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Litigation, Political Mobilization, and Social Reform: Insights from Florida's Pre-Brown Civil Rights Era

Jonathan L. Entin

BOOK REVIEW

LITIGATION, POLITICAL MOBILIZATION, AND SOCIAL REFORM: INSIGHTS FROM FLORIDA'S PRE-*BROWN* CIVIL RIGHTS ERA

Ben Green. *Before His Time: The Untold Story of Harry T. Moore, America's First Civil Rights Martyr.* New York: The Free Press, 1999. viii + 310 pp.

Jonathan L. Entin[*]

Christmas 1951 was Harry and Harriette Moore's twenty-fifth wedding anniversary.[1] That night a bomb destroyed their house in Mims, Florida, killing both of them.[2] The explosion was so powerful that some people thought it had resulted from a rocket accident at nearby Cape Canaveral.[3] The crime remains unsolved, but there were plenty of suspects. Harry Moore had made numerous enemies. He was the point man in Florida for the NAACP and the Progressive Voters League, which had helped register over 100,000 black voters in the state. Suggested culprits have included the Ku Klux Klan, a white political boss who lost his reelection bid in a

* Professor of Law and Political Science, Case Western Reserve University. J.D., 1981, Northwestern; A.B., 1969, Brown University.

1. *See* BEN GREEN, BEFORE HIS TIME: THE UNTOLD STORY OF HARRY T. MOORE, AMERICA'S FIRST CIVIL RIGHTS MARTYR 7 (1999).

2. *See id.* at 9, 168-69. Harry Moore was pronounced dead in a hospital about an hour and a half later. *See id.* at 171. Harriette Moore lingered for just over a week but died the day after her husband's funeral. *See id.* at 186–87.

3. *See id.* at 9.

stunning upset Moore helped engineer, a citrus operator who thought he was disrupting traditional labor arrangements in the groves, and a redneck sheriff whom Moore had condemned for shooting two handcuffed African American prisoners charged with raping a white woman.

Ben Green's book about Harry Moore is not a murder mystery, despite the number of people who wanted Moore dead and the lack of closure about his assassination.[4] Rather, it is a biography of a man whose demise made headlines around the world and evoked widespread protests at home but who today has been almost forgotten.[5] The author means to correct that oversight. Green has produced a useful book that reminds us that there was a civil rights movement before *Brown v. Board of Education*.[6] The most celebrated direct action efforts after *Brown*—the Montgomery bus boycott, the sit-ins, and the Freedom Rides—all drew on pre-1954 activism.[7] *Brown* itself culminated years of NAACP litigation coordinated by Charles Hamilton Houston and Thurgood Marshall.[8] Harry Moore was not, as the subtitle would have it, "America's first civil rights martyr,"[9] but he did

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4. Green devotes three full chapters and part of a fourth to the aftermath of Moore's death. Much of this discussion is informed by the complete FBI file on the case. The file suggests that, despite its well-known lack of sympathy for and reluctance to take seriously attacks on civil rights activists, *see, e.g.*, DAVID J. GARROW, THE FBI AND MARTIN LUTHER KING, JR. (1981); KENNETH O'REILLY, "RACIAL MATTERS": THE FBI'S SECRET FILE ON BLACK AMERICA, 1960–1972, at 9-193 (1989); RICHARD GID POWERS, SECRECY AND POWER 323–32, 367–73 (1987), the Bureau conducted a thorough investigation that came tantalizingly close to solving the crime. *See* GREEN, *supra* note 1, at 228–42. One prime suspect committed suicide the day after federal agents interviewed him. *See id.* at 245–47.

5. Moore is still remembered in Brevard County, where he lived almost all his adult life. *See* GREEN, *supra* note 1, at 253-54, 256. This book also has had some impact, such as the 17-minute segment that aired last summer on a National Public Radio news program with author Green prominently featured. *See Harry T. Moore's Life as a Modern Civil Rights Leader*, NPR Weekend Edition Saturday, July 3, 1999 (available on LEXIS, News Library, NPR file); "Civil Rights Martyrs" (audio version) <http://search.npr.org/cf/cmn/cmnpd01fm.cfm?PrgDate=07/03/1999&PrgID=7&prgcode=WESAT>. Moore's work and the circumstances of his death also have been noted by several scholars. *See, e.g.*, ALEXANDER HEARD, A TWO-PARTY SOUTH? 189 (1952); H.D. PRICE, THE NEGRO AND SOUTHERN POLITICS 45, 57, 117–18 n.29 (1957); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 115 (1994); Steven F. Lawson et al., *Groveland: Florida's Little Scottsboro*, *in* THE AFRICAN AMERICAN HERITAGE OF FLORIDA 298, 315 (David R. Colburn & Jane L. Landers eds., 1995).

6. 347 U.S. 483 (1954).

7. *See, e.g.*, AUGUST MEIER & ELLIOTT RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT 13-14, 38-39 (1973); ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT 17-25 (1984).

8. *See generally* RICHARD KLUGER, SIMPLE JUSTICE (1976); TUSHNET, *supra* note 5, at 116-67.

9. The Civil Rights Memorial in Montgomery, Alabama, covers only post-*Brown* martyrs, so it does not recognize Moore. It does include lynching victims such as Emmett Till, however. *See* GREEN, *supra* note 1, at 254–55. On that basis, Cellos Harrison, Willie James Howard, Jesse James Payne, and Leroy Bradwell—whose lynchings Moore protested and investigated, see *id.* at 47–50,

devote almost two decades to the movement before Martin Luther King, Jr., Malcolm X, or Medgar Evers got involved.[10] Ironically, his efforts were not entirely appreciated within the NAACP, whose national leadership was discreetly trying to ease him out at the time of his death because they disapproved of his style and priorities.

Although the book does not discuss them, Moore is important for other reasons as well. For one thing, his assassination set in motion a series of events that culminated in an important Supreme Court decision on the scope of First Amendment protection against legislative harassment of political dissidents. Furthermore, Moore's extraordinary efforts have implications for debates about litigation and political mobilization as strategies for promoting social reform. This Essay uses Harry Moore's story to consider some of those questions.

I. HARRY MOORE'S STORY

Harry Moore taught for more than two decades in the "colored" schools of Brevard County, Florida. He advanced quickly, becoming a principal in his third year, but soon grew increasingly frustrated by the reality that separate was never equal under segregation.[11] In response, Moore organized the Brevard chapter of the NAACP in 1934[12] and three years later took the lead in establishing the Florida State Teachers Association, an organization of African American educators.[13] That group's first priority was to eradicate racial discrimination in salaries. In Brevard County, for example, no black teacher was paid as much as the minimum for whites. The school board refused to eliminate the disparities, so the teachers took the matter to court with a local attorney. Unfortunately, the case failed. Worse, the plaintiff was fired and never again held a teaching job.[14] Green notes, however, that later cases did outlaw salary discrimination in the state.[15]

55–58, 69–71—should count as martyrs who preceded him in death.

10. *See id.* at 6. When Moore was killed, King was a graduate student who "maintain[ed] a steadfast aloofness from racial issues." *Id.; see also* DAVID J. GARROW, BEARING THE CROSS 42 (1986) (noting that King's pastoral evaluations reflected an attitude of "aloofness . . . which prevent[ed] his coming to close grips with . . . ordinary people"). Malcolm X was in jail until August 1952, when he began his involvement with the Nation of Islam. *See* GREEN, *supra* note 1, at 6; *see also* THE AUTOBIOGRAPHY OF MALCOLM X 165-66, 208-09 (1965); LOUIS A. DECARO, JR., ON THE SIDE OF MY PEOPLE 91 (1996). Evers had gotten married the day before the Moore bombing, *see* MARYANNE VOLLERS, GHOSTS OF MISSISSIPPI 39 (1995), and went to work for the NAACP in November 1954, *see id.* at 56; ADAM NOSSITER, OF LONG MEMORY 42 (1994).

11. *See* GREEN, *supra* note 1, at 27, 30.

12. *See id.* at 37.

13. *See id.* at 35.

14. *See id.* at 38–41; Gilbert v. Highfill, 190 So. 2d 813 (Fla. 1939).

15. *See* GREEN, *supra* note 1, at 42. Green does not identify the successful case, but he

Moore also devoted considerable energy to the fight against lynching, which was a serious problem in Florida.[16] He vigorously pressed state and federal leaders to investigate several lynchings during the 1940s, including one incident involving a fifteen-year-old black boy who had sent a Christmas card to a white girl.[17] In most instances he tracked down relatives of the victims and got them to give their version of events, which diverged dramatically from the official accounts.

