SOUTHERN JUDGES IN THE DESEGREGATION STRUGGLE

UNLIKELY HEROES. By Jack Bass. New York: Simon & Schuster. 1981. Pp. 352. $14.95.

Reviewed by Burke Marshall[1]

In *Brown II*,[2] after reiterating "the fundamental principle [first stated in *Brown I*[3]] that racial discrimination in public education is unconstitutional,"[4] the Supreme Court turned to the unaccustomed task of delegating power, rather than merely pronouncing law. "All provisions of federal, state, or local laws requiring or permitting such discrimination must yield to this principle," the Court said; what remained for consideration was "the manner in which relief [was] to be accorded."[5] These words did not, of course, mean what they usually mean — that is, relief for the parties in the particular cases. Nor, as soon became clear, did the Court really mean to confine its mandate to the field of public education.[6] The job of "according relief" was, as the Court must have known, more complex, more intrusive on powerful entrenched interests, and in many ways more intractable than even the far-reaching tasks delegated by Congress to the executive branch since the New Deal. The task involved nothing short of a commission to restructure a network of law supporting, and supported by, an oppressive economic, social, and political system in the former Confederate and neighboring states. Having no conceivable institutional way to do this job itself, the Court in *Brown II* simply delegated it to the only bodies that the Court

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[2] Brown v. Board of Educ., 349 U.S. 294 (1955).

[3] Brown v. Board of Educ., 347 U.S. 483 (1954).

[4] 349 U.S. at 298.

[5] *Id.*

[6] Consider, for example, the following summary per curiam decisions: Schiro v. Bynum, 375 U.S. 395 (1964) (segregation in municipal auditorium); Johnson v. Virginia, 373 U.S. 61 (1963) (courtroom seating); Turner v. City of Memphis, 369 U.S. 350 (1962) (airport restaurant); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (athletic contests); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf course); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses). Mr. Bass refers at several points to the decision below in the *Browder* case, Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956). *See* J. BASS, UNLIKELY HEROES 68–69, 74–76 (1981). It is a minor but infuriating defect in the book that the citation to this case, among others, is never given. There are also some miscitations. *See, e.g., id.* at 235 n.4 (323 F.2d given as 223 F.2d).

could tell to do what it wanted done: the inferior federal courts in what was then the Fifth Circuit,[7] as well as those in parts of the Fourth and Sixth Circuits.

The subject matter of Jack Bass's *Unlikely Heroes* is the impact of *Brown II* on the Court of Appeals for the Fifth Circuit. The book revolves around four court of appeals judges: John R. Brown of Texas, Richard Taylor Rives of Alabama, John Minor Wisdom of Louisiana, and Elbert P. Tuttle of Georgia, all now on senior status or retired. Two district court judges — Frank M. Johnson, Jr., of the Middle District of Alabama, now on the Eleventh Circuit Court of Appeals, and J. Skelly Wright of the Eastern District of Louisiana, now on the Court of Appeals for the District of Columbia Circuit — also figure prominently in the story.

The strength of the book comes from the fact that these are all extraordinary men, experienced and able advocates, firm-minded judges, articulate defenders of their decisions — in short, lawyers exhibiting the kind of personal integrity, courage, and vision to which all members of the profession should aspire. They did their work at a time when federal judges had orders from the Supreme Court, through *Brown II*, to implement a revolution in law that was feared and resisted by an overwhelming majority of the white population in the areas affected. The combination of unusually creative judges and the sea change in American race relations implemented initially through the federal judiciary necessarily contains the elements of drama. Mr. Bass, a Southern reporter with a longstanding interest in race relations, watched the drama unfold. In his book, we learn something, by no means too much, about each of the six men — their personal backgrounds, their views of judicial work, the personal and social indignities they endured because of their work, and their individual and collective convictions about racial justice and the social condition of their land. Mr. Bass also provides a description of what that social condition was like only a few years ago, in order to remind his readers how swiftly the revolution of law initiated by *Brown I* has proceeded.

