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PLESSY V. FERGUSON: A REINTERPRETATION

David W. Bishop*

There have been three momentous Supreme Court decisions in the history of Afro-Americans: Dred Scott v. Sanford, Plessy v. Ferguson and Brown v. The Board of Education. In contrast to Dred Scott, Plessy was decided after the adoption of the Fourteenth Amendment which prohibited discriminatory state action in regard to equal protection of the laws and due process of law and after the coming of Social Darwinism which included a body of sociological theories utilized to supplement American conservatism. Considering the historical background of the times, Robert Harris regarded Plessy as "a compound of bad logic, bad history, bad sociology, and bad constitutional law."¹

Despite the historical significance of Plessy, its historiography is sparing, cursory, tangential and misleading. Among the outstanding monograph essays on the topic are: C. Vann Woodward’s cursory historical account of the case in his article "The Birth of Jim Crow: Plessy v. Ferguson;” the brief and over-simplified account of the “separate but equal” origin in Leonard Levy and Harlan Phillips’ article “The Roberts Case;” and two articles by Barton Bernstein in the Journal of Negro History interpreting the Plessy decision as sociological jurisprudence, and his 1962 case study analysis criticizing the Louisiana Supreme Court for misleading the United States Supreme Court in regard to state statutes and legal issues.²

Significant related essays on Plessy may be found in Otto H. Olsen’s documentary compilation The Thin Disguise, and a similar documentary edition by Albert P. Blaustein and Clarence Clyde Ferguson, Jr. entitled Desegregation and the Law. There are several essays, articles and books explaining the historical problems and different interpretations of Jim Crow history. Of major importance are: John Hope Franklin, “History of Racial Segregation in the United States;” August Meier and Elliott Rudwick, “A Strange Chapter in the Career of Jim Crow”—a study on Black opposition to street car segregation in Savannah, Georgia; Joel Williamson (ed.), The Origins of Segregation, which is a collection of controversial essays on the topic; a series of articles by Alexander M. Bickel, John P. Frank and Robert F. Munro and Alfred Kelly indicating that the Fourteenth Amendment did not require the Supreme Court to embrace the “separate but equal” principle, and Alan Westin’s valuable analysis of Justice John Marshall Harlan in his “John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner.”³ The most popular reference in regard to recent segregation is C. Vann Woodward’s Strange Career of Jim Crow; but the most thorough study of underlying economic factors, politics, philosophy and

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literary caricatures which produced the "color line" and the "separate but equal" principle is Rayford Logan's *The Betrayal of the Negro*.4

With the exception of Barton Bernstein's two articles, practically all of the related essays emphasized legal issues at the expense of legal reasoning, and state and lower federal court opinions were sacrificed in the interest of the Supreme Court's ruling of 1896. Bernstein analyzed several cases cited in *Plessy* in search for legal precedents supporting the "separate but equal" principle. He observed that of the eleven cases cited to uphold the constitutionality of state laws requiring racial segregation on public carriers, not one supported the contention.5 Legal issues in these cases involved a variety of unrelated topics, *i.e.*, state penal codes, a federal statute, self-imposed Jim Crow regulations by carriers and two pre-Fourteenth Amendment cases. Bernstein concluded that the "Supreme Court was compelled to distort cases before it could pollute the stream of the law with the 'separate but equal' doctrine."6 Since the Court could not discover legal precedents to support the "separate but equal" doctrine, according to Bernstein, it allowed the post-Civil War sociological theories of Herbert Spencer and William Graham Sumner to become the basis for a legal decision. It was alleged that Social Darwinism influenced the "separate but equal" principle, and the basic sociological theories were: (1) racial segregation was a custom or tradition, (2) laws could not change customs or folkways, (3) law was reasonable when it adhered to custom and unreasonable when it did not, (4) the court would be enforcing social equality if it did not agree to a "separate but equal" ruling and (5) the scientific basis of the inferiority of races.7 The purposes of this article are to examine a cross section of federal and state court cases cited in *Plessy* in order to determine whether legal precedents within the American judicial system or social ideas, especially Social Darwinism, formulated the basis for the decision, and to analyze legal reasoning as well as legal issues as discussed in the various court cases selected for this study.

