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"Segregation Cases" Supreme Court

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"SEGREGATION CASES" SUPREME COURT

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I. INTRODUCTION

An editorial appeared on February 5, 1959, in the Omaha World Herald. The editorial was entitled *"Not One Defender."* The writer set out the severe criticism of the Supreme Court of the United States in the Senate by Senator Russell of Georgia to the effect that the court was "highhanded," "power-mad," "Bent on a cynical, heartless, cruel and almost sadistic effort to impose mixed schools on the South."

The editorial then said that not a Senator arose to defend the Court, not even the loudest supporter of school integration. The writer then asked this question:

> Strange, isn't it, that there should be no answer?

The editorial writer then finally concluded:

> Add them all together, there are few in the Congress who still regard the Court with awe and respect.

It has been my good fortune to appear before the Supreme Court on several occasions and I am ever mindful of its great contribution towards making America the greatest nation on the face of the earth. I regard the Court Room of that Court as holy ground. I worry a great deal about the criticism of the personnel of the Court and of its opinions which currently appear in the press. I particularly notice the bitter comments contained in the World Herald and the comments of its commentator David Lawrence.

It is obvious that these attacks stem from the decision of the United States Supreme Court in what is known as the *"Segregation Case," Brown v. The Board of Education*[1] decided in May, 1954.

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[1] 347 U.S. 483 (1954).

As a member of the Bar, I feel that active steps should be taken to correct the reaction resulting from the unwarranted attacks upon the Court and the attendant unfavorable publicity and I, likewise, feel that someone should rise from the Bar at this time as a defender of that Court. I have the opinion that the Southern Senators and lawyers, so critical of the decision in the Segregation Cases, are attempting to discredit the Court and in so doing weaken the effect of its decisions and judgments.

Brown v. The Board of Education,[2] in effect, prohibits segregation in public schools solely because of color when that segregation is permitted or required by State Statutes and this even though equal educational facilities are furnished to negroes.

A. Early Criticism

The effect of early criticism of the decision is evidenced by the adoption in 1956 of a Declaration of Constitutional principles by 19 United States Senators and 77 members of the House of Representatives. Most of these Senators and Representatives were from southern states. This Declaration referred to "the unwarranted decision of the Supreme Court in the public school cases and stated that the decision was a clear abuse of judicial power. It said the Supreme Court was undertaking to legislate and substitute the personal, political and social ideas of its members for the established law of the land. The signers pledged themselves to the use of lawful means to bring about a reversal of this decision, asserting that it is contrary to the Constitution. The pronouncement was the beginning of a torrent of violent comments.

A number of the legislatures of the southern states adopted resolutions denouncing the Supreme Court. On February 22, 1957 the General Assembly of Georgia passed a resolution requesting the impeachment of six members of the United States Supreme Court. Copies of this resolution were broadcast throughout the country by an agency of the State of Georgia, which is called the Georgia Commission on Education. This opposition to the integration of negroes into tax-supported schools is reminiscent of the opposition to the Emancipation Proclamation of President Lincoln. Following its issuance, his party at the next elections suffered overwhelming defeats in Ohio, Indiana and Illinois. The Democrats at that time issued what they called an address to the Democracy of the United States which was, in effect, a platform for the Western Democracy.

[2] Ibid.

This manifesto advocated principles of strict construction of the Constitution with due regard to state's rights and jealous limitations of governmental powers and non-interference anywhere by the Federal Government with the institution of slavery. The manifesto indicated that they were opposed to the war if it was for the purpose of overthrowing or interfering with the established rights or established institutions of any state.

The Legislature of Lincoln's own state resolved that the proclamation was:

> A gigantic usurpation, at once converting the war professedly commenced by the administration for the vindication of the authority of the Constitution, into a crusade for the sudden, unconditional and violent liberation of 3,000,000 Negro slaves; a result which would not only be total subversion of the Federal Union but a resolution in the social organization of the Southern states, the immediate and remote, the present and far reaching consequences of which to both races cannot be contemplated without the most dismal foreboding of horror and dismay.

II. THE SEGREGATION CASES

The appeals involved actions originally brought in *Kansas, South Carolina, Virginia, Delaware and the District of Columbia.* The causes were presented to the Supreme Court at the same hearings (there were two hearings) and the decision rendered in 1954, after re-argument and consideration by the Court. The consolidated case is generally known as *Brown v. The Board of Education.*[3] The opinion, written by Chief Justice Warren, was unanimous. It is significant to note that two of the present Judges of the Supreme Court are from the Fifth Circuit which comprises the Gulf States from Florida through Texas. They were born and reared in the climate of segregation, one in Texas and the other in Alabama. Neither dissented in any of the cases. The appeal from the District of Columbia will not be discussed as that case was decided on the issue of the 5th Amendment.