If Moore's anti-lynching crusade was not enough to get him into trouble, his political activism certainly was. Moore organized the Progressive Voters League (PVL) to open up Florida's primary to blacks following a 1944 Supreme Court decision involving similar discrimination in Texas.[18] One of the group's biggest challenges was in Moore's own Brevard County, where election officials at first refused to allow blacks to register as Democrats. It took almost three years to overcome that problem.[19] Meanwhile, the PVL launched a statewide registration drive that nearly tripled the number of black voters and endorsed several congressional candidates in the 1946 Democratic primary.[20]

These activities proved too much for the white establishment. A month later Moore and his wife lost their jobs.[21] Shortly afterward, the state conference of the NAACP hired him as executive secretary.[22] There would be a small salary and a shoestring budget, although raising enough money to cover these items would prove to be a continuing problem for the organization.[23]

All the while, Moore continued his work with the Progressive Voters League. In the 1948 Democratic runoff primary, which then was determinative in statewide contests,[24] PVL-endorsed gubernatorial

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probably was referring to *McDaniel v. Board of Pub. Instruction*, 39 F. Supp. 638, 641 (N.D. Fla. 1941). For further discussion of teacher salaries, see *infra* notes 67–68 and accompanying text.

16. *See* GREEN, *supra* note 1, at 45 (noting that Florida had the highest per capita lynching rate in the country between 1900 and 1930 and that it had the third highest number of lynchings of any state between 1921 and 1946).

17. *See id.* at 47–50, 55–58, 60.

18. *See* Smith v. Allwright, 321 U.S. 649 (1944).

19. *See* GREEN, *supra* note 1, at 54, 58–59, 73.

20. *See id.* at 54, 59; STEVEN F. LAWSON, BLACK BALLOTS 134 (1976) (reporting black registration increased from 18,000 to 49,000 between 1940 and 1947).

21. *See* GREEN, *supra* note 1, at 61.

22. *See id.* at 62–63.

23. *See id.* at 63–64, 76–77, 111, 126, 159–60.

24. *See* DAVID R. COLBURN & RICHARD K. SCHER, FLORIDA'S GUBERNATORIAL POLITICS IN THE TWENTIETH CENTURY 59–60 (1980). The insignificance of Florida's Republican Party at the time is suggested by the chapter on the Sunshine State in the classic work on southern politics, which does not contain a single word about the GOP. *See* V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 82–105 (1949). In 1950, only six percent of Florida voters were registered Republicans. *See* ALEXANDER P. LAMIS, THE TWO-PARTY SOUTH 191 (expanded ed. 1988).

candidate Fuller Warren won by a narrow margin.[25] The organization had registered tens of thousands of new black voters, thereby enabling Moore to claim that the group's endorsement mattered.[26] The PVL endorsed President Truman in the general election,[27] but he did not need African American support to carry the state comfortably.[28] By 1950 the number of black registered voters was about six times the 1944 figure.[29] That spring the PVL favored liberal Senator Claude Pepper in his bid for renomination, but conservative Congressman George Smathers defeated him in a contentious primary campaign.[30] The PVL's greatest triumph that year came in the general election in Moore's own Brevard County, where African Americans helped a white write-in candidate upset the local Democratic political boss who had served twenty-four years on the county commission.[31]

Moore also had a high profile in the Groveland case, which arose in July 1949. Norma Padgett, a seventeen-year-old white housewife from the community of that name, north of Orlando, claimed to have been raped by four African American men in circumstances that were hauntingly

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25. *See* GREEN, *supra* note 1, at 74–75. Warren received the PVL endorsement because he was, according to Moore, "the lesser of two evils." *Id.* at 75. Warren was widely regarded as more moderate than his primary opponent. *See* KEY, *supra* note 24, at 93, 95. Warren turned out to have a mixed record on racial issues, *see* GREEN, *supra* note 1, at 89–90, and tried unsuccessfully to make a comeback as a segregationist in 1956, *see* PRICE, *supra* note 5, at 99. Warren's overall record can fairly be characterized as undistinguished. *See* COLBURN & SCHER, *supra* note 24, at 130, 137–39, 146, 195–96, 205–06, 268, 277, 291, 294; CHARLTON W. TEBEAU, A HISTORY OF FLORIDA 426–30 (1971); Michael Gannon, *A History of Florida to 1990*, *in* GOVERNMENT AND POLITICS IN FLORIDA 7, 43 (Robert J. Huckshorn ed., 1991).

26. *See* GREEN, *supra* note 1, at 73, 74-75; *see also* PRICE, *supra* note 5, at 65. There is some confusion about both the size of Warren's victory margin and the number of new black voters. Green says that Warren won by under 2,000 votes, *see* GREEN, *supra* note 1, at 75, whereas a study of the Florida governorship gives the figure as slightly over 23,000 (out of nearly 600,000 votes cast), *see* COLBURN & SCHER, *supra* note 24, at 97. Similarly, Green gives the number of newly registered African Americans as 69,000, *see* GREEN, *supra* note 1, at 73, while the Florida secretary of state reported 53,368 registered black voters in 1948, *see* PRICE, *supra* note 5, at 33. Whatever the correct figure, blacks voted in sufficient numbers to give Warren his primary victory. The significance of this development is particularly noteworthy because as late as 1944, African Americans were prohibited from voting in Democratic primaries. *See id.* at 32.

27. *See* GREEN, *supra* note 1, at 75.

28. Truman outpolled Republican nominee Thomas Dewey by 15 points statewide in a four-way race. *See* HEARD, *supra* note 5, at 26. Truman's margin over Dewey was larger than the number of African American registered voters. *See* PRICE, *supra* note 5, at 33.

29. *See* GREEN, *supra* note 1, at 117; *see also* LAWSON, *supra* note 20, at 134; PRICE, *supra* note 5, at 33.

30. *See* GREEN, *supra* note 1, at 116–18.

31. *See id.* at 118–19, 121–22. Except for the 1948 gubernatorial runoff primary, *see supra* notes 25–26 and accompanying text, the PVL's influence was greatest in local contests. *See* HEARD, *supra* note 5, at 212–13, 215, 229; PRICE, *supra* note 5, at 68.

reminiscent of Scottsboro.[32] There was little evidence that her claim was true, but within hours three suspects (Walter Irvin, Samuel Shepherd, and Charles Greenlee) were in custody.[33] A fourth (Eugene Thomas) was shot to death following a ten-day manhunt led by Willis McCall, a good ol' boy sheriff who could have come from central casting.[34] Green misleadingly characterizes McCall as a precursor of Bull Connor,[35] though the sheriff certainly had a long record of violence toward blacks and close relationships with the Ku Klux Klan.[36]

Angry whites tried to lynch the prisoners, but finding that McCall had transferred them to the state prison, frustrated mobs repeatedly shot up Groveland's black section over the next few nights and burned several houses there.[37] Meanwhile, McCall told reporters that the three suspects had confessed,[38] and the Orlando *Sentinel* ran a front-page editorial cartoon, captioned "No Compromise" and showing four electric chairs marked "The Supreme Penalty."[39]

Moore immediately wrote to Governor Warren, whom the PVL had endorsed in his narrow primary victory the year before, and to federal

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32. For the details of her allegations, see GREEN, *supra* note 1, at 83–84. It is not at all clear that any rape actually occurred. Norma and Willie Padgett had been married less than a year during which time he had beaten her on several occasions. The couple might have concocted the rape story to protect Willie from his in-laws' ire if, as the defense team suspected, he had hit Norma again that night. *See* Lawson et al., *supra* note 5, at 304–05.

33. *See* GREEN, *supra* note 1, at 84. The author consistently refers to Shepherd and Greenlee by their nicknames. *Cf.* JACK GREENBERG, CRUSADERS IN THE COURTS 93–94 (1994) (consistently using the men's given names).

34. *See* GREEN, *supra* note 1, at 87–88.

35. *See id.* at 12. Connor was similar to McCall in many ways, but he had been a Birmingham official since 1937 and was in the process of wearing out his welcome by 1951. During that period he became increasingly strident and heavy-handed on racial issues, at one point defending the police officers who arrested Senator Glen Taylor of Idaho for violating a municipal segregation ordinance while attending a conference in the city. Just days before Harry Moore was murdered, Connor was caught in a tryst with his secretary. That scandal and other embarrassing revelations were thought to have ended his political career, but he made a comeback a few years later and became even more repressive of civil rights advocates. *See* GLENN T. ESKEW, BUT FOR BIRMINGHAM 89-102 (1997); WILLIAM A. NUNNELLEY, BULL CONNOR 14–16, 30–36, 40–44 (1991); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 116–17 (1994); J. Mills Thornton III, *Municipal Politics and the Course of the Movement*, in NEW DIRECTIONS IN CIVIL RIGHTS STUDIES 38, 47–49 (Armstead L. Robinson & Patricia Sullivan eds., 1991).

36. *See* GREEN, *supra* note 1, at 52, 80, 208, 251. McCall served 28 years until losing a reelection bid in 1972, when he was charged with second-degree murder for kicking to death a black prisoner who was being held for a minor traffic violation (the sheriff was later acquitted). *See id.* at 51, 208.

37. *See id.* at 84–86.

38. *See id.* at 85.

