Separate But Equal: The *Plessy* Case

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The case of *Plessy v. Ferguson*, 1896, brought the concepts of "Jim Crow" and "separate but equal" into prominence in the United States. With that decision, the United States Supreme Court allowed for legal segregation in all public areas. The decision stood for fifty-eight years before being overturned. During this time whites and blacks were kept separate, and for fifty-eight years, tension mounted until the Supreme Court reversed itself in 1954 and ordered the integration of schools with the *Brown v. Board of Education* decision. *Plessy* has affected every person in the United States in some way because current race relations can be traced back to those of former years when segregation was the norm.

Contrary to popular belief, segregation was not common in the nineteenth century and as late as the 1880s most establishments in the United States, including public transportation, were not segregated. Blacks may not have been allowed in the ladies' car, but they were allowed in all other cars with white men. Private owners and managers made the decision on whether or not to segregate - the law did not require it.[1] New Orleans, where the *Plessy* case originated, was highly integrated. One reason was the diversity of the area; French, Spaniards, Germans, freeborn blacks, and freed slaves dominated the population in large numbers and the races intermingled without much tension. New Orleans was the only southern city

[1] C. Vann Woodward, "The Birth of Jim Crow," *American Heritage* 15 (April 1964): 52.

to integrate public schools. The city also integrated the police department and paid city employees equally regardless of race. Blacks were allowed to serve on juries and on public boards as well. Louisiana had many black senators and representatives at the state and federal levels and the state even made intermarriage legal, though the practice was not always accepted.[2]

Starting around the years 1887 to 1900, states began adopting "Jim Crow" laws, specifically in transportation, but in other areas as well, such as education. "Jim Crow" was coined by a minstrel, "Daddy" Rice, who introduced a blackface act in 1832, based on the antics of a slave with that name. People began to use the word to describe segregation laws, which stigmatized blacks as inferior.[3] New Orleans reluctantly began segregating, but the city did it more slowly than most other areas.[4]

Louisiana began debating a "Jim Crow" transportation law in the late nineteenth century and in 1890 passed Act 111 segregating railways. Many white judges and legislatures opposed it based on the fact that many blacks had light complexions and had blood ties to the white gentry.[5] There were sixteen black senators and representatives in the Louisiana General Assembly who vigorously fought the bill. Blacks in New Orleans organized to fight it, but on June 10, 1890, it passed anyway. It was called "An Act to promote the comfort of passengers," and required railroads "to provide equal but separate accommodations for the white and colored races."[6] According to the Separate Car Act, as it was also known, there was a $500 fine to railway companies who did not provide separate cars or partitions. If a black person was on the wrong car, he or she could be fined twenty-five dollars or spend twenty days in jail. The only exception was for "nurses attending

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[2] Keith Weldon Medley, "The Sad Story of How 'Separate But Equal' Was Born," *Smithsonian* 24 (February 1994): 106.

[3] Woodward, 52.

[4] Medley, 108.

[5] Charles Edwards O'Neill, "Separate But Never Equal," *America* 172 (April 1995): 13.

[6] Woodward, 53.

children of the other race."[7] By the early1890s, segregation had become a part of life in Louisiana.

New Orleans' black citizens organized to work against this act. *The Crusader*, a paper founded by attorney Louis Martinet, led the opposition to this racism and segregation policy. Rodolphe Desdunes was often a columnist who rallied people behind the cause. [8] The Citizen's Committee to Test the Constitutionality of the Separate Car Law formed on September 1, 1891, and with eighteen men joined *The Crusader* to fight the law. A boycott was considered, but the group decided to initiate a test case instead. A test case is an act where a person breaks a law in order to get into court to test the constitutionality of the law. Money was raised, and Albion Winegar Tourgée of Mayville, New York, was chosen to be leading counsel.[9] Tourgée was a former "carpetbagger" who had written novels about his experiences during Reconstruction. He was born in Ohio, served in the Union Army, and in 1865, moved to Greensboro, North Carolina, to practice law. There, Tourgée became a radical member of the Republican Party and helped write the Reconstruction constitution of North Carolina. For six years, he had also been a judge of the superior court and earned distinction there. He was enthusiastic about the fight to end segregation. James C. Walker, a local New Orleans attorney, was picked to help Tourgée with the case. The committee decided a person of light complexion should be used for the test case. A woman was not favored because a light-skinned woman would not be denied transportation on a white car. Martinet said he would volunteer, but because of his status, he would always be allowed to ride the white car as well. Once the proper person was found, the group needed a railroad to cooperate. The first official approached said he did not enforce the laws beyond posting the required signs and providing the required cars. Two more thought the law was wrong and would be willing to help as soon as they talked to their legal counsel.[10] The railroad companies' willingness surprised many people, but the railroads