The cases involved the Constitutional question of whether a state may pass a statute which requires or permits the segregation of negro students into separate public schools, assuming facilities furnished negro students in separate schools were equal to those furnished in schools reserved for whites.

It was vigorously asserted by the plaintiffs that negro children by the statutes involved were deprived of the equal protection

[3] Ibid.

of the laws within the meaning of the 14th Amendment to the Constitution of the United States adopted in he year 1868.

The 14th Amendment states:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of* laws....

This requires equality of treatment before the law of all persons without regard to color.[4]

This amendment was not a mere legalism or empty pretense. It was a clear expression of the conscience of America, directly in accord with the stream of American tradition and aspiration and pronounced at a time which followed the tragedy of a Civil War.

The Court had no control over the timing of the personal sense of frustration which set in motion the lawsuits under discussion which came before the Court in 1952. The issue was squarely presented and required a decision.

It was to be expected that the changing status of the negro and the experience arising out of two wars would provoke attempts to have carried into effect the promises of equality contained in the amendments adopted after the Civil War.

III. QUESTION INVOLVED

Now the question is—did state statutes requiring or permitting segregation in public schools on account of color, deprive the colored children of the equal protection of the laws? Remember the schools involved were public schools supported by taxation. The cases involved in the *Brown case* that came up from Kansas, South Carolina, Virginia and the District of Columbia were appeals from the United States District Courts in those areas. These courts had held against the negro plaintiffs in their suits to force admittance into white schools, basing their decisions on the case of *Plessy v. Ferguson,*[5] decided in 1896. This case involved public transportation and the Court at that time held that the furnishing to negroes of separate but equal facilities in railroad transportation did not violate the 14th Amendment, that is, the Court held the

[4] Strauder v. West Virginia, 100 U.S. 303 (1879) holding that Negroes must be permitted an opportunity to serve on juries.

[5] 163 U.S. 537 (1896).

requirement that negroes ride in separate coaches on railroad trains did not offend the Constitution if the facilities were equal.

The Delaware case (one of the consolidated cases) was an appeal from the Supreme Court of that State. This case was affirmed. The lower Court had ordered the immediate admission of colored students into white schools. The Supreme Court of Delaware held the school for negroes not equal to schools for whites.

The Federal Judge before whom the case was tried in Kansas made this finding:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of the law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.

In the opinion by Chief Justice Warren, he said, after quoting this finding of the Kansas Judge:

> Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority.

The Chief Justice then stated:

> Any language in Plessy v. Ferguson contrary to this finding is rejected.

He further stated:

> We conclude that in the field of Public Education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore we hold that the plaintiffs and others similarly situated for whom the actions have been brought are by reason of the segregation complained of deprived of the equal protection of the laws guaranteed by the 14th Amendment.

IV. REVERSAL OF PLESSY V. FERGUSON

Complaint has been made that the Supreme Court erred in not following the rule announced in *Plessy v. Ferguson.*[6] Was the 1954 decision wrong? The Court had to decide the case at that time when presented to it. Did the Supreme Court in inter-

[6] Ibid, overruled by 352 U.S. 903 (1956).

preting the Constitution of the United States in the segregation case decide the case not on legal precedents, but on the opinion of sociologists?

Current criticism claims that the high tribunal decided the case not on the law, but on sociology. It has been said that such critics are not concerned that social values are being taken into account by the Court, but that the Court has not accepted the critic's own social values. The sociologist who believes in racial segregation has a grievance against the Supreme Court, but the grievance is not that the Court made a choice between views on race relations but that the Court made its choice against the critic's views.[7]

It would appear that the rationale of the Court in the Kansas case is sound, logical and inescapable.

V. TREND SINCE PLESSY V. FERGUSON

It is interesting to observe the trend of the decisions in the Supreme Court since the 1896 opinion involving railroad transportation. In 1938 it was held in *Gaines v. Canada*,[8] that the Missouri practice of offering to negro students payment out of the public funds for tuition costs in schools in adjacent states, when those students (because of their color) could not secure professional training in state-supported Missouri colleges and universities, violated the principles of the 14th Amendment.

Again in 1948 in the case of *Sipuel v. Board of Regents of the University of Oklahoma*,[9] the case before the Court involved the following facts: A negro, concededly qualified, applied for admission to the School of Law of the University of Oklahoma, the only law school maintained by the taxpayers of the state.

This application was denied solely because of the color of the applicant. The applicant then applied to the state courts for a Writ of Mandamus compelling the university to accept her as a law student. This was denied by the state courts. An appeal was taken to the Supreme Court of the United States. The decision was reversed and the Court held:

> The State must provide it (legal education) for her in conformity with the equal protection clause of the 14th Amendment and provide it as soon as it does for applicants of any other group.

[7] Comment by Robert Leflar, Professor, Arkansas Law School.

