du Bois, James Farmer, Lippmann, A.J. Muste, and Reinhold Niebuhr all belonged at one time or another. The Christian-socialist magazine, *The World Tomorrow*, received grant money, as did *The New Masses*, which was the successor to the pre-war-era literary and political journal *The Masses*.²⁴

A fifth of the Fund's resources went to the second-largest funding category, which was workers' education, including large grants to the astounding and forgotten Brookwood Labor College in Katonah, New York, along with the socialist Rand School in Manhattan, the Denver Labor College, Commonwealth College in Arkansas, the Workers' School in New York, and United Mine Worker education efforts in Pennsylvania.²⁵

Educational propaganda efforts received substantial grants, too, including a speakers' service modeled on George Creel's World-War-I-era Committee on Public Information.²⁶

23. United Mine Workers of America, District #2, box 24, reel 17, AFPS Records; American Fund for Public Service, *Report for the First Year*, 10.

24. *Final Report*, 2; American Fund for Public Service, *Report for the Second Year*, 10 (*New York Call*); American Fund for Public Service, *Report for the Two Years, 1928-1930, Summary of Eight Years* (New York: AFPS, 1931), 18 (*Oklahoma Leader*); American Fund for Public Service, *Report for the First Year*, 11 (*Messenger* and *Labor Age*); and American Fund for Public Service, *Third Report*, 18 (*New Masses*).

25. *Final Report*, 2; American Fund for Public Service, *Report for the Second Year*, 4 (Brookwood); American Fund for Public Service, *Report for the Second Year*, 6 (Rand School, Denver Labor College); American Fund for Public Service, *Third Report*, 12 (Commonwealth, Workers' School, and United Mine Workers).

26. American Fund for Public Service, *Report for the Three Years 1925-1928 and Summary of All Six Years of Operation* (New York: AFPS, 1929), 17.

A significant share of Garland money went to research, too, on subjects like imperialism and labor injunctions. Other areas of funding included strike relief, farm organizations, producer cooperatives, workers' health, trade unions, and legislative campaigns—even a traditional progressive-style defense of the constitutionality of the minimum wage published by *The New Republic*.²⁷

None of these projects was narrowly legal in its orientation; even the substantial support for legal defense was not legalistic in the sense that the critics usually mean. Legal defense efforts were rooted in the pre-war and wartime tradition of defense efforts by the Wobblies and others to fend off the state, not to affirmatively use it. The Fund helped pay for Clarence Darrow's services in the Scopes evolution case in Tennessee; supported the campaign to clear Sacco and Vanzetti, the anarchists whose Boston-area conviction for murder the Garland Fund helped make a cause celebre on the left; subsidized criminal defense lawyers for Communists (including board member Foster) charged with criminal syndicalism; and provided bail money to any number of labor radicals in the 1920s.²⁸

Only 5% of Garland resources went to black organizations, and only a small fraction of that went to the litigation campaign. The first NAACP grant, one of the very first made by the Fund, went not to desegregation efforts, but to the extraordinary 1922 anti-lynching campaign in the newspapers in 1922. More generally, nearly three fifths of Garland grants to black organizations went to labor organizing, including to A. Philip Randolph's Brotherhood of Sleeping Car Porters, and to an NAACP legal defense fund that was put to use, among other ways, in the successful representation of Dr. Ossian Sweet and his family. The Sweets had been charged with homicide in the defense of their home against a white mob in Detroit; the Fund paid for Clarence Darrow again. Adding support for black publications, three quarters of the Fund's nearly \$100,000 in awards to black agencies went to projects *other than* the litigation campaign. We can go a step further. As we shall see in a moment, in 1928 and 1929 the Fund undertook efforts to support the organizing of labor in the South,

27. *Final Report*, 2; National Consumers' League, *The Supreme Court and Minimum Wage Legislation* (New York: The New Republic, 1925).

28. Melvyn Dubofsky, *We Shall Be All: A History of the Industrial Workers of the World* (Chicago: Quadrangle Books, 1969); Edward Larson, *Summer for the Gods: The Scopes Trial and America's Continuing Debate Over Science and Religion* (New York: Basic Books, 1997); Adam R. Shapiro, *Trying Biology: The Scopes Trial, Textbooks, and the Antievolution Movement in American Schools* (Chicago: University of Chicago Press, 2013); John A. Farrell, *Clarence Darrow: Attorney for the Damned* (New York: Doubleday, 2011); Moshik Temkin, *The Sacco-Vanzetti Affair: America on Trial* (New Haven: Yale University Press, 2009); and Draper, *The Roots of American Communism*.

efforts that were understood crucially to be about the race problem in the United States. Including these grants, the amount received by the NAACP litigation campaign falls to less than 20% of the resources dedicated by the Fund to support for racial minorities.²⁹