The personnel of the United States Supreme Court in 1896 had the potential for instability and possible reliance on strong seniority leadership.8 Six of the nine justices had been appointed between 1890 and 1896; there were five Republicans and four Democrats, three northeasters, two southerners, three midwesterners, one far-wester, five with previous state court experience, two former federal court judges and two with no prior judicial experience.9 Most of the judges were conservatives who favored protection of property rights *vis-a-vis* state regulation of private property.10

Justice Stephen J. Field, a California Democrat appointed by Abraham Lincoln in 1863, was by far the most influential member of the *Plessy* Court. Like Sumner, Field was of New England Puritanical heritage and he underwent several philosophical and personality changes. Although he was an early champion of minority rights, he later became an advocate of laissez-faire economics and championed the revolution in due process of law, between 1890 and 1898, when the Court recognized substantive due process as a limitation on state legislative power. Prior to the 1890's, the Court under Chief Justice Waite’s leadership exercised judicial
self-restraint encompassing a pragmatic understanding of legislative problems; but under Field’s influence the Court embraced economic activism and read the Declaration of Independence into the Fourteenth Amendment in an attempt to protect the businessman’s “pursuit of happiness” and to reduce the tendency of state regulation of and interference with private enterprise. Economic activism, however, did not mean that the Court would intervene in behalf of minority rights. Field’s complex personality probably was influenced by a mixture of Puritanism, rugged and innovative individualism, Americanism and the turmoils of warfare. Although there were similarities between Sumnerism and Fieldism, Field saw no need to abandon traditional Puritanical “religious verities” and self-evident rights in the face of materialism. As Robert McCloskey observed: “The Declaration of Independence . . . is called to the defense of the conservative cause; and the dogma of ‘laissez-faire’ becomes synonymous with Jeffersonian democracy.” Field lived to see most of his ideas accepted by the Court, and his nephew, Justice Josian Brewer, was ever present to provide a decisive family vote.

Of the forty-six judicial cases cited by the Court to support Plessy, fourteen were United States Supreme Court decisions, five were lower federal court cases, two were Interstate Commerce Commission decisions and twenty-five were state court opinions.

The Plessy case had an aura of mysticism because Homer Adolph Plessy never admitted to any court that he had any colored, Negroid, or African blood. Attorney Albion Tourgee, who represented the plaintiff and had previously suggested a near-white to be used in the test case, filed a brief stating that Plessy had seven-eights Caucasian and one-eighth African blood with no discernible Afro-American features. For this reason, he argued, Plessy was entitled to all the privileges and immunities enjoyed by white people. Counsel for the plaintiff never discussed the question of equal accommodations, nor did the Court consider or express any opinion of equal accommodations; rather, the entire case revolved around the constitutionality of a Louisiana statute requiring separate but equal accommodations for the races. The Louisiana law, Tourgee argued, implied a statutory grant of power to railroad officials to arbitrarily determine racial identity and to assign persons to coaches designated for their race. Finally, the reputation of one who belonged to the dominant (white) race in a mixed community was property in the sense of inheritance being property.

Justice Henry Billings Brown, a Republican native of Massachusetts who migrated to Michigan and served as a federal district judge for fifteen years before his appointment to the Supreme Court in 1891, wrote the Court’s majority opinion, and he partially conceded the property argument provided the person was white and assigned to an Afro-American coach; but if the person was black he did not have the lawful reputation of a white man. According to the Court, the case had one legal issue: the constitutionality of a Louisiana law, enacted under the state’s police power, requiring separate but equal accommodations for the races. Since the act involved only the police power of the state vis-a-vis the Fourteenth Amendment and not transportation per se, the Court examined a variety of in-
stances and topics unrelated to transportation in quest for legal precedents in the local, state, and federal courts relative to the exercise of police powers requiring racial segregation.\textsuperscript{14}

Barton Bernstein misinterpreted the legal issue argued in the case as understood by the Court, plaintiff’s counsel, the prosecutor and Justice John Marshall Harlan’s dissent. No one discussed equal facilities in transportation as an issue.

The question of Plessy’s racial identity was belatedly dismissed for lack of federal jurisdiction; however, the Court mentioned confusion of that issue on the state level and cited five state court cases pertinent to the topic.\textsuperscript{15} Since this study is concerned with the legal reasoning within a federal judicial system, one of these significant cases is selected for review. Concomitantly, if there was ever a sociological problem, Homer Adolph Plessy was it.

As early as 1853, Ohio attempted to clarify the color question because many people believed that blacks with mixed blood should be allowed to vote, testify in court and attend public schools. Enos Van Camp, who claimed that he and his two children were white, brought suit before the Ohio Supreme Court in 1859 because his children had been denied attendance in the public schools of Logan, Ohio, due to alleged African ancestry of very remote origin. Justice William V. Peck, speaking for the majority, observed that Afro-Americans were a proscribed and degraded race, consequently Ohio had prohibited their settlement within the state. “Our standard philologist,” stated the court, “defines ‘colored people’ to be ‘black people’—Africans or their descendants, mixed or unmixed.”\textsuperscript{16} According to the court’s rationale, the precise shade of color did not matter because white people did not desire to associate with any person who had a “perceptible admixture of African blood.”\textsuperscript{17}