39. *Id.* at 86; GREENBERG, *supra* note 33, at 95. *Cf.* Shepherd v. Florida, 341 U.S. 50, 53 (1951) (Jackson, J., concurring in the result).

officials demanding prompt action against the mob leaders, whom Sheriff McCall claimed to know but would not arrest.[40] Moore also launched his own investigation, which revealed that the three prisoners—all of whom denied any wrongdoing—had been severely and repeatedly punched, kicked, and clubbed while in custody.[41]

The defendants went on trial only ten days after reluctant local counsel agreed to take the case.[42] The much ballyhooed confessions were not introduced.[43] Nor did the prosecution present medical testimony about the alleged rape, fingerprints linking the defendants to the crime, or laboratory tests of crucial evidence.[44] Nevertheless, the jury quickly returned guilty verdicts. Irvin and Shepherd received mandatory death sentences; the jury recommended mercy for Greenlee, who was only sixteen years old.[45] A year and a half later, the Supreme Court summarily reversed Irvin and Shepherd's convictions—Greenlee had not appealed[46]—on the ground that African Americans had been excluded from the grand jury pool.[47] Justice Jackson wrote separately to emphasize the prejudicial atmosphere in which the trial took place; he complained that reversing on the basis of the jury-

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40. *See* GREEN, *supra* note 1, at 88–89.

41. *See id.* at 90–91. Their injuries were still evident three weeks later when FBI agents photographed them. *See id.* at 95–96. Despite the FBI investigation, no federal charges were ever filed. *See id.* at 97–98.

42. *See id.* at 99, 100. The defense team consisted of two white Orlando lawyers, a young black lawyer from Daytona Beach, and Franklin Williams of the NAACP national office. *See id.* at 92, 99.

43. Shepherd and Greenlee had confessed but said they had done so only to avoid further beating by the authorities. *See id.* at 91. It is not surprising that the prosecution did not try to introduce the confessions. *See* GREENBERG, *supra* note 33, at 97; *cf.* Brown v. Mississippi, 297 U.S. 278, 287 (1936) (finding a conviction based solely on a confession obtained as a result of police beating to be void).

44. *See* GREEN, *supra* note 1, at 102.

45. *See id.* at 104. The judge had arranged for the black defense lawyers to leave the courtroom immediately after the verdict to escape hostile whites. Nevertheless, a group of Ku Klux Klansmen chased their car to the county line. *See id.* at 105, 107–08.

46. *See id.* at 108, 116. Indeed, Greenlee essentially disappears from the story at this point. The book's last reference to him concerns his work "on a prison road gang" in February 1952. *Id.* at 191. In fact, he was paroled in 1962 and moved to Tennessee. *See* Lawson et al., *supra* note 5, at 318–19.

47. *See* Shepherd v. Florida, 341 U.S. 50 (1951) (per curiam); GREEN, *supra* note 1, at 127. One African American served on the grand jury. There is some disagreement about how unusual that was. Green reports that he was the first black grand juror ever to serve in the county. *See id.* 87. Other writers have said that he was the first in 21 years, *see* GREENBERG, *supra* note 33, at 96, or that he was the second in history, *see* Lawson et al., *supra* note 5, at 306. The discrepancy is immaterial, because the entire process for selecting grand jurors was for all practical purposes identical with that which the Supreme Court had struck down in *Cassell v. Texas*, 339 U.S. 282 (1950). Indeed, the per curiam opinion in *Shepherd* consisted of the word "*Reversed*" with a citation to *Cassell*. *See Shepherd*, 341 U.S. at 50.

selection process "is to stress the trivial and ignore the important."[48]

The Groveland case soon took a bizarre turn. In November 1951, Sheriff McCall shot Irvin and Shepherd while bringing them back from the state prison for their retrial. He claimed the prisoners, who were handcuffed to each other at the time, had tried to escape while he was changing a flat tire along an isolated country road.[49] Shepherd died at the scene,[50] and Irvin was critically wounded.[51] The reaction was immediate and volcanic: even the prosecutor suspected McCall of acting in cold blood.[52]

Moore quickly took the lead in pressing for outside intervention and demanded the sheriff's arrest.[53] No charges were ever brought against McCall despite local, state, and federal investigations.[54] Irvin was retried in 1952, convicted, and again sentenced to death.[55] Three years later, newly elected Governor LeRoy Collins, relying in part on the prosecutor's recommendation, commuted the penalty to life imprisonment.[56]

In perhaps the ultimate irony, Moore found himself a target of the NAACP's national office at the very time he was taking a prominent role in protesting the Groveland affair.[57] His political activities were viewed as

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48. *Shepherd*, 341 U.S. at 54 (Jackson, J., concurring). *See* GREEN, *supra* note 1, at 127–28.

49. *See* GREEN, *supra* note 1, at 136–38.

50. *See id.* at 138.

51. *See id.* at 140.

52. *See id.* at 140–41. So did a local editor who until then had supported the sheriff. *See* Lawson et al., *supra* note 5, at 313–15.

53. *See* GREEN, *supra* note 1, at 142, 151, 163.

54. *See id.* at 141–42, 146–48, 155, 251.

55. *See id.* at 191. To comply with the Supreme Court's decision overturning the convictions in the first trial, the state had seven blacks in the pool from which the jury was selected this time. Four were disqualified because they were opposed to capital punishment, and the prosecutor used peremptory challenges to strike the other three. *See* GREENBERG, *supra* note 33, at 145. Using peremptories against the three remaining African Americans might be grounds for reversal today. *Cf.* Batson v. Kentucky, 476 U.S. 79 (1986). In the event, the conviction and sentence were upheld on appeal. *See* Irvin v. State, 66 So. 2d 288 (Fla.), *cert. denied*, 346 U.S. 927 (1953), *reh'g denied*, 347 U.S. 914 (1954). Habeas corpus relief was also denied. *See* Irvin v. Chapman, 75 So. 2d 591 (Fla. 1954), *cert. denied*, 348 U.S. 915 (1955).

56. *See* GREEN, *supra* note 1, at 206–07; *see also* GREENBERG, *supra* note 33, at 258; Lawson et al., *supra* note 5, at 317–18. Irvin was paroled in 1969 on the condition that he never return to the county in which Groveland is located. The following year he was permitted to go back for a day to visit his family and died there of an apparent heart attack. *See* GREEN, *supra* note 1, at 207.

57. Moore's principal antagonist was Gloster Current, the national office's director of branches. Perhaps the conflict would not have arisen had Current's predecessor, Ella Baker, remained in that position. Baker believed in decentralized organization and grass-roots leadership, which put her at odds with the NAACP hierarchy during her tenure as director of branches. *See* JOANNE GRANT, ELLA BAKER: FREEDOM BOUND 47–50, 51, 53–55, 69–70, 73, 81 (1998); CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM 84-90 (1995); Carol Mueller, *Ella Baker and the Origins of "Participatory Democracy," in* WOMEN IN THE CIVIL RIGHTS MOVEMENT 51, 57–58,

inconsistent with the organization's nonpartisan stance, and his support for Democratic candidates disturbed some important Florida black leaders who were Republicans.[58] Moreover, he was said to be more interested in working in smaller communities than in major urban centers, a fact that took on greater significance when the NAACP suffered substantial membership losses all over the country after doubling its minimum dues in 1949.[59] The national office tried to engineer his ouster as early as November 1950, even though he worked for the state conference rather than the national organization.[60] Moore survived that coup attempt,[61] as well as others in the ensuing months.[62] Finally, over the Thanksgiving weekend in 1951, the state conference abolished his job. He was offered the option of serving in the unpaid position of state coordinator, with the state paying his expenses.[63] Less than a month later Moore was dead, and the NAACP enthusiastically claimed him as a martyr.[64] The story of his dismissal would not be reported until forty years later.[65]

II. SOME ADDITIONAL PERSPECTIVE

Before assessing Harry Moore's work and analyzing its larger implications, we need to consider three points that are not developed in Green's book. The first relates to the challenge to disparities in teacher salaries, the others to Groveland.

61–62 (Vicki L. Crawford et al. eds., 1990). Baker resigned in 1946, *see* GRANT, *supra*, at 242 n.55; PAYNE, *supra*, at 90, and later went on to serve as administrator of the Southern Christian Leadership Conference and to play a substantial role in the founding of the Student Nonviolent Coordinating Committee, *see* GRANT, *supra*, at 104–20, 126–37; PAYNE, *supra*, at 91-92, 95-102; Mueller, *supra*, at 53–54, 58, 62, 64.

58. *See* GREEN, *supra* note 1, at 77, 113, 123. In fact, Florida's newly registered African Americans were overwhelmingly Democratic. The number of black Republicans in the state declined slightly between 1944 and 1948, then remained steady for several years. *See* PRICE, *supra* note 5, at 33; *see also* HEARD, *supra* note 5, at 228–29.

59. *See* GREEN, *supra* note 1, at 77, 111–12.

60. *See id.* at 123–24.

61. *See id.* at 124–25.

62. *See id.* at 126, 129–30.

63. *See id.* at 160–61. Shortly afterward, a national staff person proposed to remove Moore's name from the official organizational mailing list despite his new position as state coordinator. *See id.* at 163–64.