[8] 305 U.S. 337 (1938).

[9] 332 U.S. 631 (1948).

In the case of *Sweatt v. Painter,*[10] a negro was refused admission to the University of Texas Law School on the ground that substantially equivalent facilities were offered by a Texas Law School open only to negroes. Mr. Chief Justice Vinson of the United States Supreme Court delivered the opinion. The Court refused either to affirm or disaffirm the doctrine of *Plessy v. Ferguson,*[11] but held that the equal protection clause required that the negro be admitted to the Texas Law School since the school for negroes did not afford equal facilities. However, this conclusion rested on grounds which made it unlikely that it would be possible for a state to establish a law school for negroes alone which afforded equal facilities. The Court relied in part on these qualities which are incapable of objective measurement but which make for greatness in a law school. The case was decided in June, 1950.

In the same month, the decision of *McLaurin v. Oklahoma State Regents of the University of Oklahoma,*[12] was decided. The opinion in this case was also written by Mr. Chief Justice Vinson. In this case the negro was admitted to the school, but was required to sit at a separate desk in the hall, apart from the other students, etc. The restrictions on the engro were in accordance with the statutory requirements of Oklahoma. Mr. Chief Justice Vinson used the following language:

> Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps the epitome of that need, for he is attempting to obtain an advanced degree in education, to become by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.
>
> It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. Shelley v. Kraemer, 334 U.S. 1, 13, 14, 92 L. Ed. 1161, 1180, 1181, 68 S. Ct. 826, 3 A.L.R. 2d 441 (1948). The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices.

[10] 339 U.S. 629 (1950).

[11] Note 6 supra.

[12] 339 U.S. 637 (1950).

> But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.
>
> We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws. See Sweatt v. Painter, 339 U.S. 629, ante 1114, 70 S. Ct. 842. We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races. The judgment is reversed.

In the case of *Henderson v. United States, et al,*[13] decided in 1950, four years before the segregation cases were decided, the Court outlawed the practice of railroads of dividing a dining car so as to allow ten tables for white passengers and one table exclusively for negro passengers. The regulation also called for a partition between the tables. The Court held that this subjected the colored passengers to undue or unreasonable prejudice in violation of the Interstate Commerce Act. It was likewise held that the City of Miami could not meet the test of the Fourteenth Amendment by furnishing the facilities of their municipal golf courses to negroes on a segregated basis, *Rice v. Arnold.*[14] To the same effect is a case later in 1954 involving a city park.[15] These cases were decided on the theory that if the state is going to provide such facilities at all, it must provide them equally to the citizens. In the case of *Morgan v. Virginia,*[16] decided prior to the segregation cases, the Court held that the attempt of a state to require the segregation of passengers in interstate buses resulted in the imposition of an undue burden on interstate commerce. This decision was not based on any claimed Constitutional provision.

It appears that the Supreme Court of the United States, when presented with the specific question involved in the public school cases could not, in the light of its prior decisions in the *Sweatt* case[17] and the *McLaurin* case,[18] and enlightened modern thinking on the subject have held otherwise.

[13] 339 U.S. 816 (1950).

[14] 340 U.S. 848 (1950).

[15] Muir v. Louisville Park Theatrical Assn., 347 U.S. 971 (1954).

[16] 328 U.S. 373 (1946).

[17] Note 10 supra.

[18] Note 12 supra.

Mr. Chief Justice Warren in writing the opinion followed the trend set forth in the cases of *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents, supra,* and also followed the finding set forth in the case appealed from Kansas, discussed earlier. He also considered the cases appealed from Delaware, i.e., the case of *Belton v. Gebhart* and *Bulah v. Gebhart* (Consolidated).[19] The Delaware cases involved the question of whether the State of Delaware through its agencies violated the rights of negroes under the equal protection clause of the Fourteenth Amendment to the United States Constitution. The negro plaintiffs who brought these actions had been refused admission to the Claymont High School, a public school maintained by the State of Delaware for white children only. They were refused admission solely because of their color and ancestry. However, they were permitted to attend the Howard High School and the Carver Vocational School, both operated by the School District and both operated for negro children. In the trial of the cases the plaintiffs introduced expert witnesses as to the effect of segregation. These experts sustained the general proposition that the effect of legally enforced segregation in education upon negro children was harmful. The Delaware Court in the opinion says:

> The other experts sustained the general proposition as to the harmful over-all effect of legally enforced segregation in education upon Negro children generally. It is no answer to this finding to point to numerous Negroes who apparently have not been so harmed. It leads to lack of interest, extensive absenteeism, mental disturbances, etc. Indeed, the harm may often show up in ways not connected with their 'formal' education progress. The fact is that such practice creates a mental health problem in many Negro children with a resulting impediment to their educational progress.
>
> Defendants say that the evidence shows that the State may not be 'ready' for nonsegregated education, and that a social problem cannot be solved with legal force.
>
> Assuming the validity of the contention without for a minute conceding the sweeping factual assumption, nevertheless, the contention does not answer the fact that the Negro's mental health and therefore, his educational opportunities are adversely affected by State-imposed segregation in education. The application of Constitutional principals is often distasteful to some citizens, but that is one reason for Constitutional guarantees. The principles override transitory passions.
>
> (1) I conclude that the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.

