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Symposium: Brown v. Board of Education and Its Legacy: A Tribute to Justice Thurgood Marshall, The Limitless Horizons of Brown v. Board of Education

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THE LIMITLESS HORIZONS OF *BROWN v. BOARD OF EDUCATION*

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Judge Pollak discusses the impact of Brown *on Supreme Court jurisprudence. He begins by recounting* Morgan v. Virginia*—a significant Supreme Court decision that foreshadowed the holding of* Brown. *The remainder of Judge Pollak's speech highlights* Brown*'s impact on, inter alia, First Amendment jurisprudence and international law.*

THE analyses advanced by Judge Motley and Professor Tushnet are extraordinarily instructive. My role is to shift the focus away a little from *Brown*[1] itself, both its genesis and its immediate *sequelae* in the field of education, and to consider its wider jurisprudential impact.

First, I want to discuss certain events that preceded *Brown*. I was struck by Judge Motley's recollection of the question put to Thurgood Marshall by a Supreme Court Justice in the argument in *Sipuel v. Board of Regents of the University of Oklahoma*[2] and Marshall's planned response that he and his clients were not directly challenging *Plessy v. Ferguson*.[3] If one goes back two years before that argument, one finds a colloquy which, in a different way, foreshadowed what was to happen in 1954.

I am referring to the case brought to the Court in 1946 by the person who might be termed Rosa Parks' "mother-in-the-law," Irene Morgan. It was Ms. Morgan who declined to move to the back of the bus for the Virginia segment of the Virginia-to-Maryland bus trip. She was arrested by the driver, charged with a criminal offense in the Commonwealth of Virginia, and fined ten dollars for declining to conform with Virginia's cultural arrangements. That case, *Morgan v. Virginia*,[4] challenged the Virginia conviction based on the principle that Virginia's Jim Crow regulations were a burden on commerce.[5]

I urge all of you to read the appellant's brief in *Morgan* authored by William H. Hastie, Thurgood Marshall, Leon A. Ransom, and Spottswood W. Robinson, III. The concluding page reminds the Justices that "we are just emerging from a war in which all of the people of the United States were joined in a death struggle against the apostles of racism."[6] The brief further states that "[w]e have already recognized by solemn subscription to the Charter of the United Nations . . . our duty, along with our neighbors, to eschew racism in our national life."[7] It is a marvel

1. Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*); Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*).
2. 332 U.S. 631 (1948).
3. 163 U.S. 537 (1896).
4. 328 U.S. 373 (1946).
5. *See id.* at 380-81.
6. Appellant's Brief at 28, Morgan v. Virginia, 328 U.S. 373 (1946) (No. 704).
7. *Id.*

of advocacy.

In the course of Hastie's argument, Justice Rutledge inquired if the real issue in the case was whether the Virginia law offended the Fourteenth Amendment of the Constitution. Hastie responded, in substance: No, your Honor, the federal question urged below, and which we urge here, is the commerce argument. But the argument that you have suggested is one that we will make in due course in future litigation and bring back to this Court.

As history would have it, it was not William Hastie who was to make this argument, for in 1949 he became the first Black Article III judge in the history of the United States. Consequently, it fell to his partner, Thurgood Marshall, and his extraordinary group of associates, to make this argument, and to make it successfully.

The wider implications of *Brown* can be seen across the entire spectrum of the Supreme Court's jurisprudence for the quarter-century following the decision. The immediate implications of the concept of equality, once unleashed, were of course, felt in the area of voting. It is hardly a matter of coincidence that the first federal civil rights legislation in three-quarters of a century, enacted in 1957, was voting legislation.[8] The Act conceptually followed the extraordinary victories of Hastie and Marshall in the pre-*Brown* voting cases. The impetus for the Act, however, was the decision in *Brown* itself.

In 1962, the Court, in *Baker v. Carr*,[9] rejected what appeared to be settled doctrine of justiciability in recognizing that inequalities in the apportionment process were matters that could be brought to court.[10] Surely, the enormous energy of *Brown* influenced that jurisprudential revolution.