64. Indeed, the national office organized hundreds of memorial meetings around the country and raised a substantial amount of money as a result of popular revulsion at Moore's murder. *See id.* at 188–90. Moore was also posthumously awarded the NAACP's highest honor at the 1952 annual meeting. *See id.* at 194.

65. *See id.* at 213 n.*.

A. *Teacher Salary Litigation*

Moore was active in the Florida State Teachers Association, the black educators group that made discriminatory pay schedules its first priority, and his involvement in Florida's first lawsuit addressing that issue brought him to the attention of Thurgood Marshall and then to others in the NAACP's national office. Green notes that, although the first test case failed, it paved the way for later cases that succeeded.[66] Unfortunately, the real story is more complicated than Green suggests.

To be sure, in 1941 a federal district court in Florida denied a motion to dismiss a salary equalization suit. The court concluded that using race as a basis for paying different salaries to teachers having the same qualifications and experience violated the Equal Protection Clause.[67] School boards quickly recognized that they could no longer justify explicitly race-based salary schedules.[68]

The response to this new legal reality was the adoption of merit pay schemes that, while formally neutral, wound up paying black teachers less than whites. Under the new approach, each teacher would be evaluated on such factors as physical health, personality, character, attitude, and instructional skill. A challenge to such a system in Tampa failed in 1943 even though the ratings placed eighty-four percent of the white teachers in the highest of three possible salary classifications and eighty percent of black teachers in the lowest.[69] A similar salary arrangement in Miami was upheld two years later.[70] Only when school boards implemented their merit systems in explicitly race-based ways would they run into legal difficulty.[71] In short, the salary equalization cases had some short-term success but ultimately had an ambiguous impact at best.

B. *Groveland*

Green's discussion of the evidence against the Groveland defendants is also incomplete. Although the gaps in the prosecution's case (absence of medical evidence, fingerprints, or lab tests of other evidence) raised questions about whether a rape had occurred much less whether any of the

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66. *See supra* note 15 and accompanying text.

67. *See* McDaniel v. Board of Pub. Instruction, 39 F. Supp. 638, 640–41 (N.D. Fla. 1941).

68. *McDaniel* was not the only case to reach this conclusion. *See, e.g.*, Alston v. School Bd., 112 F.2d 992 (4th Cir.), *cert. denied*, 311 U.S. 693 (1940); Thomas v. Hibbitts, 46 F. Supp. 368 (M.D. Tenn. 1942); Mills v. Board of Educ., 30 F. Supp. 245 (D. Md. 1939).

69. *See* Turner v. Keefe, 50 F. Supp. 647, 651 (S.D. Fla. 1943).

70. *See* Reynolds v. Board of Pub. Instruction, 148 F.2d 754 (5th Cir.), *cert. denied*, 326 U.S. 746 (1945).

71. For example, the Little Rock school board adopted a three-factor point system and awarded white teachers twice as much per point as black teachers received. *See* Morris v. Williams, 149 F.2d 703, 707 (8th Cir. 1945).

defendants had been involved,[72] a deputy sheriff offered "damning" testimony that he had made plaster casts of footprints and tire tracks at the crime scene that exactly matched Irvin's shoes and Shepherd's car.[73] At Irvin's retrial, a defense expert suggested that the deputy had faked the footprints, but the jury nevertheless returned a guilty verdict.[74]

Green points out that the deputy was charged with doing exactly the same thing in a 1960 case in which two young black men "languished on death row for nearly twelve years" for raping a white woman until a federal judge set aside their convictions.[75] He does not explain that the convictions in the later case were reinstated on appeal and that the death sentences had already been invalidated.[76] The court of appeals emphasized that the state courts had fully considered the claim of manufactured evidence and rejected it in a detailed opinion to which the district judge was said to have given insufficient weight.[77] We need not resolve whether the deputy faked evidence, though, because the best that can be said for the footprint and tire track moldings in Groveland is that they were incompetently made. The deputy's bungling of the plaster casts was a prime factor in Governor Collins' decision to commute Irvin's death penalty, something that Green never explains.[78]

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72. *See supra* note 32 and text accompanying notes 43–44. A recent book suggests that Thurgood Marshall, who represented Walter Irvin at his 1952 retrial, suspected that Norma Padgett might have had consensual sex with at least one of the Groveland defendants. *See* JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 155 (1998). Marshall might well have made this comment for rhetorical effect. *Cf.* TUSHNET, *supra* note 5, at 3–4 (noting Marshall's penchant for telling outrageous stories).

73. *See* GREEN, *supra* note 1, at 101. These casts were not presented at Irvin's retrial, but the deputy was allowed to testify about them. *See* Irvin v. State, 66 So. 2d 288, 296 (Fla.), *cert. denied*, 346 U.S. 927 (1953), *reh'g denied*, 347 U.S. 914 (1954).

74. *See* GREEN, *supra* note 1, at 191–92; GREENBERG, *supra* note 33, at 146.

75. *See* GREEN, *supra* note 1, at 207; *see also* GREENBERG, *supra* note 33, at 146–47. State criminal charges against the deputy were dismissed on statute of limitations grounds. Sheriff McCall then reinstated the deputy with back pay. *See* GREEN, *supra* note 1, at 207; GREENBERG, *supra* note 33, at 147.

76. *See* Shuler v. Wainwright, 491 F.2d 1213 (5th Cir. 1974), *rev'g* 341 F. Supp. 1061 (M.D. Fla. 1972). The prisoners' death sentences were set aside as a consequence of *Furman v. Georgia*, 408 U.S. 238 (1972). *See Shuler*, 491 F.2d at 1215 n.1.

77. *See Shuler*, 491 F.2d at 1216–17, 1219, 1220 (discussing Shuler v. State, 161 So. 2d 3 (Fla.), *cert. denied*, 379 U.S. 892 (1964)).

78. *See* TOM WAGY, GOVERNOR LEROY COLLINS OF FLORIDA 66 (1985); Lawson et al., *supra* note 5, at 317-18.

There are a few other points that might have put the Groveland situation into broader context. First, the defendants were charged with a capital offense, something that almost certainly could not have happened today as a result of *Coker v. Georgia*, 433 U.S. 584 (1977), which held that the Eighth Amendment does not permit the death penalty for raping an adult woman. The Groveland complainant was 17 at the time of the alleged rape. *See* GREEN, *supra* note 1, at 81. Although she was therefore not old enough to be classified as an adult, she was married. *See id.* Even if her

C. *Aftermath: From Groveland to* Gibson

Finally, Irvin's commutation set in motion a series of events that led to a Supreme Court ruling on freedom of association. Green does not mention those later developments, but they are worth considering in any assessment of Harry Moore's civil rights activities.

Governor Collins' decision to commute the death sentence prompted suspicions that he had been taken in by Communist propaganda.[79] The

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marriage would not have made her a legal adult, the only statute now in effect that permits execution for child rape uses age 12 as its upper limit. *See* State v. Wilson, 685 So. 2d 1063, 1073 (La. 1996) (Calogero, C.J., dissenting), *cert. denied sub nom.* Bethley v. Louisiana, 520 U.S. 1259 (1997).

Second, the book does not fully explain why Charles Greenlee failed to appeal his conviction. This decision was apparently based on the possibility that a new jury might not recommend mercy. The prospects were sufficiently doubtful that a rational person might have chosen to accept a life sentence rather than risk execution, especially in a case in which a black male was accused of raping a white female. At that time, in places like Florida, Greenlee's chances for acquittal were extremely remote. *See* GREENBERG, *supra* note 33, at 135 ("a black man accused of rape by a white woman in the Deep South was always convicted"). Under current law, however, the government may not seek the death penalty at a second trial if the first trial resulted in a lesser sentence. *See* Bullington v. Missouri, 451 U.S. 430 (1981) (finding that the possibility of a death sentence under such circumstances impermissibly discouraged convicted defendants from exercising their right to appeal).

Finally, a development that occurred after the book was published makes clear that Greenlee could not have been executed for another reason. He was 16 at the time of the alleged rape. The Florida Supreme Court has determined that the state constitution prohibits the death penalty for crimes committed by 16-year-olds. *See* Brennan v. State, No. 90,279, 1999 Fla. LEXIS 1186, at *12-*30 (Fla. July 8, 1999). *Cf.* Stanford v. Kentucky, 492 U.S. 361 (1989) (holding that the U.S. Constitution permits execution for crimes committed by 16-year-olds).