Ultimately, the litigation campaign for which the Garland Fund is now principally known used a mere 3% of the resources deployed by the Fund in its 20-year existence.³⁰

Desegregation through the courts was just one part—and a tiny part at that—of a much larger strategic project to break the ideological bonds of 1920s America. Baldwin conceived of the Fund as the affirmative side of his ACLU, setting the agenda and entering into battle to upset what he called the “colossal” social power of the myths that controlled American social life. Through workers’ education, publishing efforts, magazines, newspapers, and news services, the directors had entered into a struggle over the kinds of public opinion and ideological structures about which thinkers around the Atlantic world had started to write, ranging from Karl Mannheim in Germany and Walter Lippman in the United States, to Antonio Gramsci in Italy and Norman Angell and Graham Wallas in the United Kingdom. The project for the Fund was to alter the landscape of strategic action, and to make possible kinds of politics that had been removed to the margin of American life.³¹

D. The Puzzle

The Garland Fund’s record of grant-making produces a kind of puzzle. Why does an organization that was almost entirely dedicated to goals of fundamental structural change, one that was suspicious of engaging the

29. *Final Report*, 2; American Fund for Public Service, *Third Report*, 8; and American Fund for Public Service, *Report for the Three Years*, 16.

30. *Final Report*, 2; American Fund for Public Service, *Report for Four Years, 1930-1934, Summary of Twelve Years* (New York: AFPS, 1934), 8; and AFPS, *Report . . . July 1, 1934 to June 30, 1936*, 2, 4.

31. Roger N. Baldwin, “Freedom of Opinion,” *Socialist Review*, August 1920, 115; Roger N. Baldwin, “Where Are All the Pre-War Radicals,” *The Survey* (1926): 555–56; Baldwin, “Myth of Law and Order,” 658; Karl Mannheim, *Ideology and Utopia* (London: Routledge, 1929); Walter Lippmann, *Liberty and the News* (New York: Harcourt, 1919); Walter Lippmann, *Public Opinion* (New York: Harcourt, 1922); Walter Lippmann, *The Phantom Public* (Piscataway: Transaction, 1925); Antonio Gramsci, *Prison Notebooks*, ed. Joseph A. Buttigieg (3 vols.) (New York: Columbia University Press, 1992), see for example 3: 213 on public opinion and hegemony and Buttigieg’s introductory essay at 1:1–64; Norman Angell, *The Press and the Organization of Society* (London: Labour, 1922); and Graham Wallas, *The Great Society: A Psychological Analysis* (London: Macmillan, 1914).

state, and that was engaged in a sophisticated critique of ideological forms of power, have a legacy of narrow legal reform?

Part of the answer is that the ideological efforts of a small foundation were swamped by the sheer amount of culture in a country of 100,000,000 people. In all, Garland's directors spent \$1,000,000 on education and publishing. The Fund produced one short film in the span of two decades: an innovative but modest melodrama about the Passaic textile strike of 1926. By the end of the 1920s, Hollywood's three major studios were spending over \$110,000,000 each year, releasing more than 350 films annually.³²

The Fund's most successful early interventions reached minds by turning events into propaganda—what Walter White called “highly spectacular dramatization[s].” The NAACP's anti-lynching bill may have failed in the Congress, but NAACP leaders believed that the Garland-financed campaign of newspaper advertisements altered public opinion and sharply reduced the number of lynchings in the middle of the 1920s. The Tennessee evolution case had become a nationwide media spectacle. The defense of Ossian Sweet had publicized residential segregation in Northern cities. The groundswell of support for Sacco and Vanzetti had galvanized the left in the 1920s as the Scottsboro episode would in the 1930s.³³

But such moments illustrate a crucial and telling caution. Sensational events have to catch people's attention. Change requires appealing to the world as it should be, and also engaging audiences as they are, taking the world as it is, at least in part, and entrenching some or even most of

32. Michael Pokorny and John Sedgwick, “Profitability Trends in Hollywood, 1929 to 1999: Somebody Must Know Something,” *Economic History Review* 63 (2010): 56–84; Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919–1939* (New York: Cambridge University Press, 1990); American Fund for Public Service, *Report for the Three Years*, 10; Kevin Brownlow, *Behind the Mask of Innocence: Films of Social Conscience* (New York: Knopf, 1990), 502–6; Barry Sabbath, *The Passaic Strike Comes to the Screen*, ms., 1976, Brandon Collection, Museum of Modern Art, New York.

