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## Reflections on Justice Before and After Brown

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## Reflections on Justice Before and After Brown

### **Cover Page Footnote**

Senior Judge, S.D.N.Y.; B.S., New York University, 1942; J.D., Columbia Law School, 1946; NY State Senator 1964-1965; Manhattan Borough President, 1965-1966; appointed to the federal bench in 1966 by President Johnson; Chief Judge S.D.N.Y., 1982-1986. Judge Motley began her career working for the NAACP Legal Defense Fund as a clerk to Thurgood Marshall. She was an integral part of the legal team that laid the groundwork for overturning Plessy v. Ferguson, and participated in most of the major civil rights cases in her twenty years at the LDF. She is best known for representing James Meredith in his struggle to gain admission to the University of Mississippi and for her contributions to Brown v. Board of Education.

## REFLECTIONS ON JUSTICE BEFORE AND AFTER *BROWN*

*Constance Baker Motley\**

In the 1950's, Mississippi had the largest number of African-American citizens of any state and was, as Professor C. Vann Woodward observed, "profoundly isolated from national life and opinion."<sup>1</sup> Few blacks were registered to vote,<sup>2</sup> white supremacist doctrines governed law enforcement, and the legislature declared that *Brown's* directive was "unconstitutional and of no lawful effect."<sup>3</sup> After James Meredith's 1961 application for admission to the all-white University of Mississippi at Oxford, I made twenty-two trips to the state during the year and a half of litigation that was needed to compel the school to accept him.<sup>4</sup>

An incident that occurred on one of these visits illustrates the intrusive indignities of Jim Crow customs and laws. I took my then nine-year-old son, Joel, with me because Medgar Evers, who was at that time the NAACP director for the state,<sup>5</sup> had three children of about my son's age. Medgar's wife Myrlie decided she would take all the children to the zoo one day and while they were there, my son parked himself on one of the benches. Along came a white policeman and said, "Boy, get up off that

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1. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 173 (1966).

2. Not even 2% of African-Americans over the age of twenty were registered. *Id.* at 174.

3. *Id.* at 157.

4. I was then an NAACP attorney on Thurgood Marshall's staff. See CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY* 162-163 (1998).

5. Ronald Smothers, *30 Years Later, 3d Trial Begins in Evers Killing*, *N.Y. Times*, Jan. 28, 1994, at A12. *Id.* Medgar Evers's racially motivated 1963 murder was recently reopened and resulted in a conviction decades after his death.

bench!" And my son was just startled, he didn't really understand. Myrlie came over to him and explained, "You know, Joel, they allow us to come to the zoo and see the animals, but they don't allow us to sit down on the benches. You have to stand." My son got up and shook his finger in the policeman's face and said, "I'm going to have you arrested!" Joel lived in New York, and that was his first encounter with real segregation.

One of segregation's other faces was danger. Lynchers were going unpunished and violence was a common Jim Crow method of repression.<sup>6</sup> United States marshals guarding James Meredith were attacked by armed mobs that were allowed onto the campus by state troopers.<sup>7</sup> Meredith had earned credits in military service toward his college degree and had spent a year and a half at Jackson State University before he was admitted to the University of Mississippi, so he only had a year to finish. During that entire year, federal marshals had to sleep with him in his room. He could not go anywhere on campus without being accompanied by these marshals.

Southern resistance to *Brown*, and to the civil rights activities the decision inspired, took many forms. Martin Luther King started a new movement, challenging state-enforced segregation directly rather than litigating, and it was very effective.<sup>8</sup> He moved around the South to various places where he was invited, founded the Southern Christian Leadership Conference, and organized peaceful marches to protest against Jim Crow. During the course of Dr. King's activities then, adults in Birmingham, Alabama who had been marching got rather tired. Someone then came up with the great idea that they would have the schoolchildren march on a Saturday when they were not required to be in class, knowing that they would not tire as easily.

Eleven hundred children did march on a Saturday, but the local school authorities devised an ingenious punishment. All of the participants were summarily expelled from school, and that was one week before graduation. Naturally, the parents were very upset about this. King and his close associates asked the NAACP Legal Defense Fund for help. Leroy Clark and I from the Legal Defense Fund both just happened to be in Birmingham for a case involving the University of Alabama.<sup>9</sup> We filed a

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6. WOODWARD, *supra* note 1, at 173-174.

7. *Id.* at 174-175.