79. *See* WAGY, *supra* note 78, at 67. Collins was in an awkward political position at the time due to the legal uncertainties of his status. Dan McCarty, who had been elected to a four-year term as governor in 1952 after losing narrowly to Fuller Warren in the 1948 Democratic runoff primary, *see supra* notes 24–26 and accompanying text, died less than a year after taking office. This was an unprecedented situation in Florida. Charley Johns, whom we shall encounter again shortly, *see infra* notes 81-82 and accompanying text, assumed the governor's chair by virtue of his status as president of the state senate. Nothing else about the situation was clear, however, so the state supreme court was called upon to resolve the many unanswered questions in a series of lawsuits. First, the court held that Johns had become acting governor and that a special election should be held in 1954 to fill the balance of McCarty's term. *See* State *ex rel.* Ayres v. Gray, 69 So. 2d 187 (Fla. 1953). Two months later the court concluded that Johns could run in that election. *See* State *ex rel.* West v. Gray, 74 So. 2d 114 (Fla. 1954). The court shortly afterward refused to decide whether the winner of the special election could seek a full term in 1956, a question of some significance to potential candidates because the state constitution prohibited a governor from serving consecutive terms. *See* Bryant v. Gray, 70 So. 2d 581 (Fla. 1954). Collins defeated Johns in the Democratic primary and easily won the special election. *See* COLBURN & SCHER, *supra* note 24, at 76-77; PRICE, *supra* note 5, at 98–99; TEBEAU, *supra* note 25, at 439; WAGY, *supra* note 78, at 36-39, 50-51; Gannon, *supra* note 25, at 49. Several months after the Irvin commutation, the state supreme court finally determined that Collins could seek election to a full term. *See* Ervin v.

Groveland trial judge empaneled a grand jury to investigate that possibility. Collins refused to appear, and the final report concluded that the commutation was an honest gubernatorial mistake.[80] More significant, the Florida legislature established a committee to investigate subversion. The committee was proposed and initially chaired by Charley Johns, a segregationist state senator whom Collins had defeated in a 1954 special election to fill the unexpired term of a governor who had died in office.[81]

The Florida Legislative Investigation Committee's prime target was the NAACP.[82] The Johns committee, as it was known, demanded the organization's Miami membership list. This was in line with efforts by authorities in other states to obtain the names of NAACP members.[83] Alabama and Arkansas officials claimed to need the names to verify the

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Collins, 85 So. 2d 852 (Fla. 1956). Collins won an absolute majority in a six-candidate Democratic primary and went on to win handily in the 1956 general election. *See* COLBURN & SCHER, *supra* note 24, at 76–78; PRICE, *supra* note 5, at 99–101; TEBEAU, *supra* note 25, at 443; WAGY, *supra* note 78, at 62-73; Gannon, *supra* note 25, at 49.

80. *See* WAGY, *supra* note 78, at 66-68; Lawson et al., *supra* note 5, at 318; *see also* P.B. HOWELL, JR., PINEY WOODS, SWAMP WATER AND 'GATOR TALES' 123–27 (1998). Collins' critics also arranged for Norma Padgett to confront him at a parade in an effort to embarrass him over the Irvin commutation, but the episode had little or no impact. *See* WAGY, *supra* note 78, at 68; HOWELL, *supra*, at 127–28; Lawson et al., *supra* note 5, at 318.

81. *See supra* note 79. On Johns' record as acting governor, see DAVID R. COLBURN & LANCE DEHAVEN-SMITH, GOVERNMENT IN THE SUNSHINE STATE 40 (1999); COLBURN & SCHER, *supra* note 24, at 140–43, 277–78, 291; PRICE, *supra* note 5, at 98; TEBEAU, *supra* note 25, at 438; WAGY, *supra* note 78, at 33; Gannon, *supra* note 25, at 48–49.

Collins also supported segregation, though he was less strident than most contemporary southern politicians. His low-key approach gave him a moderate reputation, but virtually no desegregation occurred during his six years in office. *See* EARL BLACK, SOUTHERN GOVERNORS AND CIVIL RIGHTS 15, 93 (1976); COLBURN & SCHER, *supra* note 24, at 224–27; WAGY, *supra* note 78, at 59–103, 120–43; David R. Colburn, *Florida's Governors Confront the* Brown *Decision: A Case Study of the Constitutional Politics of School Desegregation, 1954–1970*, *in* AN UNCERTAIN TRADITION 326, 329–39 (Kermit L. Hall & James W. Ely, Jr., eds., 1989). He later served as director of the Community Relations Service in the Justice Department and in that capacity played a constructive role in several civil rights controversies, particularly in Selma, Alabama, in 1965. *See* WAGY, *supra* note 78, at 179–90. Those efforts contributed to his defeat when he ran for the U.S. Senate in 1968. *See id.* at 193–94, 196.

82. The committee also looked briefly at Ku Klux Klan activities but did not pursue that subject very far. *See* Steven F. Lawson, *The Florida Legislative Investigation Committee and the Constitutional Readjustment of Race Relations, 1956–1963*, *in* AN UNCERTAIN TRADITION 296, 307, 321 nn.38 & 45 (Kermit L. Hall & James W. Ely, Jr., eds., 1989). Its other targets included allegedly subversive books and suspected homosexuals at state universities. *See* COLBURN & DEHAVEN-SMITH, *supra* note 81, at 40; JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 48 (2d ed. 1998); Lawson, *supra*, at 325 n.77.

83. For detailed accounts of state efforts to harass or outlaw the NAACP, see NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE 212–24 (1969); TUSHNET, *supra* note 5, at 283–300; Walter F. Murphy, *The South Counter-Attacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371, 374–80, 386–88 (1959).

NAACP's compliance with various business and tax laws. The Supreme Court rejected those demands because information about individual members was unnecessary to determine compliance, and disclosure of the names would have a chilling effect on the exercise of First Amendment associational rights in places where the NAACP was widely despised.[84]

The committee's rationale for obtaining the list was its desire to determine whether several alleged Communists were members of the NAACP. The Florida courts initially upheld the committee because, unlike in the Alabama and Arkansas cases, the NAACP had not presented sufficient evidence that turning over the list would subject its members in the Sunshine State to reprisals or deter other persons from joining for fear of ostracism (or worse).[85] Later the Florida Supreme Court concluded that there was persuasive evidence to that effect.[86] Accordingly, the NAACP need not turn over the list, but the president of its Miami branch, who had custody of the records, could be required to bring it to a committee hearing and consult it in response to questions about the membership status of suspected Reds.[87]

In *Gibson v. Florida Legislative Investigation Committee*,[88] the Supreme Court held that the committee could not compel the witness to do even that much. The First Amendment precluded the legislature from

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84. *See* Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); *see also* Shelton v. Tucker, 364 U.S. 479 (1960) (invalidating an Arkansas statute requiring teachers at state-supported schools and colleges to reveal all organizations to which they had belonged or contributed over the previous five years and noting that another law, which had been struck down by a lower court, made it unlawful for any member of the NAACP to work for the state or any of its subdivisions).

The Court also blocked an effort by Louisiana authorities to force the NAACP to turn over its membership list. That ruling upheld a temporary injunction preventing enforcement of a law that had been passed in 1924 to deal with the Ku Klux Klan. The state's apparent interest in regulating organizations engaging in unlawful activity could have been vindicated by less drastic means than requiring disclosure of the membership list. *See* Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 295-97 (1961). For discussion of another aspect of this case, see *infra* note 106.

85. *See* Gibson v. Florida Legislative Investigation Comm., 108 So. 2d 729, 743 (Fla. 1958), *cert. denied*, 360 U.S. 919 (1959); *see also In re* Graham, 104 So. 2d 16, 18 (Fla. 1958) (rejecting motion to quash committee subpoena for NAACP records in advance of hearing).

86. *See* Graham v. Florida Legislative Investigation Comm., 126 So. 2d 133, 135 (Fla. 1960). The subpoenas at issue in the 1958 cases, *see supra* note 85, lapsed when the committee went out of existence at the end of the legislative term. In 1959 the legislature reauthorized the committee, which issued new subpoenas that gave rise to a second round of litigation. *See* Gibson v. Florida Legislative Investigation Comm., 126 So. 2d 129, 131 (Fla. 1960), *rev'd on other grounds*, 372 U.S. 539 (1963).

87. *See Gibson*, 126 So. 2d at 129; *see also Graham*, 126 So. 2d at 135 (dismissing contempt citation against a committee witness who refused to testify about his own and others' NAACP membership because that information was available from Gibson, the custodian of the NAACP's membership list).