[19] 32 Del. Ch. 343, 87 A.2d 862 (1952).

It is apparent that in these segregation cases the Court was again required to interpret the 14th Amendment to the United States Constitution. It had to determine when the question was presented whether state statutes which required or permitted the furnishing of separate, although equal, facilities for education to whites and blacks in public schools was a violation of that amendment. It was required to do this in the years 1952 and 1954.

These segregation cases certainly arose under the Constitution. The Court had to apply the generalities of the amendment in the cases before it. They involved the specific proposition of whether or not the state statutes involved deprived the plaintiffs of the equal protection of the laws as guaranteed by the 14th Amendment. The Supreme Court could not equivocate. There could be no retreat. The Court, based on sound legal reasoning, in effect said:

> Compliance with the 14th Amendment means more than lip service; it means that the protection afforded all citizens must be equal.

Why this unavoidable moral and legal conclusion should shock any right thinking citizen of a country dedicated to the proposition that all men are created equal is inconceivable. In the Declaration of Independence, adopted by the Thirteen Colonies on July 4, 1776, it was provided:

> We hold these truths to be self-evident that all men are created equal.

VI. OTHER CASES INVOLVING RIGHTS OF NEGROES SINCE ADOPTION OF 14TH AMENDMENT—1868

It should be recognized that the segregation decisions are the culmination of a long line of decisions involving the application of the concept of equal protection of the laws.

In 1880 the right of negroes to be included on juries had to be established by a judicial decision of the Supreme Court. In this case Mr. Justice Strong said in referring to the 14th Amendment to the Constitution of the United States in *Strauder v. West Va.*:[20]

> It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal pro-

[20] 100 U.S. 303 (1879).

> tection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

In 1917 racial restrictions in municipal zoning laws were held by the same court unconstitutional in *Buchanan v. Warley*,[21] and in 1948 this principle was applied to prevent the enforcement of private racial covenants involving housing. *Shelley v. Kraemer*.[22] In 1927 the first of a series of cases outlawing the all-white primary under the 14th Amendment was decided and in 1938 the first cases applied the principle of equal protection to higher education. Through Chief Justice Hughes, the Court held that a state did not satisfy its constitutional duty by offering to pay for a negro student's tuition at a nonsegregated university in another state.[23]

The equal protection clause of the 14th Amendment was deliberately couched in general terms. It speaks in general terms and those are as comprehensive as possible. It did not specifically mention education, jury service, transportation on railroad trains or any of the other specific fields in which the Court has been faced with racially restrictive laws. The Court was required to decide the cases involving such restrictive laws. The "Equal Protection of the Law" clause is not self defining.

VII. REVERSAL OF PLESSY V. FERGUSON

Critics of the decision especially condemn the disregarding of the rule laid down in that case although decisions are but evidence of the law and not the law itself.

A. Stare decisis

The Supreme Court has the right to reverse the rule of law stated in prior judicial precedents whenever, in the judgment of

[21] 245 U.S. 60 (1917).

[22] 334 U.S. 1 (1948).

[23] Gaines v. Canada, 305 U.S. 337 (1939).

the Court, such reversal is necessary to correct previous error or to interpret more accurately the meaning and to apply more effectively the purpose of Constitutional provisions. Such a reversal may be necessitated as the result of experience and by the impact of changing political, economic, technological or social conditions in a complex and dynamic society or by the evolution of a clearer understanding and deeper appreciation of the moral and social values and legal rights implicit in the Constitutional provisions themselves.

As to this right, it has been said:

> This will always be true, at least until such time as society ceases to grow, knowledge ceases to advance and the Supreme Court becomes infallible.

The Supreme Court has overruled sixty decisions in the Constitutional law area since its beginning—it has overruled ninety altogether. Some opinions had not been overruled for over 90 years. There is no limit to the right to overrule a prior decision. The law is a progressive science.

In considering the question of whether a prior opinion should be overruled Dean Roscoe Pound observes "We must seek principles of change no less than principles of stability."

It has been said:

> The inn that shelters for the night is not the Journey's End; the law like a traveler must be ready for the morrow. It must have a principle of growth.

Judges Stone and Cardozo explained in the opinion in *St. Joseph Stock Yards Co. v. United States*[24] that "the doctrine of 'stare decisis' has only a limited application in the field of Constitutional law."