33. Memorandum from Walter White to James Weldon Johnson, September 16, 1929, and Report of the Committee on Negro Work, To the Directors of the American Fund for Public Service, October 18, 1929, both in box I: C196, folder 2, February–November 1929, NAACP Records; see also James Weldon Johnson to Roger Nash Baldwin, December 22, 1922, box 1 – C196, folder 1, 1922–1928, NAACP Records; Larson, *Summer of the Gods*; Kevin Boyle, *Arc of Justice: A Saga of Race, Civil Rights, and Murder in the Jazz Age* (New York: Henry Holt, 2004); Roger Nash Baldwin to Amleto Fabbri, Sacco-Vanzetti Defense Committee, September 23, 1925, Aldino Felicani Sacco-Vanzetti Collection, 1915–1977, Boston Public Library; and Elizabeth Gurley Flynn, *The Rebel Girl: An Autobiography, My First Life, 1906–1926* (New York: International Publishers, rev. ed. 1973 [originally published 1955]), 297–335.

its existing features. Not even the most radical efforts at transformative revolution escape this inevitability. The world's structures and interests screen for the kinds of messages and episodes that will be attention getting and mind shaping. Dreaming about change in the research and publishing branches of the Garland Fund was one thing; altering minds, perhaps millions of minds, was entirely another.³⁴

Dreaming in the world means compromising with injustice, it means loss of purity and the sacrifice of at least some righteous claims.³⁵

For the Fund's directors, an ugly truth was that their core mission—to animate the labor movement—was also the principal site of the Fund's biggest failures. The 1920s were the “lean years” for American labor, in Irving Bernstein's evocative phrase. Union membership fell in absolute terms by a fifth during the early 1920s and continued to fall for a decade thereafter. Between 1923 and 1932, the number and scale of recorded labor actions dropped to levels not experienced since the mid-nineteenth century.³⁶

The Fund's labor efforts stood out for their lack of success. The Fund invested heavily in failed strikes in coal mines, in textile mills at Passaic in 1926 and in Gastonia in 1929, among New York's furriers, and in the garment trades. At the end of the decade, Morris Ernst observed that the Fund had “been entirely unsuccessful” in its efforts “to aid trade-union organization by direct support.” An uncharacteristically frustrated Baldwin wrote that the average American worker “does not know he has lost the right of free speech”—because he had “nothing to say.”³⁷

34. On reform and its entrenchment effects, see for example David Brion Davis, *The Problem of Slavery in the Age of Revolution* (Ithaca: Cornell University Press, 1975) or the controversial, third-rail versions of activism in our own time in Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010); and Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (New York: Macmillan, 2021).

35. A crucial test case is the Quakers and abolition. See Davis, *The Problem of Slavery in the Age of Revolution*, 213–54.

36. Irving Bernstein, *The Lean Years: A History of the American Worker, 1920-1933* (Boston: Houghton Mifflin, 1960); Melvin W. Reder, “The Rise and Fall of Unions: The Public Sector and the Private,” *Journal of Economic Perspectives* 2 (1988): 89–110, at 91; and Melvyn Dubofsky, “Labor Unrest in the United States, 1906-90,” *Review (Fernand Braudel Center)* 18 (1995): 125–35, at 131.

37. Memorandum to the Directors of The American Fund for Public Service from The Committee on Negro Work (n.d., early 1930), b. 1, f. 14, James Weldon Johnson Papers; and Baldwin, “Myth of Law and Order,” 658.

Idealistic social projects meet the world almost instantly. As boxers sometimes say, everybody has a plan until they get punched in the face. And the Fund's labor efforts got hit hard.

E. A Synthesis

The Garland Fund we remember, I propose to you, is a Garland Fund that had been punched in the face and had been altered in the experience.

In this respect, the history of the Garland Fund is characteristic of the history of the law more generally: a family of institutions and practices that are fundamentally about engaging with a world riven by violence and disagreement and imperfection and, yes, evil. To study the law is to study dreams crushed, righteousness compromised, utopias dashed. To study law's history is to study human beings living together with a particular form of authority dedicated to dealing with the fact of bitter and persistent and ineradicable disagreement over facts and values and interests.³⁸

There's a structural reason why the most common narrative in the extraordinary outpouring of legal histories over the past two decades is one of lost promise. The law always delivers blows to at least one side—and sometimes to all sides—of the disagreements it manages.