88. 372 U.S. 539 (1963).

requiring him to refer to the list in response to questions about whether specific individuals belonged to the NAACP. The Court concluded that it was unclear whether there was any reason to believe that the alleged Communists had ever belonged to the NAACP, whether the suspected individuals were involved in any way with the NAACP (either as members or simply by attending public events) at the same time they belonged to the Communist Party, or even whether they still resided in Florida.[89] Moreover, there was no evidence that the NAACP was engaged in subversion or influenced by subversives.[90] Because the committee could not show a sufficient need for the information, First Amendment associational rights outweighed the legislature's interest in forcing the NAACP official to rely on the membership list in testifying about the membership status of particular individuals.[91]

This decision went beyond previous rulings that imposed limitations on legislative committees investigating disloyalty and subversion. In *Watkins v. United States*,[92] for example, the Court in 1957 set aside the contempt of Congress conviction of a labor union official who refused to answer questions at a hearing of the House Un-American Activities Committee about whether some persons with whom he worked had belonged to the Communist Party in the past.[93] While recognizing that Congress has "broad" and "inherent" power to investigate,[94] the Court concluded that the precise subject of the hearing was ambiguous and therefore the committee had not shown that the few questions the otherwise cooperative witness refused to answer were pertinent to its investigation.[95]

The pertinency limitation turned out to be less than stringent, however, because the *Watkins* opinion offered a catalogue of ways for a committee to specify the subject of its inquiry with sufficient clarity to withstand judicial scrutiny.[96] Two years later, in *Barenblatt v. United States*,[97] the Court upheld the contempt conviction of a professor who refused to answer HUAC questions about his own Communist Party membership. The ruling rested on the unmistakable pertinence of the questions under the *Watkins* criteria, including the opening statement of the committee chair and the committee's public announcement of the hearing.[98] The Court reached the same conclusion on similar reasoning in a pair of 1961 cases upholding

89. *See id.* at 552–54.
90. *See id.* at 554-55.
91. *See id.* at 555–58.
92. 354 U.S. 178 (1957).
93. *See id.* at 185.
94. *Id.* at 187.
95. *See id.* at 206-16.
96. *See id.* at 209-11.
97. 360 U.S. 109 (1959).
98. *See id.* at 123–25.

contempt of Congress convictions of a civil rights advocate and an anti-HUAC crusader who refused to discuss their Communist Party membership in circumstances where the questions were deemed pertinent to the committee's investigation.[99]

A related limitation on legislative committees might be called accountability: the concern that the legislature properly define the committee's authority. This concern was discussed in *Watkins*,[100] and it was the basis for the plurality decision in *Sweezy v. New Hampshire*.[101] *Sweezy* involved an investigation of subversive activities undertaken by the state's attorney general acting as a special committee of the legislature. A university professor refused to answer questions about one of his classroom lectures or about his involvement in the Progressive Party. The Court overturned the professor's contempt conviction because there was insufficient evidence that the legislature had authorized an inquiry into those subjects.[102] Post-*Sweezy* cases showed that the accountability limitation was also not very demanding. Of particular note, in *Uphaus v. Wyman*,[103] decided the same day as *Barenblatt*, the Court upheld a contempt conviction against another witness who refused to answer the New Hampshire attorney general's questions about a left-wing summer camp. This time the majority concluded that there was a sufficient nexus between the state legislature's general concern with subversive persons and organizations and the attorney general's specific inquiries.[104] Other cases also took a permissive approach to legislative definitions of committee jurisdiction to investigate subversion.[105]

The Florida situation differed from both the previous NAACP cases and the earlier legislative investigation cases, although it shared elements of all of them. This time the demand for membership information came from a legislative committee with admittedly wide investigatory power, rather than from administrators such as those in Alabama and Arkansas who used economic regulation as a pretext for silencing dissent. At the

99. *See* Braden v. United States, 365 U.S. 431, 435 (1961); Wilkinson v. United States, 365 U.S. 399, 407–08, 413–14 (1961).

100. *See Watkins*, 354 U.S. at 201.

101. 354 U.S. 234 (1957).

102. *See id.* at 251–55. Justices Frankfurter and Harlan, who dissented in *Watkins*, concurred in *Sweezy* on the ground that the questions, whether authorized or not, intruded on the professor's First Amendment rights. *See id.* at 261–66 (Frankfurter, J., joined by Harlan, J., concurring in the result). This opinion is perhaps most famous for its strong defense of academic freedom. *See id.* at 261–63.

103. 360 U.S. 72 (1959).

104. *See id.* at 79–80.

105. *See Braden*, 365 U.S. at 433; *Wilkinson*, 365 U.S. at 407–08; *Barenblatt*, 360 U.S. at 116–23. *Barenblatt* also rejected the notion that *Sweezy* had somehow insulated educators from questioning by legislative committees investigating subversion. *See id.* at 121-22, 129.

same time, the committee purported to be inquiring into possible infiltration of a loyal organization rather than seeking to expose the NAACP as a Communist front.[106] Of course, the Johns committee was hardly sympathetic to the NAACP. Although Florida proceeded differently than Alabama or Arkansas, there was good reason to suspect that the real goal was the same: to undermine the most prominent civil rights organization in the state.[107]

This unusual concatenation of circumstances suggests the potential significance of the *Gibson* decision. From the standpoint of the legislative cases, the Florida committee seemed to have a powerful position. It had clear authorization from the state legislature, and the questions asked of the witness were surely pertinent to its investigation of Communist infiltration. Moreover, in contrast to the Alabama and Arkansas cases, the Johns committee did not demand access to the membership list, and the witness was willing to testify from memory about whether the suspected Reds belonged to the NAACP's Miami branch. The organization, from this perspective, was being given a chance to defend itself against forces that did not have its true interests at heart. Indeed, the state's intrusion into the group's affairs appeared minimal. Justice Harlan emphasized all these points in his dissent.[108] He also emphasized that the committee had at all times treated witnesses fairly, a factor he had suggested in *Barenblatt* was relevant in evaluating challenges to legislative investigations.[109]

The Court did not explicitly reject these contentions. Instead, Justice Goldberg's majority opinion found that the committee had not "convincingly show[n] a substantial relation between the information sought and a subject of overriding and compelling state interest."[110] Justice Goldberg then reviewed the record in exhaustive detail to show the logical

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106. There is no small irony in the suggestion that the NAACP needed the state's help to protect it from Communists. The NAACP and the Communist Party had a long history of tension, if not outright conflict, that showed the NAACP's ability to separate itself from the party. *See generally* WILSON RECORD, RACE AND RADICALISM (1964).

Nevertheless, one other state demanded, as part of its procedures for regulating "non-trading associations" affiliated with out-of-state groups, that the NAACP affirm that none of its officers belonged to subversive organizations. The Court invalidated this provision on the ground that the state organization could not reasonably be expected to know whether the dozens of out-of-state NAACP officials had subversive connections and should not be required to refrain from engaging in "wholly lawful activity" because of its inability to file the required affidavit. *See* Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 295 (1961).

107. *See* Lawson, *supra* note 82, at 299, 301, 303.

108. *See Gibson*, 372 U.S. at 582 (Harlan, J., dissenting).

109. *See id.* (Harlan, J., dissenting); *see also Barenblatt*, 360 U.S. at 134 (emphasizing absence of evidence that the committee "was attempting to pillory witnesses" or select them through "indiscriminate dragnet procedures"). The Court invoked some of this *Barenblatt* language in *Wilkinson*. *See Wilkinson*, 365 U.S. at 412.

110. *Gibson*, 372 U.S. at 546.

gaps in the committee's position.[111] At first glance, that approach is unsatisfactory. After all, the state could plausibly claim a "sufficiently compelling" interest in "self-preservation" to justify the relatively minor incursions on associational rights at issue.[112]

Perhaps a combination of insights from both opinions can illuminate the underlying concern and suggest some of *Gibson*'s implications. Although, as Justice Harlan explained, the Johns committee did not browbeat witnesses,[113] its purpose was neither to give the NAACP a clean bill of health nor to minimize the possible damage that might result from revelation of even limited Communist infiltration into its ranks. The committee was established as part of Florida's effort to resist desegregation in the wake of *Brown v. Board of Education*.[114] Justice Goldberg's emphasis on the lack of independent evidence of a connection between the alleged Communists and the Miami NAACP—he variously referred to probable cause, nexus, and foundation[115]—implies the Court's awareness that the Johns committee had chosen to focus on the NAACP in order to discredit it. There was no reason to suspect that the organization was subversive or that it needed the help of a hostile legislative tribunal to vindicate its loyalty. The committee failed, as Harry Kalven observed, to explain why it chose to focus on the Miami NAACP rather than the local Republican party.[116] We might surmise the explanation, though: Republicans were politically irrelevant in Florida at the time,[117] whereas the NAACP was perceived as the vanguard of the movement to overturn segregation and therefore as a genuine threat to the South's traditional way of life.[118] In short, the Communist-infiltration rationale was a pretext for smearing the NAACP, and branding governmental critics as disloyal strikes at the heart of our constitutional system.

The ultimate implications of *Gibson* remain unsettled because the Court has not had much occasion to address the limits on legislative

111. *See supra* notes 89–90 and accompanying text.

112. *See* Uphaus v. Wyman, 360 U.S. 72, 81 (1959).

113. *See Gibson*, 372 U.S. at 582 (Harlan, J., dissenting).

114. 347 U.S. 483 (1954); *see* COLBURN & SCHER, *supra* note 24, at 224–26; WAGY, *supra* note 78, at 87–89; Lawson, *supra* note 82, at 299.

115. *See Gibson*, 372 U.S. at 546.

116. *See* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 113 (1966).