Mr. Justice Douglas of the Supreme Court in an article on "stare decisis"[25] likewise observed:

> The place of stare decisis in Constitutional law is even more tenuous. A Judge looking at a Constitutional question may have compulsions to revere past history and to accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend not the gloss which his predecessors may have put on it—he cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him.

[24] 298 U.S. 38 (1936).

[25] 49 Col. Law Rev. 736 (1949).

In an article by Albert P. Blaustein, Associate Professor of Law, Rutgers Law School, assisted by Andrew H. Field of Rutgers[26] entitled "Overruling Opinions in the Supreme Court" the author says:

> The last decision of the Supreme Court consistent with the *Plessy* spirit—but by no means a reaffirmance of the Plessy holding was *Gong Lum* v. *Rice* in 1927 (275 U.S. 78). Thus, with the possible exception of the Korematsu determination (Decision in 1944 based on wartime powers and emergencies 323 U.S. 214) it can safely be said that every Supreme Court decision since 1927 involving racial discrimination constituted some erosion of the Plessy doctrine.
>
> Just as an overruling is 'necessary' in resolving prior conflicting precedents, so an overruling is at least 'justified' where the Court must choose between following a precedent and following a contrary philosophy expressed in other cases. The Court in the school segregation case of *Brown* v. *Board of Education* and the transportation case of *Gayle* v. *Browder* finally overruled *Plessy* v. *Ferguson*. And the Court was severely criticized for its departurefrom this acknowledged precedent. But what the critics failed to realize was that adherence to the 1896 case of *Plessy* v. *Ferguson* would have resulted in a decision contrary to the philosophy and spirit of at least four cases involving Negro rights in education, decided between 1938 and 1950. Faced with the task of determining the constitutionality of laws based on racial segregation, the Supreme Court could not have reconciled all of the prior cases on the subject. Some decision or decisions had to be overruled—at least in spirit.

B. No Basis for the Plessy Decision

It appears that the development of the law, as evidenced by the cases which have been cited, eroded away whatever basis there was for the Plessy decision and compelled the Supreme Court of the United States to hold, when directly confronted with the question, that to require by law children of a citizen, simply because of the color of their skin, to attend a separate public school from that attended by their white brothers violated the equal protection of the law clause of our constitution.

The Court, in coming to this conclusion, could not be conclusively swayed by the fact that there would be much opposition to its conclusion and that there would result many problems in enforcing the rule laid down by the Court.

In the Court's opinion in *Cooper v. Aaron*[27] the Court cited, as authority for the proposition that the Constitution cannot yield

[26] 57 Mich. Law Rev. — (1958).

[27] 358 U.S. 28 (1958).

because of possible violent resistance, the 1917 case entitled *Buchanan v. Warley*.[28] In this case the Court held unconstitutional a city ordinance of the City of Louisville, Kentucky, prohibiting any colored person from moving into and occupying as a residence any house in a block in which a greater number of houses were occupied by persons of the opposite race.

The title of the Ordinance in question was:

> An ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville, and to preserve the public peace and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks, for residences, places of abode, and places of assembly by white and colored people respectively.

In the opinion the Court said:

> That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.
>
> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

Considering the background involved, did or did not the decision in the Segregation Cases come at an appropriate time?

Assuming that the negro is a citizen and assuming that under the Constitution he is really entitled to the equal protection of the laws and that no state may pass a statute denying him the equal protection of the laws, must there not come a time when in all sections of our country, where he is allowed to vote, where he is not required to ride in the back of a bus and where, at least by public statute, his children are not required to go to separate schools from those provided for white children simply because of their color.

It would appear dangerous to allow millions of citizens to be second-rate citizens and to discriminate against them. One can readily see that the loyalty of such a citizen might be affected if he, although he had educated himself, is still required by ordinance to ride in the back of the bus, is still required to send his children to a separate school and where, in some sections of the country, he is not allowed to vote and where he is otherwise dis-

[28] Note 21 supra.

criminated against simply because he was born with a dark skin although he is drafted into the armed forces and is compelled to defend his country with his life.

Likewise, is it not a good thing to strengthen the concept that justice requires equality of treatment under the law without prejudice because of race, religion or national origin? You will remember the prophetic dissent of Judge Harlan in the *Plessy v. Ferguson*[29] case wherein he said: "The Constitution is color blind."

VIII. SEPTEMBER 30TH OPINION OF SUPREME COURT

On September 11, 1958, there was heard by the Supreme Court of the United States an appeal from the Court of Appeals for the Eighth Circuit.[30] The Court of Appeals reversed a decision of the lower court[31] which had suspended for 2½ years the operation of the School Board's (Little Rock) Court approved desegregation program.[32] On September 12, 1958, the decision of the Circuit Court of Appeals was affirmed by the Supreme Court.[33] The opinion, however, was not handed down until September 29, at which time the Supreme Court unanimously reaffirmed its school segregation decisions of 1954 and 1955.