[7] Medley, 108-109.
[8] Ibid., 109-111.
[9] Woodward, 53.
[10] Ibid., 54-55.

had financial reasons for wanting to get rid of the laws. Providing extra cars meant spending more money, especially when a white car was not full and a car had to be added to transport just a few blacks. Also, in New Orleans, deciding which race a person was could be tricky because of the ethnic diversity of the area, causing the officials to offend passengers.[11]

The plan was for a black to get on a white car and a white passenger would object. The conductor would then ask the offender to move back to the "Jim Crow" car, and he would refuse. The conductor would call in the police to arrest the black man without harming him or forcing him to move back, and the white passenger would swear out an affidavit.[12] In February of 1892, Daniel Desdunes, son of Rodolphe Desdunes, provided the first test case. Desdunes bought a ticket to go out-of-state, and everything went according to plan. The case made it as far as the Louisiana Supreme Court, and Desdunes won. But this was not the victory blacks wanted. The Louisiana Supreme Court ruled that the state legislature had no jurisdiction over interstate travel. The group had to use a passenger car traveling *within* the state to get the ruling they wanted, for the law to make it to the Supreme Court and make the Louisiana law unconstitutional.[13]

On June 7, 1892, Homer Adolph Plessy bought a ticket to New Orleans and boarded the East Louisiana Railroad on a white coach. The conductor asked him to move back, and he refused. Detective Christopher C. Cain peacefully arrested Plessy. It can be assumed the railway agreed to help in the case because Plessy was only one-eighths black and had few visible features of his African heritage.[14] Plessy was released on $500 bond, posted by Paul Bonseigneur, who had raised the money by mortgaging his home.

In October of 1892, Plessy's attorney filed for a bar to prosecution instead of a plea. This was done in order to invoke the Fourteenth Amendment, which guaranteed due process, to make the state acknowledge the segregation law as

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[11] Medley, 112.
[12] Woodward, 54-55.
[13] O'Neill, 13.
[14] Woodward, 55.

unconstitutional and prevent a local trial. On October 28, 1892, the attorneys debated Plessy's plea and the court decided to make a ruling. That November 18, Plessy's original plea was overruled and he was released on bond to wait. Judge John H. Ferguson had upheld the constitutionality of the law.[15]

Plessy's attorneys then applied to the Louisiana Supreme Court and were heard in November of 1892. The court realized that the interstate commerce clause and the equality of accommodations were not the issues. What was in consideration was whether the law requiring separate but equal accommodations violated the Fourteenth Amendment. The court ruled the law to be constitutional and cited several decisions in the lower courts, which ruled that accommodations did not have to be identical or together to be equal. The Chief Justice of the Louisiana Supreme Court was Francis Redding Tillou Nicholls who had signed "Jim Crow" legislation while governor. Before that however, he had always been fair to blacks, even appointing them to office. He felt pressured by the Populist rebellion of white farmers and turned to support segregation to slow the rebellion. Nicholls did grant Plessy a writ of error that allowed Plessy to take his case to the United States Supreme Court.[16]

At this point, it is important to explain what part of the Constitution Plessy's lawyers were using to bring this case to the Supreme Court. The Thirteenth Amendment, which abolished slavery, was invoked in order to explain the inferiority felt by blacks living under "Jim Crow" laws. The lawyers tried to make a connection between the ideas of slavery and involuntary servitude to that of inferiority. Both appear as "badges" of shame. Later on, it was seen that this did not work well as an argument. Most of the defense was based on the Fourteenth Amendment, specifically Section One, which 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 any person within its jurisdiction the equal protection of the laws." Forcing blacks on separate cars

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[15] O'Neill, 13-14.

[16] Woodward, 55, 100.

violated privileges and liberty. Blacks were not receiving equal protection in the form of equal treatment.