8. Martin Luther King came to power after Rosa Parks' decision in December 1955 not to move to the back of the bus in Montgomery, Alabama. At that time, King and Ralph Abernathy were both pastors at black churches in Montgomery. They came immediately to Rosa Parks' aid when she was arrested for refusing to give up her seat so that a white man could take it. A bus boycott by black riders followed, led by King and Abernathy. *See generally* URIAH FIELDS, *INSIDE THE MONTGOMERY BUS BOYCOTT* (2002).

9. *Lucy v. Adams*, 224 F. Supp. 79 (D. Ala. 1963).

suit in the federal district court asking that the expulsion of the students be enjoined. The local Federal District Court Judge, a man named Clarence W. Allgood who had been appointed by President Kennedy,<sup>10</sup> denied our application for an injunction. He did not actually issue his decision until two o'clock in the afternoon, although we had appeared before him at eleven in the morning. He knew that we would be going to the Fifth Circuit before Judge Elbert Tuttle to appeal his decision, and so he held it up, thinking, "Well, if I wait until two o'clock they will miss the last plane to Atlanta, at 3:00 p.m."

We had arranged with Judge Tuttle to hear us that afternoon, telling him we would be coming in with a special application, and we should be there at three or four o'clock. Of course we called Tuttle when we got the opinion late, and said, "Oh we're sorry we can't get there." And he replied, "Oh yes you can, there is a plane at five o'clock, and I'll hear it at seven, notify your opponents." He heard us at seven o'clock at night, and overturned the denial of the injunction. We returned to Birmingham at 11 p.m. and announced the decision in the church where King and his followers were meeting (every night they met in a different church). The church people were there, and we explained that we had succeeded in getting the children back in school. In retrospect, I think that saved Martin Luther King. The parents were certainly with him, but they never contemplated that their children would have to pay such a price for this, and so they were very happy about this outcome.

Virtually all of the black clergy in the South had joined the Southern Christian Leadership Conference. By 1963, King had emerged as a leader of the African-American communities' fight against segregation. A critical event occurred in Birmingham, Alabama where Police Commissioner Eugene "Bull" Connor had closed city playgrounds and parks in defiance of a court order opening them to every citizen.<sup>11</sup> When peaceful demonstrators refused to stop marching on City Hall to protest this action, Connor loosed dogs and fire hoses on them. Pictures of this ugly confrontation outraged people throughout the nation.<sup>12</sup>

As a result, in August 1963, Martin Luther King led a march on Washington with the direct organizational aid of A. Philip Randolph and Bayard Rustin. At the time I was vacationing in Cape Cod, and my husband asked me, "Are we going to this march on Washington?" I said,

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10. We found that Southern judges appointed by President Eisenhower, all Republicans such as Judges Elbert Tuttle, John Minor Wisdom, and John R. Brown, were generally more liberal than the Democrats. See MOTLEY, *supra* note 4, at 133-134.

11. WOODWARD, *supra* note 1, at 176.

12. *Id.* at 177.

"Yes, I guess we better go, we'll be the only people there. You know there won't be many." We left Cape Cod, went to Washington and got up the next morning to participate. My husband, my son, and I were eating breakfast in our hotel room and the television was on. The announcer started by saying, "Well, I guess there are about 1000 people here," then he said, "Wait a minute, make that 2000 people," and then, "No, no make that 10,000." We ran to join the others. Estimates of the number present ranged between 200,000 and 250,000. This great gathering had come unexpectedly for those of us directly involved in the civil rights movement. In retrospect, it became the turning point in the war on segregation.

The role of federal judges in the history of Southern justice ranged from protecting segregation to disapproving of it, as indicated in the prior description of Judge Tuttle's energetic reversal of Judge Allgood regarding the expulsion of the marching school children. Even before *Brown*, federal courtrooms were not segregated,<sup>13</sup> although African-Americans were generally unaware of that.

During 1949, we brought litigation to equalize the salaries of black and white teachers in Mississippi.<sup>14</sup> Bob Carter was the lead counsel and I was assisting him. On the first day of trial, we started at two o'clock in the afternoon. Whites had taken all the seats because blacks thought they would not be permitted to sit down. They were lining the walls. Carter told the blacks who were standing, "You know, there's no segregation here. You can sit." When we arrived the next morning, all the seats were filled by blacks. District Court Judge Sidney Mize ordered the marshals to open the huge doors to the courtroom, so that the whites could parade by all day to see the "Negra lawyers from New York" as they would call us.