This decision,[34] reiterated in strong and clear language that the Supreme Court's interpretation of the Constitution is the law and that the decision ordering at least a prompt and good faith start on the court approved plan to eventually desegregate schools in Little Rock, stands and that neither direct nullification nor indirect evasion will be tolerated. It should be noted that the Court indicated that a District Court might conclude that justification existed for not requiring the present nonsegregated admission of all qualified negro children, the Court indicated that what is demanded is a "good faith" and "prompt start" toward ultimately complete desegregation which might take years, as some schemes already approved by District Courts will surely do. (Little Rock Plan is to be completed by 1963).

[29] Note 6 supra.

[30] Cooper v. Aaron, 358 U.S. 28 (1958).

[31] Aaron v. Cooper, 163 F. Supp. 13 (1958).

[32] Aaron v. Cooper, 257 F.2d 33 (1958).

[33] Note 30 supra.

[34] Note 30 supra.

It is worthy of note that since the original *Brown* case three new justices have come to the Supreme Court. These new Justices agreed with the other Justices still on the Supreme Court in arriving at a unanimous decision reaffirming the original case.

IX. PHILOSOPHY

The philosophy upon which this Republic was founded assumed the essential equality of the citizen. I assume that that philosophy was in part based on the Christian belief that all men —white, black, red, brown and yellow—were created by God for the intimate association with him ultimately for all Eternity, this notwithstanding any accidental or temporary differences, be they physical, intellectual, economic or racial. This thought, in part, was expressed as early as the Declaration of Independence. It may be of interest to present the opinion from the moral standpoint of a Great Christian Church, i.e., the Catholic Church. In this Church what is known as the Red Mass is traditionally offered for the sanctification of the new Court Year. A sermon was preached at a Red Mass by William J. Knealy, S.J. in the Cathedral of New Orleans to the members of the Louisiana Bench and Bar in December, 1956. The segregation case had been decided in 1954. It took courage for this church to take the stand it did on segregation and to announce it so soon after the decision and in a Cathedral in New Orleans. Jesuit Knealy at the end of his sermon stated:

> The position of the Catholic Church has been clearly and courageously stated by His Excellency, the Archbishop of New Orleans. The philosophy of the natural law has always been embraced and elevated by the theology of the Church Universal. Popes, archbishops, bishops, dogmatic and moral theologians, the unanimous judgment of the teaching Church is that compulsory segregation is objectively and morally wrong. It is a cancer in the body politic. It is a desecration of Christian civilization.
>
> We like to think that God is on the side of our American way of life; but it is true only to the extent that our American way of life is on the side of Him who said, 'I am the way, the truth and the life.' In the eyes of God there is neither white nor black nor red nor yellow nor brown; neither Jew nor Gentile nor barbarian nor Scythian; but all are brothers in Christ Jesus. 'By this will all men know that you are my disciples, if you have love one for another.'

The New York Times in an editorial said of the cases under discussion:

> What the Supreme Court has said will stand because it is true and because it meets the ethical test of our traditions. It is time for men of wrath to draw aside and for reason and tolerance to take over.

The editorial in the World Herald, heretofore referred to, likewise mentioned criticisms based on the claim that decisions of the Supreme Court made more difficult the investigation of the activities of Communists and made their prosecution more difficult. The editorial writer was, undoubtedly, referring to the opinions of the Supreme Court of the United States in the cases known as the *Nelson* case, the *Jencks* case and the *Yates* case.

X. NELSON CASE

This is the case of *Pennsylvania v. Nelson*,[35] where the Court held that the adoption by Congress of the Smith Act had superseded state statutes in the field of subversion. There is, of course, nothing novel or startling in this decision. The same general conclusion has been reached before in literally hundreds of cases. The point actually decided in the *Nelson* case was that the Commonwealth of Pennsylvania could not maintain a prosecution under its act for subversion against the Federal Government after Congress had provided for such prosecutions in the Smith Act.[36]

Why should a state prosecute for a conspiracy to overthrow the United States Government when Congress has made provision for prosecution in such cases by Federal authorities and in the Federal Courts? Such conspiracies to overthrow the national government have interstate ramifications and are surely in more experienced and better informed hands when they are handled by Federal authorities. Moreover, the Supreme Court simply affirmed the decision of the Pennsylvania Supreme Court. The Pennsylvania Supreme Court held that the State of Pennsylvania was without authority to prosecute under its statute for a conspiracy to overthrow the Federal Government. In the case it is made clear that none of the testimony had anything to do with state governments, but all the testimony had to do with a conspiracy to overthrow the Federal Government. There is nothing novel in this doctrine and there is certainly nothing to warrant the criticism that swept through the press following this decision. I suggest that if state officers have information of subversion against the United States Government that there is no reason to think that it will not get full attention from the F.B.I. and other agencies of the Federal Government. Why should it be the responsibility of the states to prosecute for offenses directed against the United States Government? The state still has complete

[35] 350 U.S. 497 (1956).