By 1929, Fund directors like Baldwin were at their wits' end for how to spend the foundation's remaining money. The fortunes of labor (and especially its left wing) were dimmer at the end of the decade than when the Fund had started.³⁹

Inspiration for a path forward came from several directions. From the left in particular came a new focus on the South and the Comintern theory of the Black Belt, which held that African Americans were best understood as a colonized people whose emancipation would look like decolonization. More practically, and I think it's fair to say more acutely, sympathizers with labor could see that racial division among American workers badly hamstrung unionization efforts. AFL unions barred black workers from membership. Baldwin learned about the consequences of racial division in the 1917 East St. Louis racial pogrom and in the failures of the Great Steel Strike of 1919; he had personal engagement with both. Strikes at textile mills in New England or the mid-Atlantic faced the threat that

38. Cf. Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1974) ("the road to hell is paved with due process").

39. Roger Nash Baldwin to Scott Nearing, May 17, 1926, and to Scott Nearing and Morris Ernst, May 20, 1926, reel 1, AFPS Records; Morris Ernst, Memorandum (n.d.), reel 1, AFPS Records; W.E.B. Du Bois to Roger Nash Baldwin, November 11, 1929, reel 1, AFPS Records; and Memorandum on Fund Winding Down, February 17, 1928, reel 1, AFPS Records.

mills would go to a non-unionized South. The Great Migration northward of millions of Black Americans meant that a strike-breaking reserve labor pool increasingly lived across town.⁴⁰

Starting in the second half of the 1920s, the Fund directed its attention to black labor organizing. The directors financed the Trade Union Committee for Organizing Negro Workers, run by black Harlem socialist Frank Crosswaith. The Vanguard Press published Scott Nearing's *Black America*, a fiercely argued critique of racism and inequality as tools of class control. The buttoned-down National Urban League received a grant. So did the Scottsboro Defense Committee.⁴¹ And at the same moment, the Fund took up a proposal to finance a challenge to Jim Crow schools in the American South.

Of course, to historians today, this last example doesn't belong in the list. What is the beginning of *Brown v. Board* doing alongside economic and labor mobilizations? Historians usually see the schools campaign as a substitute for economic and labor mobilization, not as a form of it.⁴²

As I've started to argue in a recently published exchange with Megan Francis, the Fund's turn to Black education had economic and labor roots. Du Bois, the most radical of the NAACP leaders in the late 1920s, started the Fund down the road to Black education when he applied to study school inequality in the South. (Black Americans, he wrote at the time, "form a large and increasingly important part of the laboring class in

40. Robin D. G. Kelley, *Hammer and Hoe: Alabama Communists During the Great Depression* (Chapel Hill: University of North Carolina Press, 1990); Glenda Elizabeth Gilmore, *Defying Dixie: The Radical Roots of Civil Rights, 1919-1950* (New York: Norton, 2008); Cedric J. Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Chapel Hill: University of North Carolina Press, 1983); Eric Arnesen, *Waterfront Workers of New Orleans: Race, Class, and Politics, 1863-1923* (Champaign: University of Illinois Press, 1991); Eric Arnesen, *Brotherhoods of Color: Black Railroad Workers and the Struggle for Equality* (Cambridge, MA: Harvard University Press, 2001); Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton: Princeton University Press, 2007); Ira Katznelson and Aristide R. Zolberg, eds., *Working-Class Formation: Nineteenth-Century Patterns in Western Europe and the United States* (Princeton: Princeton University Press, 1986); Matthew Hild & Keri Leigh Merritt eds., *Reconsidering Southern Labor History: Race, Class, and Power*, (Gainesville: University of Florida Press, 2018); Herbert Hill, "The Problem of Race in American Labor History," *Reviews in American History* 24 (1996): 189-208; and Nell Irvin Painter, "The New Labor History and the Historical Moment," *International Journal of Politics, Culture, and Society* 2 (1989): 369-70.

41. AFPS, Inc., *Third Report, 1924-1925* (February 1926), 12; Scott Nearing, *Black America* (New York: Vanguard, 1929); AFPS, *Report for the Three Years 1925-1928*, 16; AFPS, *Report for the Two Years July 1, 1934 to June 30, 1936*, 16.

42. For example, Goluboff, *The Lost of Promise of Civil Rights*.

the United States.”) James Weldon Johnson argued to Baldwin that assisting Black schools would allow Black workers “to become as rapidly as possible an integral factor in the industrial and labor world.” A few years later, he appealed to his fellow directors by observing that 12,000,000 black American’s were the nation’s “largest group of unorganized workers.”⁴³

Left-leaning Fund directors worried that the NAACP had “no labor program.” Du Bois replied that grants to *The Crisis* and the NAACP would “lead[] the race into industrial democracy and emancipation from their present peonage.” Du Bois supported the 1930 grant proposal by preparing a twelve-page memorandum setting out the *The Crisis*’s coverage of black workers’ role in the American labor problem. Even a comparative moderate like Walter White joined the effort to appeal to labor and class interests. The Fund’s desegregation grant, he explained in 1930, aimed “to establish conditions and a psychology which will put the Negro laborer” on “an equal basis . . . with white labor.”⁴⁴

