Peter Charles Hoffer. *The Search for Justice: Lawyers in the Civil Rights Revolution, 1950–1975*. Chicago: University of Chicago Press, 2019. 224 pp.

Hoffer's "interpretive essay" persuasively argues that the civil rights movement was partially structured by lawyers "acting as lawyers" (p. 2)—not just NAACP lawyers, but the lawyers who unsuccessfully defended Jim Crow, the often reluctant judges who heard civil rights cases, and the growing number of law professors, all brought together by lawsuits. Hoffer introduces these figures in fascinating, short biographical vignettes.

Certain arguments between them recur and persist. Recounting *Sweatt v. Painter* (1950), in which an African American student was denied entry into the University of Texas School of Law (Texas planned instead to create a "separate but equal" law school for black students), Hoffer notes that Thurgood Marshall drew on the Louis Brandeis brief in *Muller v. Oregon* (1908) to argue from social science findings. Chief Justice James Wooten McClendon of the Texas Court of Civil Appeals rejected such findings as "outside the judicial function" (p. 39), less compelling than local customs that denied racial equality and education premised on it. A unanimous Supreme Court decided for Sweatt, if reluctantly, by admitting social science evidence that suggested a new law school could hardly be equal to the University of Texas. So, *Plessy v. Ferguson* and "separate but equal" became vulnerable.

Likewise, in discussing *Briggs v. Elliott* (1952), Hoffer notes that Marshall had to argue for the expertise of academic psychologists in contrast to the local knowledge of school administrators who ostensibly supported segregation. Justice Stanley Reed, after opposing counsel John W. Davis dismissed "professors and associate professors" (p. 67), queried if South Carolina segregation laws had been (reasonably) "passed for the purpose of avoiding racial friction" (p. 69). Marshall had to respond that, no, this was just "plain race prejudice" (p. 69).

Davis would also make a persisting historical argument: the Fourteenth Amendment's framers had not intended to desegregate schools. However, Davis eventually revealed that segregation existed not only because of history or any perceived need for order, and he quoted British Prime Minister Benjamin Disraeli: "No man will treat with indifference the principle of race. It is the key of history" (p. 79).

The Supreme Court ruled unanimously against school segregation in *Brown v. Board of Education*. However, history, it found, really was

inconclusive. Chief Justice Earl Warren's opinion that segregated schools inevitably generated feelings of inferiority was commonsensical, but footnote 11 (*Brown v. Board of Education* 347 US (1954) at 495) cited experiments, opening the Court to charges of sociological jurisprudence. Cautiously, the Court did not even overturn *Plessy*. At least, not yet.

Hoffer then covers the skillful, misguided attempts of pro-segregation lawyers to delay *Brown's* implementation. Florida's attorney general, Richard Ervin, though personally liberal (if politically aspirational), argued on the basis of states' rights and a "sociology of the south" in which Jim Crow served as a "protective influence" against wounding the injured pride of volatile southern whites and for the special needs of African Americans (p. 92). Hoffer writes, "*Brown* II had inadvertently shifted the burden of proof in desegregation cases to the plaintiffs, while stubborn and creative litigation strategies among defendants turned delay into a legal set piece" (p. 101).

All this culminated in (or descended to) the Southern Manifesto—"a brilliant if brittle and curiously opaque argument" (p. 107) that Hoffer thoroughly covers over several pages. The Manifesto's authors argued that the Supreme Court depended on "unsubstantiated allegations of fact" (p. 108) and misread the Fourteenth Amendment. They drew on the same "sociology of the South" that Ervin had and Davis's historical arguments in the school segregation cases. If the Manifesto disregarded the sociological expertise marshaled by the NAACP, it proposed an alternative theory of "habits, traditions, and way of life" that undergirded the supposedly hard-won "amicable relations between the white and Negro races" (p. 114-15). The Southern Manifesto was a legal failure, though; no court would ever validate its claims.

However, local judges continued to slow the implementation of *Brown* through narrow readings of the "all deliberate speed" charge in *Brown* II, likely because of their "conservative judicial philosophy" or their "social acclimatization" (p. 126). (Southern judges who confronted segregation often faced ostracism.) Hoffer discusses the forms of judicial delay, as when a judge accepted the testimony of University of Mississippi officials that their refusal to admit James Meredith had nothing to do with color or race. (This would be overruled.) Hoffer recognizes that anti-desegregation jurists increasingly appealed to residential resegregation: the claim, first in *Plessy*, that the races might prefer to separate naturally and voluntarily—and legally. However, the anti-civil rights lawyers had lost their major arguments; Hoffer detects intellectual decline and a telling shift from "law to politics."

The anti-civil rights lawyers' legacy was, first, that their defense of traditional ways of life gave rise to the privileging of freedom of

association as a constitutional right, which, as mentioned, could then be used to defend racial homogeneity in de facto segregated neighborhood schools. Second, their arguments gave rise to a jurisprudence of original intent, especially if it were to undergird states' rights. (Presently, contra Hoffer, academic originalism usually focuses on original public *meaning*, allowing for unintended consequences.) Again, as the sixties progressed, Hoffer claims *explicit* pro-segregation arguments lost legal credibility and fell into "tropes of racialism" (p. 163).

Hoffer finally turns to the legal academy, which he finds somewhat disappointing. Except for Howard, law schools only added civil rights law in the mid-1960s. The *Brown* decision was hardly welcomed by a flood of law review articles. Hoffer critically discusses the work of Herbert Wechsler and Alexander Bickel on neutrality, as well as recent work on "what *Brown* should have said," as theoretical, distanced from practical considerations. (He critiques Derrick Bell's proposed dissent in *Brown* as prophetic at the severe cost of delaying or destroying any prospect of desegregation.) Hoffer acknowledges that civil rights discussions popularized legal scholarship.

Hoffer certainly believes that the civil rights era resulted in meaningful if limited change. It raised the profile of law in the United States, not only legal scholarship but also the legal arguments increasingly voiced before an attentive public. Further, following civil rights era practice, reformers could use injunctions for many different reforms. Nonetheless, Hoffer's narrative also argues for the limits of the law.

Two figures come across relatively well, if briefly. First is Benjamin Cardozo, who noted that judges, in difficult cases, should rule according to contemporary moral progress, but this demanded wisdom: judges could not do so if caught up in the past. Second is law professor Owen Fiss, who admires figures like Department of Justice Civil Rights Division head Burke Marshall, for whom the law was principled, even heroic, and often practically quite limited. Its most meaningful effect could be in enabling the risks and sacrifices of protestors. This is a counsel for neither despair nor sentimentality.

Hoffer's *The Search for Justice*, in broadening the civil rights movement's legal history to include all the lawyers, lets us see, as if in a cinematic wide shot, the law's possibilities and limitations. Bad sociological and historical arguments can fail in court, as they should. However, judges can remain caught up in the past, their courts complicit. At least for a while.

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