[36] 62 Stat. 808 (1948), 18 U.S.C. 2385.

power to prosecute under its own Act for a conspiracy to overthrow the state government.

XI. YATES CASE

This is the case of *Yates v. United States.*[37] The opinion was written by Mr. Justice Harlan and was handed down in June, 1957. The case was heard on appeal from the lower court wherein fourteen defendants were convicted of having violated the Smith Act, that is, advocating the overthrow of the United States Government. The cases as against five of the defendants were reversed and dismissed for lack of evidence. As to the other defendants, their cases were sent back for retrial. These cases were reversed in part because of instructions to the jury given by the trial judge.

It will be remembered that before this case reached the Supreme Court there was a case known as the *Dennis* case[38] which was instituted during the administration of President Truman. This case was tried before Judge Medina. The defendants were convicted under the Smith Act. The convictions were upheld in the Court of Appeals by Chief Justice Learned Hand and thereafter the Supreme Court granted certiorari limited to the question of the constitutionality of the Smith Act and by a vote of six to two the Court affirmed the convictions. I mention the *Dennis case* because Judge Medina gave instructions requiring that the advocacy of the overthrow of the Federal Government be in words reasonably and ordinarily tending to incite to forcible action at some future time, that is, Judge Medina distinguished between advocacy of an abstract doctrine and advocacy directed at promoting unlawful action.

In the trial of the *Yates* case,[39] the attorneys for the Government and the attorneys for the defendants both requested the Court to give the Medina instructions. The trial court refused and the Supreme Court held that the lower court erred in such refusal.

As Judge Hand says in his book *"The Bill of Rights"* in commenting on the *Yates* case:

> The Supreme Court made a distinction between words that advocate concrete action and those that advocate principles divorced from action.

[37] 354 U.S. 298 (1957).

[38] Dennis v. United States, 341 U.S. 494 (1951).

[39] Note 37 supra.

Judge Harlan in commenting on the *Dennis* case[40] stated the case held that advocacy employing language of incitement is not constitutionally protected (by the 1st Amendment) when the group is of sufficient size and cohesiveness to justify apprehension. As to the five that were cleared, Mr. Justice Harlan said:

> So far as this record shows none of them have engaged in or been associated with any but what appear to have been wholly lawful activities, or has ever made a single remark or been present when someone else made a remark which would tend to prove the charges against them.

The issue in the *Dennis* case was the reconciliation of the free speech guaranty in the Constitution with convictions under a statute which treated speaking and teaching as criminal offenses. The eleven in the *Dennis* case had taken no action with the immediate intention of initiating a revolution. The convictions could be upheld only if the speech was by judicial standards sufficiently related to the possibility of illegal action.

Judge Hand in his book *"The Bill of Rights"* in commenting on the *Yates* case said:

> It would be difficult, indeed perhaps it would be impossible, to imagine an occasion on which the statute would make the advocate of principles divorced from action a principal in a crime.

At any rate in the *Yates* case the Supreme Court held that the judge's instructions to the jury furnished wholly inadequate guidance and supplied a reason why the convictions could not be allowed to stand and ordered that nine of the cases be sent back for retrial.

The Smith Act likewise made it unlawful to organize a group which advocates the overthrow of Government by force and violence. The defendants were charged with both organization and advocacy. Mr. Justice Harlan held that the term organize in the act referred to the actual formation of the American Communist Party, an event which took place in 1945. The date of the indictment was 1951. Therefore the Court held that the three-year Statute of Limitations had run on that part of the charge.

Amendments may be passed by the Congress to broaden the scope of the Smith Act and to more specifically define the meaning of its terms and more precisely express the intentions of Congress. These amendments will, of course, be attempted in a manner to avoid the hurdles of the first amendment to the Constitution and the due process of law amendment.

[40] Note 38 supra.

XII. JENCKS CASE

This is the case of *Jencks v. United States.*[41] In this case Jencks, a Labor Union Official, filed a non-Communist affidavit with the National Labor Relations Board in 1950. The Government charged that the affidavit was false and it presented two witnesses in Court to establish his connection with the Party. The witnesses were informers paid by the F.B.I. who had made oral and written reports to the F.B.I. concerning Jencks. A witness of this character testified and counsel for the defendant wanted to see his report to compare what the witness had said at the time with his testimony in Court, hoping to impeach his testimony. Consequently, counsel requested, after the witness had testified and after he had stated that he had made written reports to the F.B.I. of the facts concerning which he testified, that the reports be produced by the Government for inspection by the trial judge who was to examine it for materiality and relevancy and then to turn over to the defense such materials as met these tests. This request was refused. Mr. Justice Brennan held that the refusal was error. I submit that this decision seems elementary to those of you who have engaged in the trial of cases wherein a witness testified to certain facts and then admitted on cross examination that he had previously given a written statement to the other side about the very same facts he testified about. Why should not the defense counsel have a right to demand that the Government produce the statement? Defendant's counsel have a right to impeach the witness if the testimony differs from the statement. How could a decent system of criminal trials exist on any other basis. Yet this decision was attacked by those who never read the opinion on the ground that it opened up the F.B.I. files to the Communists, crooks, etc. The opinion did nothing of the kind.