Moving farther afield, the Warren Court presided over extraordinary change in the area of criminal procedure which became constitutionalized during the 1960s and 1970s. This change recognized in many ways that the most frequent users of the American criminal process are the poor and deprived—mainly Black Americans. Certainly, this recognition has informed the capital punishment jurisprudence in the Supreme Court.

Of course, the history of gender discrimination in the United States courts follows directly from *Brown*. Interestingly, while clerking in my first year out of law school in 1948 to 1949, the great equal protection case that came to the Supreme Court concerned a Michigan statute that barred women from acting as barmaids unless they were either the wife or the daughter of the proprietor of the enterprise.[11] The Supreme Court

8. *See* Civil Rights Act of 1957, Pub. L. No. 85-315, pt. IV, § 131, 71 Stat. 637 (1957).

9. 369 U.S. 186 (1962).

10. *See id.* at 209.

11. *See* Goesaert v. Cleary, 335 U.S. 464, 465 (1948).

sustained that statute against equal protection attack.[12] The world has changed rather dramatically over the past forty years.

Chief Justice Warren regarded *Baker* as the most important decision of his time on the Court. Perhaps he said this as a courtesy to his great colleague, Justice Brennan. Surely, the Chief Justice must have privately felt that *Brown*, his own decision, was the Court's most significant case during that time, although *Baker* was very important, indeed.

New York Times v. Sullivan[13] was equally important in its field of jurisprudence. I bring a First Amendment case into this discussion because, in my opinion, one cannot really understand the impetus behind the Supreme Court's decision to use *Sullivan* as the vehicle for changing the law of libel, as it had been understood for two centuries, without recognizing just what the focus of debate was in that case. Specifically, *Sullivan* centered upon an advertisement captioned "Heed Their Rising Voices,"[14] which dealt with protests of young people in the South who were not going to sit still for segregation any longer.

Justice Brennan stated that the allegedly defamatory advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[15] Although we always think of *Sullivan* as a defamation case against *The New York Times*, it bears remembering that it was also a defamation case brought against Ralph Abernathy and three of his ministerial colleagues, principal aides of Dr. King.

Finally, *Brown* had enormous impact not only on American jurisprudence, but also on the jurisprudence of countries around the world and on the fabric of international law itself. In 1966, Judge Jessup, the American member of the International Court of Justice, relied on *McLaughlin v. Florida*[16] in appraising the legality of the system of apartheid established by the government of South Africa in its United Nations trust territory, South West Africa.[17] *McLaughlin* overturned a Florida statute that made it a crime for "[a]ny negro man and white woman, or any white man and negro woman . . . [to] habitually live in and occupy in the nighttime the same room."[18]

Judge Jessup turned to *McLaughlin*, which itself stood on *Brown*, to demonstrate the justiciability of a challenge to the South West Africa apartheid system that was brought to the International Court of Jus-

12. *See id.* at 466-67.

13. 376 U.S. 254 (1964).

14. *See id.* at 256.

15. *Id.* at 266.

16. 379 U.S. 184 (1964). *McLaughlin* was the precursor of the anti-miscegenation decision, Loving v. Virginia, 388 U.S. 1 (1967).

17. *See infra* note 19 and accompanying text.

18. *See McLaughlin*, 379 U.S. at 184 (quoting Fla. Stat. § 798.05, *repealed by* 1969 Fla. Laws ch. 69-195, § 1).

tice.[19] In that case, Liberia and Ethiopia sought to persuade the International Court that the Republic of South Africa, to which the United Nations had entrusted its trusteeship over South West Africa, was violating that trust by imposing a system of apartheid. Judge Jessup wrote a dissenting opinion but it surely presaged what was to happen in the United Nations and throughout the world—a series of legal, moral and political developments that are now on the point of liberating South Africa itself. *Brown*, in short, was a decision whose limits we do not yet know.

19. *See* South West Africa Cases (Ethiopia v. South Africa), 1966 I.C.J. 6, 436-37 (July 18) (Jessup, J., dissenting).