Mr. Bass has ambitions, however, that go beyond telling the personal story of six judges at work in the midst of drama. He also undertakes a technical and analytical description of the judicial work of the Fifth Circuit under Chief Judge Tuttle. The court faced four kinds of difficulties in the post-*Brown*

[7] Pursuant to the Fifth Circuit Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994, Alabama, Georgia, and Florida have been separated from the old Fifth Circuit and now constitute the new Eleventh Circuit.

era. First, it grappled — in a racial context — with the doctrinal constraints on federal control of state trial courts developed since *Douglas v. City of Jeanette*.[8] A second problem concerned the special difficulty of appellate control over federal district court judges who, in race cases, simply would not move the judicial business ahead in conformity with the substantive commands of the Constitution as it was construed by the Supreme Court and the Fifth Circuit.[9] A third, relatively unstudied part of the judicial business concerned the Fifth Circuit's internal management, a source of intense, bitter, and sometimes public disagreement among the judges of the Circuit, a disagreement that stemmed basically from differences over the speed and manner with which racial matters should be handled by the federal judiciary.[10] The fourth, more traditional, and therefore more easily understood and described area of judicial work was the development of doctrine through the application of *Brown I* to a variety of new contexts.[11]

Mr. Bass's book recognizes and describes, to varying degrees, each of these elements of the judicial business, but not in a way that advances the existing literature[12] or that subjects the work of the Fifth Circuit after the *Brown* decisions to the analysis it deserves. The author's training is in journalism, and the book's organization and style is anecdotal. What is needed, however, is legal and historical scholarship and careful contextual analysis.

The very title of the book suggests both its premise and its conclusion: that the "heroic" judges were those who in every case stood for racial justice above all else. This is clearly a supportable point of view, but it is not self-evident absent a principled view of what the role of a judge should be.[13] It

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[8] 319 U.S. 157 (1943).

[9] See, for example, the discussion of United States v. Lynd, 301 F.2d 818 (5th Cir. 1962), in J. BASS, *supra* note 6, at 218–220.

[10] *See* J. BASS, *supra* note 6, at 231–47.

[11] *See, e.g.*, Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.) (application of *Brown I* principle to city buses), *aff'd per curiam*, 352 U.S. 903 (1956).

[12] *See, e.g.*, J. BASS, *supra* note 6, at 333–35 (bibliographic essay); J. PELTASON, FIFTY-EIGHT LONELY MEN (1961); F. READ & L. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978); Note, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90 (1963). There are two books on Judge Frank Johnson, both worth reading. *See* R. KENNEDY, JUDGE FRANK M. JOHNSON, JR. (1980); T. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA (1981).

[13] Compare Robert Cover's wonderful assessment of the behavior of some judges in slavery cases. R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

assumes the answers to some hard questions: To what extent did the Fifth Circuit doctrine developed after *Brown* distort principles of federalism to achieve short-term results in a way that damaged basic postulates of the constitutional structure? Did the Fifth Circuit mechanically move equal protection doctrine beyond the dictates of *Brown* because of preconceptions about racial matters on the part of the court's majorities? Did the court of appeals in fact usurp the function of the trial courts, to the detriment of the orderly administration of justice in the Circuit? Was the membership of the panels of the Court of Appeals and of three-judge district courts manipulated administratively to ensure particular results in important race cases? Further, even if the answer to these questions is "yes," was that behavior improper for federal judges such as Judges Brown, Rives, Tuttle, and Wisdom, who knew well that some state and lower federal judges would never follow *Brown* in the manner required by the basic premises of the judicial system?

Of these questions, the one that Mr. Bass faces most directly is the charge that, in integration cases, the appellate panels and three-judge courts were, in effect, packed.[14] The charge was made by Judge Ben Cameron in a widely noted dissent to the denial of a petition for rehearing en banc in *Armstrong v. Board of Education*.[15] The panel in the case consisted of Judges Tuttle, Rives, and Gewin. The procedural status of the case and the majority's decision were indeed unusual. The hearing was on a motion seeking an injunction from the court of appeals, pending appeal from the district court's denial (but with a retention of jurisdiction) of an injunction against the school board. On the merits, even on a conservative view of *Brown I* the district court had been wrong in refusing relief, though its decision could not be called irrational.[16] But instead of reversing and remanding, the appellate panel wrote an injunction itself and ordered the district court to enter that injunction, which was to "remain in effect until the final determination of the appeal of the above-styled case in the Court of Appeals for the Fifth Circuit on the merits, and until the further order of this Court."[17] The in-

[14] J. BASS, *supra* note 6, at 231–47.

[15] 323 F.2d 333, 352 (5th Cir. 1963) (Cameron, J., dissenting).

[16] The district court held that the Birmingham pupil assignment system, which permitted assignments and transfers on pupil application, was constitutional on its face, and that there had been no showing that the school board would not apply it in a nondiscriminatory way. The court retained jurisdiction in order to deal with any complaints about discriminatory application of the system. 323 F.2d at 334–35 (Rives, J.).

[17] *Id.* at 339.

junction, ordered by the appellate panel on July 22, 1963, required the school board to file by August 19, 1963, a plan providing for full desegregation of the school system that September. It was not a decision "on the merits" only in the technical sense that it was ordered in a decision on a petition for an appellate injunction pending appeal, rather than on an appeal as such.