Then the school superintendent took the stand. He was examined by Bob Carter. The superintendent spoke in a very low, Southern accent. Carter asked Judge Mize if he would require the witness to speak up. Judge Mize took his gavel, hit the bench hard and said to the witness, "Yes,

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13. This formed a marked contrast to the custom in state courthouses. After *Brown*, a young black woman named Mary Hamilton challenged such customs. She was on the witness stand in Birmingham, Alabama, charged with an offense under state law for participating in a civil rights demonstration. *Ex parte* Hamilton, 156 So. 2d 926 (Ala. 1963). The state's attorney continued to address her as "Mary" instead of "Miss Hamilton," and she insisted on being addressed as Miss Hamilton, so she refused to answer any of the state attorney's questions. *Id.* The judge held her in contempt of court. *Id.* The NAACP took the case to the United States Supreme Court, which reversed, citing *Johnson v. State of Virginia*, 373 U.S. 61 (1963), a decision with similar facts to *Hamilton*, which solely cited *Brown*. *Hamilton v. Alabama*, 376 U.S. 650 (1964). There was no oral argument, just the *Brown* citation through *Johnson*. The state could no longer make any distinctions among its citizens predicated on race.

14. See MOTLEY, *supra* note 4, 71-72.

“speak up so the lawyer can hear you.” To the black community, that was the first demonstration they had ever had that a white person in Mississippi was on their side. That night in all the barber shops, black men were reenacting the scene of a judge telling a white man to speak up so that a black man could hear him.<sup>15</sup>

In a contrasting post-*Brown* case, *Hawkins v. Board of Control of Florida*<sup>16</sup> plaintiff's application for admission to the University of Florida's law school had been rejected because of his race. After many prior litigation stages in the Florida state courts,<sup>17</sup> I filed suit in federal court in Florida, and moved for a preliminary injunction in the United States District Court in Tallahassee. Dozier De Vane, the elderly and erratic judge who was sitting, merely said he would set it down for trial some day, and denied the injunction. The Fifth Circuit issued a writ of mandamus ordering him to schedule a hearing. Instead, he issued an entirely arbitrary order stating that any black applicant who was part of the class Hawkins represented could apply for admission to the law school except plaintiff Virgil Hawkins. Hawkins in the meantime did get a legal education, in Boston. His response was: “I've been at this for nine years. I've been admitted to Suffolk Law School in Boston, and I will accept.” After he graduated, he went back to Florida, and about ten years later the black lawyers there secured his admission to the Florida Bar without examination. If he had been accepted at the University of Florida Law School, as he should have been, state law would have allowed him to become a member of the Bar upon graduation.

Some federal judges found the adjustment to desegregation very difficult. During the Meredith case, Judge Mize was considering senior status (semi-retirement). A new federal judge, Harold Cox, was brought in to sit with Mize on the Meredith case, which was still pending because of

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15. Judge Mize ultimately held that the plaintiffs in the lawsuit, Gladys Noel Bates and R. Jess Brown, had prevailed on the issue of equalizing teachers' salaries, but that he had to rule against plaintiffs nonetheless because they had not exhausted state administrative remedies as the Fifth Circuit Court of Appeals then required. *Cook v. Davis*, 178 F.2d 595 (5th Cir. 1949); *Bates v. Batte*, 187 F.2d 142 (5th Cir. 1951).

16. 162 F. Supp. 851 (N.D. Fla. 1958).

17. After granting certiorari, the U.S. Supreme Court initially remanded the case to the Supreme Court of Florida in light of *Brown*. See *State ex rel. Hawkins v. Board of Control*, 60 So. 2d 162 (Fla. 1952); 347 U.S. 971 (1954). Florida delayed implementing a mandamus order claiming that a determination needed to be made as to what adjustments were needed in order to admit black students. *State ex rel. Hawkins v. Board of Control*, 83 So. 2d 20, 24 (Fla. 1955). When the case again reached the Supreme Court, Florida was ordered to promptly admit black students. *State ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 413 (1956). When the Florida courts again delayed, the plaintiff filed a new suit in Tallahassee. *Hawkins v. Board of Control*, 253 F.2d 752 (5th Cir. 1958).