Even as the NAACP urged funding for its legal campaign, the organization pressed the AFL (without success) to include black workers in the their organizing campaigns. We “face a crisis in interracial labor conditions,” the NAACP told the AFL, in which the black worker “will soon be in a position to break any strike.”⁴⁵

The schools grant brought to the surface sharp disagreements about class and race among the Fund’s directors. Baldwin asserted that class, not race, was the fundamental basis of oppression; race prejudice according to this view was a tool of the real villain, namely class exploitation. Johnson and Ernst disagreed, as they had throughout the 1920s, but answered that the theoretical point did not much matter. All could all agree that the race problem was a practical bottleneck in labor organizing. “Negro

43. Megan Ming Francis and John Fabian Witt, “Movement Capture or Movement Strategy? A Critical Race History Exchange on the Beginnings of *Brown v. Board*,” *Yale Journal of Law & Humanities* 31 (2021): 521–46; W.E.B. Du Bois to AFPS, 11/9/24, AFPS Records, reel 7; James Weldon Johnson (JWJ) to AFPS, 12/17/24, AFPS Records, reel 10; and To the Directors of the American Fund for Public Service (n.d., September 1929), box I: C196, folder 2, February–November 1929, NAACP Records.

44. Walter White to W.E.B. Du Bois, 1/23/1930, W.E.B. Du Bois Papers, University of Massachusetts Special Collections and University Archives; W.E.B. Du Bois to JWJ, 12/20/29, Du Bois Papers; W.E.B. Du Bois, “The Crisis and the Labor Problem,” box I: C196, folder 3, January 3–31, 1930, NAACP Records; Walter White to A. Philip Randolph, October 7, 1930, reel 34, AFPS Records.

45. “A Letter to the American Federation of Labor” (1924), in *Fifteenth Annual Report of the National Association for the Advancement of Colored People for the Year 1924* (New York: NAACP 1925), 48–50; see also General Aims [n.d., Jan. 1930?], box I: C196, folder 3, January 3–31, 1930, NAACP Records.

wage workers,” Ernst wrote to the Fund in 1930, quoting director Scott Nearing’s *Black America*, “carry the normal burden of workers under capitalism.” And in addition, they “must constantly pay the penalty for their blackness. They are exploited as a race.”⁴⁶

The aim of the education campaign offered by Ernst and Johnson was “to create conditions which may lead to a spontaneous outburst of Negro organization.” Until America solved its race problem, they observed, putting money into the labor movement would be “like pouring money down a sink.”⁴⁷

The Ernst–Johnson synthesis did not satisfy everyone. Critics on and off the board insisted that “to reconstruct education,” one “must first reconstruct society.” But the critics offered no path to any such reconstruction, and the counter-argument was clear: the school program was designed precisely find a way to begin such an effort, which must after all start somewhere, and which a decade of experiments in labor and elsewhere—experiments actually undertaken by the Fund itself—had failed to produce.⁴⁸

By 1930, the more heterodox left shared unusually wide agreement that the school equality dimensions of the NAACP’s proposed legal campaign were directly connected to the economic standing of the Black community. An ACLU pamphlet issued in 1931 asserted that the new litigation project might reduce destructive economic rivalry between working-class whites and black America, whose “low standard of living” made them hard to organize. For this reason and others, as Ken Mack has shown in his important work on civil rights lawyering, early critics of legalistic reform—black and white alike—joined in the NAACP campaign during the 1930s.⁴⁹ The campaign was itself heterodox in the 1930s. The white lawyer whom the NAACP retained to develop and prosecute the legal campaign, Nathan Margold, worked to develop a legal theory that might support federal prosecution of white rioters who had violently chased black tenants away from

46. Memorandum for the American Fund for Public Service, May [March?] 1930, Original Copy with Corrections (Mr. Ernst), box I-C196, folder 4 (February–May 1930), NAACP Records; also Barbas, *The Rise and Fall of Morris Ernst, Free Speech Renegade*.

47. Memorandum to the Directors of The American Fund for Public Service from the Committee on Negro Work (n.d., early 1930), box 1, folder 14, James Weldon Johnson Papers.

48. Bertam D. Wolfe, Negro and Education: Presented by Bertram D. Wolfe, Director of New Workers School Opening Discussion of International Student Service Interracial Conference at Shaw University, November 30 to December 2, 1934, box I-C196, folder 11 (May–December 1934), NAACP Records.