The dissent by Judge Gewin attacked the procedure followed by the majority, as well as the majority's abrupt disagreement — before any hearing on the appeal as such — with the district court's disposition below.[18] Judge Gewin requested that the Fifth Circuit rehear the case en banc "because of the extraordinary relief granted which conditions the merits of the case before an examination of the record by the court, the hurried and emergency action taken by the court, [and] the unique procedure involved."[19] A majority of the full court voted against an en banc hearing, with Judge Gewin noting his dissent and Judge Cameron entering a dissent attacking in full the "unorthodox procedures" followed by the Fifth Circuit in cases involving racial problems.[20] That dissent discussed in detail the emerging dispute in the court concerning the handling of integration problems. Procedures were indeed used that seem "unorthodox," in the sense that they would not have been used in cases that did not involve the double urgency of time and informed doubt about the will of district judges to protect rights that would be lost through delay. Judge Cameron's dissent listed twenty-five such cases decided in the previous two years, and pointed out that in twenty-two of them the majority of the panel was some combination of what he called "The Four" — Judges Brown, Rives, Tuttle, and Wisdom.[21] He also pointed out that he himself — the circuit judge from Mississippi — had not been assigned to any of the three-judge district court cases in Mississippi during that period.[22]

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[18] *Id.* at 339 (Gewin, J., dissenting).

[19] *Id.* at 352.

[20] *Id.* at 353 (Cameron, J., dissenting).

[21] *Id.* at 358. In an addendum to his list, Judge Cameron added four cases. The panels consisted of three of "The Four" in one case, two of "The Four" plus another judge in two cases, and one of "The Four" plus Judges Jones and Bell in the fourth case. *Id.* at 360-61.

[22] On any view of the matter, Judge Cameron's own bizarre judicial behavior in connection with the efforts of James Meredith to be admitted to the University of Mississippi disqualified him from sitting on such cases. A three-judge panel of the Fifth Circuit had ordered District Judge Sidney Mize to issue an injunction ordering Meredith's admission to the University. Judge Cameron then took the unprecedented step of issuing a series of four stays suspending the panel's order, although Cameron

Mr. Bass's approach to this judicial squabble illustrates the shortcomings of his book. He treats the matter as if the primary question were whether the assignment pattern suggested by Judge Cameron's statistics invariably led to judicial stretching in favor of civil rights plaintiffs.[23] On that premise, he analyzes the results in the cases and refutes the charge. Five of the cases were actually decided against the plaintiff; another five dealt with clearly settled issues; and fifteen involved special factors (p. 244). Accordingly, Mr. Bass concludes, "[t]he case-by-case analysis discloses that the innuendo Cameron's statistics raised in regard to [Chief Judge] Tuttle's character was totally without foundation" (p. 245).

The interesting question, however, and the one Cameron was really raising, was not whether the packing affected the outcome of important desegregation cases, but whether it was proper judicial conduct.[24] An answer requires coherent conceptions of proper judicial conduct and of evenhanded justice. The members of the court disagreed about the extent to which special judicial efforts were justified to prevent the atrophy of civil rights through delay — delay caused by intransigent district judges in some cases, but also delay stemming from the demands of federalism and the normal pace of litigation. These are matters over which conscientious lawyers, scholars, and judges may disagree, and there is no necessary consensus that it is an appropriate exercise of judicial power to resolve them through techniques of court administration, if, as the statistics suggested, that was being done. A more careful and thoughtful book would have discussed these considerations and assessed the value of strict adherence to federalist doctrines and of other sources of delay in themselves.

The book has one other limitation that should be mentioned. It treats as heroes, as they were in a way, six white men who happened to be federal judges in the South during the period before the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The role of these men in the desegregation struggle is the subject matter of the book.

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himself had not sat on the case. The logjam was finally broken when Supreme Court Justice Black ordered that the judgment of the court of appeals be obeyed (pp. 179–82).

[23] Mr. Bass also shows that, for a variety of reasons, the statistics exaggerate the extent of packing that actually occurred (pp. 240–41). He points out, however, that Cameron's statistics "retained a disturbing appearance" (p. 241).

[24] Mr. Bass does quote Griffin Bell, then a Fifth Circuit judge, to the effect that assignment manipulations generated the appearance of unfairness (pp. 246–47), but Bass offers no analysis or assessment of the problem.

To the extent that the book departs from their story, it does so in a chapter about civil rights lawyers (chapter 16). The lawyers Mr. Bass chooses to profile were also white. But clearly, those whose lives, personal safety, economic security, and futures were most at stake were not lawyers or judges at all; they were the plaintiffs in the lawsuits described in *Unlikely Heroes* and the participants in the civil rights movement, and they were mostly black.