117. *See supra* note 24. Florida did support Eisenhower in 1952 and 1956, *see* Stephen C. Craig, *Politics and Elections*, *in* GOVERNMENT AND POLITICS IN FLORIDA 77, 82, 84 (Robert J. Huckshorn ed., 1982), and even went for Hoover in 1928, *see* KEY, *supra* note 24, at 317-18, 319-20; Craig, *supra*, at 81, 84. Support for these Republican presidential candidates does not undermine statements about the GOP's general weakness in the Sunshine State. As late as 1956, barely 13% of Florida voters were registered Republicans; a decade later the figure was still below 20%. *See* LAMIS, *supra* note 24, at 191.

118. *See* Lawson, *supra* note 82, at 297–98.

investigations over the past three dozen years.[119] But the concern over allowing the government to silence its critics has played a pervasive role in modern First Amendment jurisprudence. Indeed, the Court has suggested that the amendment's "central meaning" reflects a deep aversion to seditious libel.[120] What the Johns committee was really doing raised the specter of seditious libel, albeit in more sophisticated form. Perhaps *Gibson* will provide a basis for challenging the legitimacy of future legislative investigatory excesses.[121]

We cannot attribute these developments entirely to Harry Moore, of course. The commutation of Walter Irvin's death sentence in the Groveland case was only one factor, albeit an important one, in the creation of the Johns committee. That so many other states found ways to harass the NAACP during the same period suggests that even without Groveland, Florida segregationists would have pressed the attack.[122] Moreover, the commutation occurred nearly four years after Moore's death. Even in life, Moore was hardly the only key player in the Groveland controversy. He did, however, take the lead in assuring public scrutiny of what might otherwise have become just another in a long line of racist miscarriages of justice. In at least a small way, then, his efforts were connected to these later developments. This tentative conclusion raises larger questions about the impact of Moore's overall civil rights activities, and those questions are related to a more general debate over social reform strategies.

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119. The Court did invoke *Gibson* to overturn a contempt conviction in yet another New Hampshire case involving the attorney general's service as a special legislative committee investigating subversion. The opinion merely quoted *Gibson*'s "compelling interest" language. *See* DeGregory v. New Hampshire, 383 U.S. 825, 829 (1966).

120. New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964); *see* Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209; *cf.* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion.").

121. For a more skeptical view, see Robert F. Nagel, *How Useful Is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 321–23 (1984).

122. Even after *Gibson* was decided, the state continued to experience high-profile conflict over civil rights. For example, in 1963 and 1964, Martin Luther King and the Southern Christian Leadership Conference led a protest campaign in St. Augustine during which the mother of the governor of Massachusetts was arrested. *See* David R. Colburn, *The Saint Augustine Business Community: Desegregation, 1963–1964, in* SOUTHERN BUSINESSMEN AND DESEGREGATION 211, 222-23 (Elizabeth Jacoway & David R. Colburn eds., 1982); Robert W. Hartley, *Long Hot Summer: The St. Augustine Racial Disorders of 1964, in* ST. AUGUSTINE, FLORIDA, 1963–1964, at 3, 27–39 (David J. Garrow ed., 1989). And as late as 1970, the governor took over a local school system in a vain effort to prevent court-ordered desegregation. *See* EDMUND F. KALLINA, JR., CLAUDE KIRK AND THE POLITICS OF CONFRONTATION 168–83 (1993).

III. HARRY MOORE AND THE CHOICE BETWEEN LEGAL AND POLITICAL REFORM STRATEGIES

The litigation campaign that culminated in *Brown* is often cited as the prime example of successful reform brought about through the legal system. That campaign served as the model for the incremental litigation strategy against sex discrimination that is most closely identified with Justice Ruth Bader Ginsburg when she directed the Women's Rights Project of the American Civil Liberties Union. Yet the notion that courts can bring about social reform has been controversial. Harry Moore's work might shed some light on that debate.

Let us be clear about the insights we could gain from Moore's story, however. It will not resolve the normative argument over whether the judiciary *should* try to promote social reform. Some critics question the legitimacy of judicial mandates for social change.[123] Others emphasize that reform issues are often polycentric, implicating numerous stakeholders and a wide array of interests that courts should not try to balance.[124] Courts are said to lack the institutional capacity to oversee social reform and therefore should not try to do so.[125] From an alternative perspective, various writers point out that courts address complex issues in such traditional fields as trust administration and bankruptcy, and they contend that courts are not necessarily less competent at addressing policy disputes than the other branches of government.[126] This normative disagreement goes to issues of political theory, so Moore's experience can be of only marginal relevance on that front.

Moore's story does have implications for assessing a more factual question: whether resort to litigation is an *effective* means of promoting reform. Perhaps the foremost academic skeptic about relying on lawsuits

123. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); ROBERT H. BORK, THE TEMPTING OF AMERICA (1990); JEREMY RABKIN, JUDICIAL COMPULSIONS (1989).

124. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978). According to Fuller, a polycentric dispute is like a spider's web, where changes in the force applied to one strand will redistribute the tension on all strands in complicated and unpredictable fashion. *See id.* at 395; *see also* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 645 (1982) ("Polycentricity is the property of a complex problem with a number of subsidiary problem 'centers,' each of which is related to the others, such that the solution to each depends on the solution to all the others.").

125. *See, e.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); R. SHEP MELNICK, REGULATION AND THE COURTS (1983).

126. *See, e.g.*, MICHAEL REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS (1982); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

to create social change is Gerald Rosenberg. He argues that the judiciary is constrained by the conventions of legal reasoning, lack of political independence, and limited resources.[127] Courts therefore can be effective agencies of reform only under very limited conditions, such as where other actors are able to provide benefits for compliance or impose costs for noncompliance with judicial rulings, where market-oriented implementation is feasible, or where court decisions provide leverage or protection for those who are willing to act.[128]

Rosenberg argues that none of these conditions existed in connection with civil rights litigation. Indeed, he goes further and argues that *Brown* had no impact whatsoever in bringing about desegregation.[129] School desegregation resulted from joint congressional and executive action beginning a decade later (the provision of substantial amounts of federal financial assistance to elementary and secondary schools subject to nondiscrimination requirements).[130] Moreover, he maintains, *Brown* was not a factor in the passage of either the Civil Rights Act of 1964 or the Voting Rights Act of 1965. Those measures arose from civil rights activism such as the sit-ins, Freedom Rides, and protest demonstrations in Birmingham and Selma.[131] Moreover, the activists were not motivated by the *Brown* decision, but by the Montgomery bus boycott, which had roots in earlier organizing efforts, and other factors unrelated to the Supreme Court's ruling.[132] If anything, Rosenberg says, *Brown* was counterproductive by stimulating resistance in the white South.[133] The talent and resources diverted to the ineffectual litigation strategy wound up weakening more promising efforts to promote reform through the political process.[134]

Rosenberg's analysis is controversial, to say the least. Michael Klarman, while generally agreeing with Rosenberg's overall assessment, believes that *Brown*'s primary effect was to drive southern politics so far to the right that the rest of the country had no choice but to respond to the outrages of Massive Resistance.[135] This in turn accelerated the inevitable demise of segregation, which was doomed by a combination of social, economic, and political trends.[136] Other critics dispute Rosenberg's contention that *Brown* did not inspire civil rights activists, including

127. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE 10–21 (1991).
128. *See id.* at 30–35.
129. *See id.* at 42-49, 70-71.
130. *See id.* at 49–54.
131. *See id.* 120-21.
132. *See id.* at 134–50.
133. *See id.* at 155.
134. *See id.* at 339.
135. *See* Klarman, *supra* note 35, at 85-149.
136. *See id.* at 13–71.

Martin Luther King, Ralph Abernathy, and other less celebrated figures who took a leading role in Montgomery and other protests.[137]

More important, perhaps Rosenberg asked the wrong question, or at least only one of many possible questions. He focused, after all, on "policy change with nationwide impact."[138] Determining causation at the societal level can be a daunting task, as Rosenberg recognized.[139] A logically prior difficulty suggests the problem with that inquiry: instigating significant reform is an extraordinarily complex undertaking. The notion that a single Supreme Court ruling can create almost instantaneous social transformation should strike a thoughtful observer as naive, yet this is precisely the view that Rosenberg ascribes to what he calls the Dynamic Court model of change.[140] There are formidable challenges of finding suitable plaintiffs and making the necessary factual and legal arguments to win a lawsuit, as *Brown* graphically illustrates. Then there are the further problems of framing an appropriate remedy and obtaining compliance by the defendants. The *Brown* Court sought advice from all affected interests and, following a new round of arguments, remanded the cases to the trial courts with little guidance about remedial issues.[141] Nevertheless, in one of those cases the authorities in Prince Edward County, Virginia, refused to comply with a modest desegregation order and closed the public schools for five years until a new Supreme Court decision ordered them reopened.[142] Even if defendants implement the remedy in good faith, a judicial order binds only the parties to the case and those in privity with them. Officials in other jurisdictions might claim not to be bound by the ruling and therefore refuse to follow it. That is precisely what happened in Little Rock, for example, where Governor Orval Faubus defied an order to admit nine African American students to Central High School.[143] Whether or not Rosenberg's larger claims about *Brown*'s irrelevance to later civil rights developments are accurate, then, he properly focuses attention on the contingencies that make it difficult for the judiciary to mandate large-scale social reform.