49. Broadus Mitchell, Foreword, in American Civil Liberties Union, *Black Justice* (May 1931); see also ACLU Press Release, June 18, 1931, box I-C196, folder 8 (June–December 1931), NAACP Records.

farming land in Oklahoma. In 1932, White and Margold began to develop model bills prohibiting race discrimination in employment by firms that contracted with federal, state, and local governments—bills that eventually began to come to fruition during the Roosevelt and Truman administrations. By the mid-1930s, new federal funding for education also meant that the economic value of schooling equality was greater than the campaign's architects could have guessed.⁵⁰

F. Summary to this Point

In a way, the move to education equalization aimed to be a kind of force multiplier in the Fund's campaign to change minds. The Fund would make a comparatively tiny investment, and if it won, victory might allow it to capture the fiscal power of the state, redirecting the public treasury toward millions of black children and altering the educations of tens of millions of white children, too. Here's how one could compete with Hollywood and the market: capture the state! Such a change might work a giant transformation of mind and reorient Americans' thinking on basic economic questions.

It was a long shot, at best. But as one memo to Baldwin put it in 1937, education seemed to be "the most effective lever" for challenging the system by which, for example, landlords exploited tenant agricultural labor across the South. Education *was* economic radicalism, though to be sure, it was a radicalism that took a particular position in the debate on the left over working within the state.⁵¹

Historians of education and of the law have debated for decades now whether the NAACP leaders were right. But White, Johnson, Houston, Baldwin, and the directors of the Fund had reasons for the views at which they had arrived: reasons often overlooked by the historians. For a decade they had experimented with the alternatives: organizing, educating, striking. Those efforts hadn't stuck. Education, it seemed, might.⁵²

50. Nathan R. Margold (NRM) to Walter White (WW), May 3, 1932, and WW to NRM, November 17, 1932, both in box I-C196, folder 9 (January–November 1932), and Walter B. Hill [Richmond, VA] to WW, January 18, 1935, box I-C196, folder 12 (January–November 1935), NAACP Records; M. Charles Wallfisch, "Franklin Roosevelt and Equal Educational Opportunity," *The High School Journal* 66 (1982): 51–56.

51. Walter White to Roger Nash Baldwin, 10/1/1937, reel 27, AFPS Records.

52. Compare Ronald E. Butchart, *Northern Schools, Southern Blacks, and Reconstruction: Freedmen's Education, 1862-1875* (Westport, CT: Greenwood Press, 1980); John Dittmer, *Local People: The Struggle for Civil Rights in Mississippi* (Champaign: University of Illinois Press, 1994), 37–38; and James Anderson, "Northern Foundations and the Shaping of Southern Black Rural Education, 1902-1935," *History of Education Quarterly* 18 (1978): 371–96, with Adam Fairclough, *A Class of Their Own:*

G. Compromises

To engage a social structure as it exists, even when aiming for transformative change, is to be compromised. Education was a move made in a social structure that had cut off other moves. It was a path of least resistance. There was no version of the school equalization campaign that did not share this tragic structure.

One conception of the school equality project famously aimed not so much to desegregate but to equalize funding. Early NAACP-supported versions of the schools campaign proposed salary and funding equalization, which garnered support from black teachers, who were vital members in local NAACP chapters. Variations on such an approach have attracted activists from Alain Locke in the 1920s and Du Bois in the 1930s all the way to the present. Even this approach, however, accepted a separateness that had been established to promote white supremacy.⁵³

The tragedy of Nathan Margold's report for the NAACP—a report that Francis fiercely calls “infamous”—is that it took stock of the existing structure of 1931 America and made a lawyer's judgment that a school funding equality litigation campaign could never work, at least not in the institutional setting of Jim Crow. As a Felix Frankfurter protégé from Harvard Law School, Margold saw that equal funding would require costly trials on fact-intensive questions in hundreds of differently situated school districts. Even assuming victory, enforcement would be a never-ending quagmire because white school officials in each district would aim to evade and backslide. Civil rights lawyers would be embroiled in literally thousands of ongoing lawsuits at any one time, each involving its own local variations and messy circumstances. Margold was right.⁵⁴

Black Teachers in the Segregated South (Cambridge, MA: Belknap Press, 2007); Adam Fairclough, “‘Being in the Field of Education and also Being a Negro . . . Seems . . . Tragic’: Black Teachers in the Jim Crow South,” *Journal of American History* 87 (2000): 65–91; and Heather Andrea Williams, *Self-Taught: African American Education in Slavery and Freedom* (Chapel Hill: University of North Carolina Press, 2005); see generally James Anderson, *The Education of Blacks in the South, 1865–1935* (Chapel Hill: University of North Carolina Press, 1988).

53. Alain Locke, “Negro Education Bids for Par,” *Survey Graphic* 54 (1925): 567; Jeffrey C. Stewart, *The New Negro: The Life of Alain Locke* (Oxford: Oxford University Press, 2018), 499–501; W.E.B. DuBois, “Does the Negro Need Separate Schools?” *Journal of Negro Education* 4 (1935): 328–335; Newton Edwards, “A Critique: The Courts and the Negro Separate School,” *Journal of Negro Education* 4 (1935): 442–55; and Bell, *Silent Covenants*, 20–28.