A social rather than a biological definition of race was an American legal tradition long before the coming of Sumnerism; its historical roots were summarized and legalized in the 1857 \textit{Dred Scott} decision.\textsuperscript{18}

The \textit{Roberts} case cited in \textit{Plessy} has been labeled as the source of the “separate but equal” principle.\textsuperscript{19} In 1847 Sarah Roberts, a five-year old black girl, applied for admission to a white public school in Boston primarily because she had been excluded from a neighborhood school near her home as opposed to the greater distance she would have had to travel in order to attend an assigned Afro-American school. Charles Sumner and his black associate lawyer, Robert Morris, represented the plaintiff and argued for equality before the law.\textsuperscript{20} They contended that separate schools for blacks were based on deep-rooted prejudice, and that blacks were inconvenienced by a system which created a feeling of degradation.

Massachusetts’ Supreme Court Chief Justice Lemuel Shaw rejected the plaintiff’s classical equality argument as pure theory and impractical when applied to the American environment. In regard to plaintiff’s psychological and sociological arguments, Shaw remarked that racial prejudice was “not created by law, and probably cannot be changed by law.”\textsuperscript{21}

The \textit{Roberts} case did not consider equal facilities, the second half of the “separate but equal” doctrine; rather, \textit{Roberts} provided a legal tradition for the public...
supported separate schools for blacks based upon the judicial principle of reasonable classification. Shaw conceded that blacks were entitled to equal constitutional, political, civil and social rights; but the question was whether segregation violated these rights. He reasoned that the Boston’s General School Committee was authorized by a general state statute to classify, arrange and distribute students according to sex, age and grade level. If the Committee’s classification, he concluded, deemed it necessary to establish separate schools for the sexes, or separate grade schools for children or separate schools for blacks and whites, these would have been reasonable regulations under the Massachusetts law.22

Roberts provided three significant legal traditions: (1) segregation of the races in public education was lawful under Massachusetts law, (2) racial classification was as reasonable as sexual classification and (3) racial prejudice was not created by law and probably could not be changed by law.

Racial classification without discrimination was an essential a priori argument related to segregation, because separation of the races meant that one race would be excluded from areas occupied by another race. The Plessy Court cited seven state cases supportive of a legal tradition sustaining state laws or local ordinances in regard to racial classification or segregation in public education. Cory v. Carter (1874) and State v. McCann (1871) involved the state laws of Indiana and Ohio and are selected for this article.

In both cases, the legal reasoning was that racial classification was similar to classification based on sex or age, and that these classifications could be used to exclude when the authority of assignment had been vested.23 Equal facilities were mentioned moderately in both cases, but it was not until 1887 when the Interstate Commerce Commission carefully examined railroad regulations of facilities and accommodations that this topic received a fair hearing.

The Indiana case involved the establishment of separate schools for blacks in Lawrence, Indiana. State Chief Justice Samuel H. Buskirk, speaking for the court, reviewed the Afro-American problem in Indiana, and observed that the state constitution of 1816 had prohibited blacks from entering Indiana; they could not vote or hold public office; and it was a serious offense for any person to employ blacks, who were regarded by the law as separate, distinct and inferior. Although the War Amendments gave blacks citizenship, reasoned the court, these amendments did not take away the reserved rights of the states. Education was a purely domestic institution, and state legislatures could classify students according to age, sex and advancement. This being true, stated the court, “the classification of scholars, on the basis of race or color, and their education in separate schools involved questions of domestic policy . . . and do not amount to exclusion . . . .”24

The reasoning of Justice Buskirk was reminiscent of the political theories of John C. Calhoun and not post-Civil War social ideas. Segregated education, like slavery, was a purely domestic institution of a state to be protected by the federal Constitution as reserved rights of the states.
A distinctly different type of reasoning, cited for support of *Plessy*, involved an 1867 Pennsylvania State Supreme Court ruling in *West Chester and Philadelphia Railroad v. Miles*. According to the Pennsylvania court, no one could be excluded from public carriers because of color, religion, political affiliations or prejudice; however, the Heavenly Father had created a problem to America’s discomfort. For some unknown and unexplainable reason, the Creator made two distinct races—one black and one white. Natural law forbade the intermarriage of the races primarily because social amalgamation corrupted the races. The solution was relatively simple, said the court, “following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix.” The court, therefore, ruled that the railroad’s regulation requiring separate coaches for blacks was reasonable since it prevented “contacts and collisions arising from natural and well-known repugnancies, which are liable to breed disturbances by promiscuous sitting.” It is evident that puritanical “religious verities” and natural law were also used to support racial segregation.