Focusing on the Supreme Court's institutional limitations is not the only way to think about promoting change through the judicial process,

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

138. ROSENBERG, *supra* note 127, at 4.

139. *See id.* at 207 (noting the difficulty of disentangling the separate effects of essentially simultaneous legislative, executive, and judicial actions to promote women's rights).

140. *See id.* at 21–28.

141. *See* Brown v. Board of Educ., 349 U.S. 294 (1955).

142. *See* Griffin v. County Sch. Bd., 377 U.S. 218 (1964).

143. *See* Cooper v. Aaron, 358 U.S. 1, 17–19 (1958). We need not resolve the debate over the Court's expansive view of the preclusive effect of its ruling in *Brown*. *See* Daniel Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387.

however. Those who are dissatisfied with the status quo might find litigation useful as a means of political mobilization or as a catalyst for change in particular communities or sectors of society. For instance, advocates of better pay for female workers used the prospect of litigation as an effective means of organizing public employees and obtaining favorable contracts even without a sweeping Supreme Court decision on comparable worth.[144]

Similar examples abound in the civil rights context. The organizers of the Montgomery bus boycott did not rely exclusively on the economic pressures produced by reduced African American patronage in their quest for better treatment; they also went to court to challenge the ordinance that required segregated seating, and the Supreme Court decision in *Gayle v. Browder*[145] was crucial to the boycott's success.[146] Even Prince Edward County, despite the school closing referred to earlier, can be understood from this perspective. For example, the decision to participate in the *Brown* litigation was precipitated by a student strike over the deplorable condition of the local black high school. In addition to the strike, the NAACP sought evidence of general support among the local African American community before agreeing to file suit.[147] After the public schools were ordered desegregated, a private academy was established that enrolled virtually every white student in the county. Eventually, however, the academy lost its federal tax exemption pursuant to an Internal Revenue Service policy that prohibited such favorable treatment for racially discriminatory private schools. Faced with declining enrollments, the academy later sought to regain its exemption. In the process, it enrolled a handful of black students, elected an African American to its board of directors, and established a minority scholarship fund. The ultimate irony came in the wake of these developments when the academy sought (unsuccessfully) to retain its interest as beneficiary of a large trust that contained a whites-only restriction by arguing that the restriction was unconstitutional.[148] To be sure, the lessons of Prince Edward County are ambiguous. It took many years for change to occur there, but the process by which the original

144. *See generally* MICHAEL W. MCCANN, RIGHTS AT WORK (1994).

145. 352 U.S. 903 (1956) (per curiam).

146. *See* Garrow, *supra* note 137, at 157.

147. *See* KLUGER, *supra* note 8, at 458–78; TUSHNET, *supra* note 5, at 150–51; Jonathan L. Entin, Litigation and Social Change in Prince Edward County (1993) (paper presented at Law and Society Association annual meeting).

148. *See* Hermitage Methodist Homes, Inc. v. Dominion Trust Co., 387 S.E.2d 740, 741, 743 (Va.), *cert. denied sub nom.* Prince Edward Sch. Found. v. Hermitage Methodist Homes, Inc., 498 U.S. 907 (1990). For further details on the events described in text, see Entin, *supra* note 147; Jonathan L. Entin, *Defeasible Fees, State Action, and the Legacy of Massive Resistance*, 34 WM. & MARY L. REV. 769 (1993); Jennifer E. Spreng, *Scenes from the Southside: A Desegregation Drama in Five Acts*, 19 U. ARK. LITTLE ROCK L.J. 327 (1997).

lawsuit came to be filed illustrates that reform litigation is a social process: the decision to sue arose from public meetings that showed widespread, albeit not unanimous, support among local African Americans for a direct attack on segregated schools.[149] Moreover, the decision to litigate led to the *Brown* decision, which was a major factor in all subsequent developments in Prince Edward County. There were, of course, other causes for these developments, but the original litigation must be counted as a but-for cause.

Let us, finally, return to Harry Moore. What does his work have to do with the debate over courts and social change? Moore was neither a lawyer nor a litigant, and he never held or even sought public office. Moreover, none of the Florida cases in which he played a tangential role could be viewed as efforts to promote large-scale social change. In fact, he was killed while the cases that were decided under the umbrella of *Brown* were still in the lower courts.[150]

Nevertheless, Moore's experience illustrates some larger themes from the debate over reform litigation. The teacher salary cases, for instance, show both the social nature of reform lawsuits and the contingencies of the legal process. Black teachers in Florida had long been angry about discriminatory policies that paid them less than their white counterparts. Moore helped to establish the Florida State Teachers Association, which made its first priority to challenge those policies. It took the organization some time to find a willing plaintiff. Moore took a leading role in that process, recruiting one of his best friends for the role even though both of them recognized that the man would be fired and drummed out of the profession by the white establishment for his temerity. Other lawsuits followed, and eventually explicitly discriminatory salary schedules disappeared. At the same time, however, school boards devised other methods for setting teacher pay and managed to maintain more subtle disparities that continued to disadvantage African Americans. The results of this litigation effort were ambiguous at best. But what alternatives were available to black teachers at the time? The principal one was the political process, but the Democratic Party controlled the state and remained resolutely all-white. Under the circumstances, politics was not a meaningful substitute for litigation.

This leads to perhaps the most significant implication of Moore's work.

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149. For further discussion of the litigation campaign culminating in *Brown* as a social process, see MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 138–41, 143–44, 147–54 (1987).

150. *See* Davis v. County Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952); Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951); Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951); Gebhart v. Belton, 91 A.2d 137 (Del. 1952). The Supreme Court reversed *Davis*, *Brown*, and *Briggs*, while affirming *Gebhart* on grounds that differed from those relied on by the state courts.

What Moore actually did on behalf of civil rights in Florida raises questions about the supposedly neat dichotomy between litigation and politics as reform strategies. Beyond the teacher salary cases, Moore devoted considerable attention to other problems related to the courts and the criminal justice system. Groveland was perhaps the most celebrated, but he regularly pressed for action against lynching and for prosecution of crimes against African Americans. But he did much more than that. Of special note, he founded and led the Progressive Voters League, which registered tens of thousands of blacks and endorsed candidates. Although the PVL could claim to have affected the outcome of only one statewide election during Moore's lifetime, it did have some impact at the local level.

There are two important points to be made about Moore's political engagement. First, he could not have organized the PVL and helped to give the group whatever political influence it possessed without the Supreme Court's decision in *Smith v. Allwright*,[151] the 1944 ruling that effectively outlawed the white primary.[152] Only the legal demise of racial restrictions on participation in the Democratic primary, the phase of the process that chose the only candidates who had a chance to win general elections at the state and most local levels, would make voter registration and education worthwhile.

Second, Moore's diverse efforts in the legal and political spheres should raise at least tentative questions about specialization in reform movements. Organizations might well have comparative advantages in seeking social change, and those comparative advantages might strengthen the drive for reform.[153] Sometimes, though, the forces favoring change are handicapped by limited numbers. In such situations, specialization is a luxury that could have deleterious effects if taken too seriously. Rather than focusing exclusively on one particular strategy, reformers might instead seek out targets of opportunity that might promote their larger goals. So today they might focus on a lawsuit, tomorrow on registering voters or defeating an especially obnoxious legislative proposal. The risk of getting spread too thin and losing effectiveness in all areas is apparent, but sometimes a diversified strategic agenda is a necessity. Harry Moore tried to work on as wide a front as possible. He wound up enraging his

151. 321 U.S. 649 (1944).

152. This is not to say that white Floridians unquestioningly accepted the end of the white primary. *See* GREEN, *supra* note 1, at 71–72; PRICE, *supra* note 5, at 29–31. Even Texas, where the white primary had been the focus of litigation since the 1920s, *see* Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927), made a last-ditch attempt to resurrect an all-white Democratic Party. *See* Terry v. Adams, 345 U.S. 461 (1953). *See generally* TUSHNET, *supra* note 5, at 99–115 (discussing laws enforcing all-white primaries).

153. *See* TUSHNET, *supra* note 149, at 146–47.

segregationist opponents, who killed him, and alienating some of his nominal allies in the NAACP, who claimed him as a martyr even while trying to push him off the stage at the end. Whatever his shortcomings, Moore had as much success as anyone in fighting racism in Florida in the decades before his death.

IV. CONCLUSION

Members of the legal profession understandably tend to lionize the lawyers whose remarkable work led to landmark civil rights rulings by the Supreme Court. In the process, we overlook the remarkable energy and personal courage of the ordinary people who put their lives on the line every day. Harry Moore was one of those people who did extraordinary work and paid for his efforts with his life. Ben Green has done us the great service of telling his story. That story is not simply one of facts and dates, as important as those are. It should also remind us that the polar opposites of litigation and political mobilization are much more interdependent than some models of law and society assume.