Dean Griswold of the Harvard Law School in commenting on this case said:

> The witness in the *Jencks* case was Harvey Matusow. Suppose your client was being convicted on Harvey Matusow's testimony, and you knew that he had made a previous statement to the F.B.I. Wouldn't you want to see that statement? Wouldn't you regard it as highly unfair and improper if you were not allowed to see the statement? Is there any lawyer who can seriously say that the Supreme Court did anything in the *Jencks* case except its plain duty? Lawyers, especially trial lawyers, should be commending the Court for this decision.

These are some of the decisions of the Supreme Court which are currently being criticized. I will not have the space to ana-

[41] 353 U.S. 657 (1957).

lyze more of them, but believe that an examination of them will show that the Court is requiring that defendants be convicted by due process of law and is attempting to uphold the substantive and procedural safeguards established by the Constitution, the Bill of Rights and the Amendments which were adopted after the Civil War. This the Court is required to do.

The New York Times, in an editorial, discussing the criticisms of certain decisions of the Court said:

> We live in a time of great stress, of great dangers, of a great necessity for discipline. Nevertheless, the basic rights of our society are not those of governments, or of any agents of government, but of the individual. And the ultimate act of treason is to despise those rights and undermine them, just as the ultimate loyalty is to protect them and carry forward the great traditions of democracy.

In speaking of the Supreme Court Mr. Justice Hughes on an occasion commemorating the 150th Anniversary of the Court said:

> It does most of its work without special public attention to particular decisions. But ever and anon arise questions which excite an intense public interest, are divisive in character, dividing the opinion of lawyers as well as laymen. However, serious the division of opinion, these cases must be decided. It should occasion no surprise that there should be acute differences of opinion on difficult questions of constitutional law when in every other field of human achievement, in art, theology, and even on the highest levels of scientific research, there are expert disputants. The more weighty the question, the more serious the debate. The more likely is the opportunity for honest and expert disagreement. This is a token of vitality. It is fortunate and not regrettable that the avenues of criticism are open to all, whether they denounce or praise. This is a vital part of the Democratic process. The essential thing is that the independence, the fearlessness, the impartial thought, and conscientious motives of those who decide should both exist and be recognized.

It might be well to remember the last few lines of Mr. Hughes address when influenced by those so violently opposed to the Court's decision in the Segregation Cases. The Chief Justice of Pennsylvania, Justice Charles Alvin Jones, who wrote the opinion in the *Steve Nelson* case[42] in the State Court in commenting upon the criticism of the opinion in that case on appeal written by the United States Supreme Court, said:

> The preponderant backing of the attack on the decision in the Nelson case is made up of those who would undo the Supreme Court's decision in Brown v. Board of Education.

[42] Note 35 supra.

XIII. CONCLUSION

It is my considered judgment that nothing has occurred to diminish confidence in our Courts, Federal or State, in litigation between citizens or in those cases which involve individual liberty, protected by the sacred guarantees of the Bill of Rights. The administration of justice, according to law, in controversies between individuals, goes forward as steadily today as at any time in the history of courts. Justice between men is in fact meted out more surely because of the modernization of our procedures and practices in compelling a full disclosure of the facts; State and Federal Courts vigilantly uphold freedom of speech and worship, the right of peaceable assembly, the right to have one's home treated as his castle, the right to be free from unwarranted searches and seizures, the right of bail and the right to trial by jury, when life and liberty are involved; and the right to be represented by counsel. All of the rights of the individual are upheld even in those cases involving subversive conduct which have lately fretted the patience of our people. This, lawyers ought to announce to their fellow citizens.

I would like, in conclusion, to repeat a paragraph from the address of the Hon. Leonard A. Brockington, K.C. at Philadelphia, at a meeting of the American Bar Association. He said:

> The law in its majesty and its real grandeur is never on the side of oppression or of violence or of unfaith or murder. In its noblest moods it stands in compassion by the side of the Man with the Hoe, in the cell of the persecuted and by the funeral pyre of the martyr. It stands wherever a man holds his head erect and speaks the truth that is within him. It stands whereever great souls and minds fight against bigotry and darkness. For the law is the language of freedom and of free men.