In 1887, the newly created Interstate Commerce Commission rendered a significant decision entirely devoted to separate but equal accommodations on public carriers. Of all the state and federal court cases cited in *Plessy*, none was more germane and none had a more enduring effect on racial segregation than the Commission’s ruling. Prior to 1885 none of the Southern states had laws requiring Jim Crow coaches on interstate public carriers; seating arrangements were left to railroad officials. This practice was the result of several state supreme court decisions, from 1867 to 1883, which allowed railroad authorities to make their own separate car regulations or allow the first, second and third class tickets to determine seating arrangements, and a United States Supreme Court ruling which nullified a Louisiana statute requiring integrated seating arrangements on all interstate public carriers because the act imposed a burden on interstate commerce.

Complainant William H. Councill, lawyer and president of the State Normal and Industrial School in Huntsville, Alabama, and a former clerk in the Alabama legislature, purchased a first-class ticket from the Western and Atlantic Railroad Company for travel over its roads from Chattanooga, Tennessee to Atlanta, Georgia. Councill was directed to the Jim Crow car, and because of his refusal he was beaten and forcibly ejected from the train. Before the Commission, Councill argued that the railroad’s regulation subjected him to unreasonable prejudice, discrimination and disadvantage in violation of the third section of the Act to Regulate Interstate Commerce.

Investigation by the Commission revealed inequities in the Jim Crow car. It was poorly lighted with one lavatory for both sexes including black and white men; the rear portion of the car was used as a smoker by black and white men, and the front half was used for black passengers of both sexes and smoking also permitted. Since these conditions did not exist in the white coach, the Commission ordered the carrier to cease and desist in “denying equal accommodations furnished the other passengers paying the same fare.”
In regard to segregated coaches the Commission relied upon the principle enunciated in *United States v. Buntin* (1882), “equality of rights does not necessarily imply identity of rights,” and the defendant’s plea of separating races and sexes in order to provide good government, comfort, and convenience on the trains. In view of these facts, the Commission stated: “Public sentiment, whenever the colored population is large, sanctions and requires this separation of races.” Although the latter idea was a distortion of fact because South Carolina, North Carolina, and Virginia had larger black populations than Tennessee in 1887 and these states did not require racial segregation on public carriers, the Commission ruled that racial segregation was reasonable as long as equal accommodations were furnished passengers paying identical fares.

The *Councill* ruling became the basic source of a legal tradition concerning “separate but equal” accommodations on public carriers from 1887 to 1955. Pursuant to this decision, every Southern state passed laws requiring separate but equal accommodations on public intrastate carriers. In *Louisville, New Orleans and Texas Railway Company v. Mississippi* (1890), the Supreme Court suggested its approval of these laws if state courts interpreted these statutes as being applicable only to intrastate carriers.

There are two unanswered questions left in limbo by *Plessy*: Who is black or Afro-American? (If remote African ancestry is the answer, then there is a strong argument for the African origins of all human beings.) Is a United States citizen denied due process of law and equal protection of the laws when a state arbitrarily assigns him to a race purely on the authority of gossip?

This paper has revealed a consistent pattern of a system of legal racism in American jurisprudence which gave birth to *Plessy v. Ferguson*. State and federal courts had coordinated their opinions in an enduring search for a rationale to justify social ostracism of Afro-Americans. There were six significant legal opinions used to buttress *Plessy*: (1) “Prejudice was created not by law and probably could not be changed by law,” (2) racial classification was as reasonable as sexual classification, (3) “equality of rights does not mean identity of rights,” (4) racial segregation has its roots in natural and “Divine” laws and (6) the “separate but equal” doctrine. Most of these legal opinions existed before the coming of Social Darwinism.

*Plessy* was not conservative sociological jurisprudence; rather, it was the consummation of a legal tradition which, in part, antedated the Civil War. With reliable Bostonians and Fieldians constantly on the scene, who needed Charles Darwin?


Ibid., p. 198.


Ibid., pp. 539, 541, 548–550.

The *Fourteenth Amendment Reconsidered*.

22Ibid., pp. 206–209.


2444 Indiana 362, 327–361.


26Ibid., p. 209.


29Ibid., p. 163. Interstate Commerce Commission op. cit., p. 347.


31Interstate Commerce Commission, op. cit., p. 346.

32Ibid.

33Louisville, New Orleans and Texas Railway Company v. Mississippi, 133 U.S. 587 (1890). In Harlan’s dissent he remarked: “It is difficult to understand how a state enactment, requiring the separation of the white and black races on interstate carriers of passengers is a regulation of commerce among the States, while a similar enactment forbidding separation is not a regulation.” Hall v. De Cuir Ibid., p. 594.