Governor Ross Barnett's resistance. We arrived in court one day seeking to have Governor Barnett held in contempt of a prior Fifth Circuit order. My secretary had gone with me, hastily typed up our motion and mistakenly put "Order" instead of "Motion" at the heading of the page. Judge Cox, sitting with Judge Mize in chambers, picked it up and said, "Look at this, it's headed 'Order,' instead of 'Motion,'" and he threw it across the table at us. Judge Mize put his hand on Judge Cox's hand, and said, "Judge Cox, it's all over." In other words, he was telling Judge Cox, blacks are going to the University of Mississippi, don't carry on, you can't treat them like this, they've won.

In other instances, federal judges followed *Brown* despite the customary excuses proffered by southern school authorities to evade its mandate. In 1959, I assisted in a suit to desegregate the University of Georgia. Plaintiffs Charlayne Hunter (Gault) and Hamilton Holmes had been straight-A students in Atlanta's high schools, and were from middle-class backgrounds.<sup>18</sup> The chairman of the state university systems board of regents testified under cross-examination that any segregation in Georgia's university system was purely voluntary, offering no plausible justification for rejecting the applications of Hunter and Holmes. Judge William A. Bootle ruled in our favor, exhibiting evident amusement during the official's testimony.<sup>19</sup> The Governor was persuaded by local businessmen not to interfere, and the plaintiffs graduated despite intermittent efforts by white students to intimidate them. Subsequently, Hamilton Holmes became a physician in Atlanta and Charlayne Hunter a well-known journalist.

The judiciary's action in *Brown* became the predicate for the passage of the 1964 Federal Civil Rights Act prohibiting discrimination in places of public accommodation. Before that, African-Americans traveling in their own country had to find a place to stay and to eat in someone's home in the black community, not in any hotel. When I went to Savannah, Georgia to try a public housing suit with A.T. Walden, the dean of all the black lawyers in Atlanta, he arranged for a local woman to fix dinner for us. They ate dinner early in the South, about one or two o'clock, so we went to court without any breakfast. It was the first time I ever had to do that, and when we came out, we went to the home of Walden's friend. It seemed to me that she had cooked everything imaginable and it was wonderful. It was hard traveling in the South at that time, especially for those who would

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18. In preparation for trial, we had spent two weeks looking at school records of white students who had been admitted at the time that Hunter and Holmes were rejected. See MOTLEY, *supra* note 4, at 145.

19. *Id.* at 145-46.

have to pass through unfamiliar communities.

After 1964, I remember being in Mobile, Alabama. The director of the local NAACP branch was so pleased to have me there, because the 1964 act banning discrimination in places of public accommodation had just been passed and he had made arrangements for me to stay in the best hotel in town. I was afraid. I told him I would rather stay at someone's house. He said, "No, no, please, please, I went to the managers and explained that they had to let you in." Of course, I went. I was the only black person in the hotel and I didn't know what to expect. This was the first time a black person had stayed there. I wondered whether someone might attack me, but nothing happened.

Another critical piece of legislation at that time that has changed the American community was the Voting Rights Act of 1965. Once blacks could vote and run for office without impediments, they did.<sup>20</sup> During Reconstruction, there were about sixteen African-Americans in Congress, and in the '50s it may have been about twenty. But now there are fifty black Congressmen and women. There is still litigation challenging gerrymandering,<sup>21</sup> but black voting is a given in the South and white candidates seek black votes.

### CONCLUSION

The degrading and arbitrary edicts of Jim Crow, permeating every sphere of Southern life, were nullified by *Brown* and its progeny, and the federal legislation enacted in the following decade. Injustice still endures in cash-starved inner-city schools, and in the lack of economic opportunity for those blocked by discrimination and rooted in poverty. Yet the Supreme Court's decision half a century ago has generated a black middle class by opening higher education to African-Americans, and has demonstrated that the law can align itself with right rather than merely enforcing the predilections of majority rule-makers. At the University of Mississippi, where James Meredith spent a perilous year, African-American students have now held every major leadership post.<sup>22</sup>

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20. By 2001, there were more than 9000 black elected officials in the United States. Eight of the ten states with the highest number of black officials are in the South. Gail Chaddock, *How the South Changed*, CHRISTIAN SCIENCE MONITOR, July 1, 2004.

21. See generally Christopher C. Confer, *To be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115, 141 (2004).

22. David M. Halbfinger, *40 Years After Infamy, Ole Miss Looks to Reflect and Heal*, N.Y. TIMES, Sept. 27, 2002, at A1.