54. Francis, “Price of Civil Rights,” 299; Tushnet, *NAACP's Legal Strategy*, 26–27; “Nathan Margold,” box I-C196, folder 6 (October–December 1930), NAACP Records; and Margold Report, June 8, 1931, 35–37, box 41, Lewis Gannett Papers, 1891–1966, Houghton Library, Harvard University.

Margold's fateful lawyerly move was to argue that a formal prohibition on compulsory racial separation in the public schools would make it harder for any one school district to allocate resources on the basis of race. If schools were for all, it would be hard (or at least harder) to direct money to white students over Black ones.⁵⁵

Let's pause here, because the point is crucial. *Brown's* rule against race segregation in this conception was not conceived in an effort to achieve formal equality or legalistic rights. Margold's report said as much: "We are trying only to force them to comply with their equally acknowledged duty to provide 'equal if separate' accommodations in white and colored schools." The desegregation project was rooted in a substantive (if desperate) economic vision for labor solidarities and built on a practical, situated political economy of equality.⁵⁶

Of course, education did not stay still. The world doesn't stay still.

The children who were conscripted by the litigation campaign into serving as the shock troops of civil rights ran headlong into massive resistance. White politicians blocked the schoolhouse doors; families fled to private academies and took refuge in residentially segregated school districts. Black migration to the North produced more residential segregation rather than less, and residential segregation undid the delicate political economy of the Margold theory and the NAACP campaign.⁵⁷

55. Margold Report, June 8, 1931, 93–96, box 41, Gannett Papers.

56. Margold Report, June 8, 1931, 95, Gannett Papers.

57. W.E.B. DuBois, "Does the Negro Need Separate Education," 330–31 ("[B]ut, dear God, at what a cost! . . . [F]or the kind of battle thus indicated, most children are under no circumstances suited. It is the refinement of cruelty to require it of them."); Jessica Trounstine, *Segregation by Design: Local Politics and Inequality in American Cities* (Cambridge: Cambridge University Press 2018); Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright, 2017); Klarman, "How *Brown* Changed Race Relations: The Backlash Thesis"; Isabel Wilkerson, *The Warmth of Other Suns: The Epic Story of America's Great Migration* (New York: Random House, 2010); Nicholas Lemann, *The Promised Land: The Great Black Migration and How It Changed America* (New York: Knopf, 1991); Thomas Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* (Princeton: Princeton University Press, rev. ed. 2014), 181–230; and Christine Leibbrand, Catherine Massey, J. Trent Alexander, Katie R. Genadek, and Stewart Tolnay, "The Great Migration and Residential Segregation in American Cities during the Twentieth Century," *Social Science History* 44 (2020): 19–55. Patterns of segregation continue to dominate public school demographics across the North. Jack Schneider, Ashley J. Carey, Peter Piazza, and Rachel S. White, *School Integration in Massachusetts: Racial Diversity and State Accountability* (Boston: Center for Education and Civil Rights, 2020) (noting that racial segregation in the Commonwealth's public school system persists); Danielle Cohen, *NYC School Segregation Report Card: Still Last, Action Needed Now* (Los Angeles: Civil Rights Project/Proyecto Derechos Civiles & Center for Education and Civil Rights, 2021) (observing that the New York public school system is among the

What about those schools that were integrated? The best estimates indicate that desegregation led to the displacement of nearly 40,000 Black teachers and 2,250 Black principals during the 25 years following *Brown v. Board* in 1954, amounting to a loss of \$240,000,000 in salary income each year in the early 1970s.⁵⁸

The NAACP strategy, as prosecuted by Houston and eventually Marshall, Motley, Greenberg, and others, left open counter-moves by *Brown's* critics. That's what it is to make change and register it in the law in the face of disagreement. You take what you can get and you try to persuade those you can reach. But those who disagree or want to stop you make moves of their own. There is no non-horrific way around this stubborn fact. Law aims for a monopoly over the resolution of disputes that have no resolution without force. And to accomplish its aim, law lets in the opposing sides, angels and devils alike.

III. Passions and Legal Histories

Megan Francis is right: the world will capture efforts to transform it. We shouldn't expect otherwise, although the energies and genius and flaws of people like Baldwin and Johnson and Du Bois and Flynn will leave indelible marks.

Legal history is the study of struggle between the world as it ought to be and the world as it is. As such, it is nearly always about the dialectic of capture and cooptation.

Law mills passions into a grain that is, at best, Grade B: suited to a fallen world of pervasive difference and disagreement. Law is moral visions, life projects, and social formations that leave their mark, but are also ground down and crushed by the weight of the world.

One thing we can say at this point, I think, is: if Francis is right, E.P. Thompson was wrong. The rule of law is not an unqualified human good. It is a good; but it is an essentially tragic one. Its virtue (when it has virtue) rests in the admixture of solvents and solutes that forge a

most segregated in the United States for Hispanic and Black students); and Marc V. Levine, *The State of Black Milwaukee in National Perspective: Racial Inequality in the Nation's 50 Largest Metropolitan Areas* (Milwaukee: Center for Economic Development, 2020): 5 ("72.2 percent of Black schoolchildren in Milwaukee attend hypersegregated schools, the highest rate in the country, and significantly higher than the percentage 30 years ago. Moreover, 35 percent of Milwaukee's Black schoolchildren today attend so-called 'apartheid schools' (schools with over 90 percent minority enrollment).")

58. Michael Fultz, "The Displacement of Black Educators Post-Brown: An Overview and Analysis," *History of Education Quarterly* 44 (2004): 11-45.

new alloy out of the divergent views of human beings. A world in which perfect justice could be achieved might not have law at all. And that's part of why law's rejection has virtues, too, or can, sometimes. The choice between law and something else is always situational and depends on just how unacceptable the law's engagement with evil is under the circumstances and what the available options are.⁵⁹

What does this have to do with legal history? The law's history records moral successes, no matter that they are compromised (as they will be). And it simultaneously records tragedy, because the law will never be more than incrementally better than the community from which it comes.

In recent years, the Thompson claim has not weathered so well. It looks like a Cold War artifact, the product of one man's struggle with the totalitarian betrayal of the twentieth-century left, like a requiem for the dreams of the Garland Fund generation.⁶⁰

More recently, the moral energy of the field cuts a different way. Historians of law, politics, and the state today focus on the past's responsibility for the crying injustices of the present, as if (one is tempted to say) responsibility for them might lie anywhere else.⁶¹

In this now-salient view, emphasis on the tragic (let alone the triumphant, no matter how qualified) seems to risk a kind of complacency. Tragedy and contingency can seem to be interpretive postures lacking a moral urgency adequate to the moment.⁶²

59. E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Random House, 1975), 266.

60. The critique began early with Morton Horwitz, "The Rule of Law: An Unqualified Human Good?," *Yale Law Journal* 86 (1977): 561, 566. On Thompson and the crisis of the English Marxist left, see Christos Efstathiou, *E.P. Thompson: A Twentieth-Century Romantic* (London: Merlin Press, 2016); Fieldhouse & Taylor eds. *E.P. Thompson and English Radicalism* (Manchester: Manchester University Press, 2013); Bryan D. Palmer, *E.P. Thompson: Objections and Oppositions* (New York: Verso, 1994): 107–25; and Perry Anderson, *Arguments within Marxism* (New York: Verso, 1980): 214.

61. See Matthew Karp, "History as End," *Harper's Magazine*, July 2021, <https://harpers.org/archive/2021/07/history-as-end-politics-of-the-past-matthew-karp/> (accessed March 15, 2022).

62. See Justin Desautels-Stein and Samuel Moyn, "Historiography, Ideology, and Law: An Introduction," *History & Theory* 62 (2021): 292; Samuel Moyn, "The Long and the Short of the History of the Laws of War Lawfare," *Lawfare*, September 14, 2021, <https://www.lawfareblog.com/long-and-short-history-laws-war> (accessed March 15, 2022); John Fabian Witt, "Oh, the Humanity," *Just Security*, September 8, 2021, <https://www.justsecurity.org/78135/oh-the-humanity/> (accessed March 15, 2022); and John Fabian Witt, "Fishing, Not Catching, in the History of the Law," *Balkanization*, September 20, 2021, <https://balkan.blogspot.com/2021/09/fishing-not-catching-in-history-of-law.html> (accessed March 15, 2022).

This is all the more so because the stories we tell construct the people we are. We're always at risk when we talk of triumphs, or when we accommodate ourselves to tragedy, of sowing surrender and subverting the passions and idealisms that promise to make the world better.

No wonder critique is where the action is today.

If I've been more successful than I expect, however, I'll have persuaded you of one thing further. At the right time and place, the tragedy and triumph view is not only descriptively illuminating. At crucial junctures, stories of compromised triumphs hold at bay the specter of a paralyzing disillusionment. They sustain hope for an attainable collective future. They maintain human morale by setting daunting but possible expectations for chastened emancipations in our own time and in our futures.

Such stories may not be the fuel to launch movements. But they may be a ballast in the perilous effort to stay afloat.