Beginning April 13, 1896, the Supreme Court heard the case of *Plessy v. Ferguson*. Besides Tourgée, Samuel F. Phillips helped with the briefs and oral presentation. He was the former Solicitor General and advised Tourgée on matters regarding procedure because he was familiar with Washington. Walker and Martinet did not participate in the oral presentation because one was in ill health and neither could get there in time, but they had helped prepare the briefs. Attorney Alexander Porter Morse represented the state of Louisiana, and Louisiana Attorney General Cunningham decided not to appear.[17]

Tourgée submitted a brief arguing that Plessy had been deprived of property without due process of law. The property was the reputation of being white. This appearance was valuable because being white under the "Jim Crow" laws allowed people to advance and have more privileges. Tourgée defended the light-colored man, Plessy, against the penalties of color. The Court was not impressed. The brief also emphasized the incompatibility of "Jim Crow" laws with the spirit and intent of the Thirteenth and Fourteenth Amendments. The distinctions made under these laws mirrored the segregation of slavery. Facilities and protection would not be equal under separate but equal, and the laws codified white superiority. Tourgée pointed out that black nurses could ride in white cars if attending white children. Of this he said, "The exemption of nurses shows that the real evil lies not in the color of the skin but in the relationship of the colored person sustains to the white."[18] The fortune of one class is asserted in its superiority. Tourgée asked the Court to look to the future. If the "Jim Crow" laws were upheld, segregation would prevail everywhere.[19] It was also argued that the law implied a grant of power to railroad officials to determine racial identity at random. In this case, the white race would always have the advantage.

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[17] Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1987), 148-151.

[18] Woodward, 101.

[19] Ibid.

The Court dismissed the question of Plessy's racial identity as an issue for lack of federal jurisdiction, but did mention that there was confusion. In 1853, the Ohio Supreme Court ruled that any mix of African blood made the person black regardless of complexion. Other cases were mentioned that added confusion to the problem of deciding on the race of a person.[20] This left the constitutionality of the Louisiana statute unclear. Justice Henry Billings Brown dismissed any problems with the Thirteenth Amendment, implying that it had been used as a filler to bolster the case. It all came down to the Fourteenth Amendment and the equal protection clause.

Two criteria were used to test the law's constitutionality. One was whether the law was a reasonable exercise of the state's "police power" or the state's right to make regulations for the benefit of the health, welfare and moral well being of its citizens. The courts demanded that this power be used in a rational and reasonable way. It could not be random or malicious. Justice Brown argued that the law was reasonable and that there were no constitutional problems with the state's action on the railway. He argued this because the law upheld the customs and traditions of the people, that of segregation, to promote comfort for all of society. Louisiana's segregation laws were also reasonable because other states had passed similar laws. The second test was to see if the law allowed Louisiana to provide all of its citizens with equal protection under the law. Brown said political and legal equality was maintained and the state could distinguish citizens based on race. If inferiority or stigma arose out of this, the government could not help because the people were still equal under the law. Equal protection under the law did not mean identical treatment under social constraints.[21]

The Court had its answer, but it still looked for legal precedent to base it on. Since the Supreme Court had not ruled in a case like this, it looked to the lower courts for rulings and cases that related to race. In *Louisville, New Orleans, and Texas R.R.. v. Mississippi*, 1890, the Supreme Court had upheld the

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[20] David W. Bishop, "Plessy v. Ferguson: A Reinterpretation," *Journal of Negro History* 62 (April 1977): 127-28.

[21] Richard A. Maidment, "Plessy v. Ferguson Re-Examined," *Journal of American Studies* 7 (August 1973): 126-130.

constitutionality of a state law which required separate cars. This decision had been restricted to the question of interference with interstate commerce. In *Hall v. Decuir*, 1877, the Supreme Court ruled a law unconstitutional because it placed a burden on interstate commerce by prohibiting racial segregation. Of eleven cases cited to uphold the constitutionality of the "Jim Crow" laws, only one actually dealt with the constitutionality of a state statute. In *People of New York City v. Calvin King*, 1888, the court upheld the constitutionality of the state penal code provision that required everything to be equal in accommodations.[22]

In 1887, the Interstate Commerce Commission ruled segregation was legal as long as accommodations were equal. This ruling arose out of a case brought to the commission that showed the great inequality between white and black cars.[23] The Court could also referred to the Senate version of the Civil Rights Act of 1875 in which racial integration was preferred, but if a state wanted segregated schools, all schools had to be comparable and provide the same educational standard. This was consistent with the equal protection clause of the Fourteenth Amendment.[24] Turn-of-the-Century intellectual currents also provided backing for the Supreme Court. Science had "proven" that blacks were inferior to whites in all aspects of physiology and psychology. Whites were more mature and "civilized." The wider intellectual content had some influence on the Court's decision.[25]

The Supreme Court handed down its decision on May 18, 1896. In the time between 1890 and 1896, segregation had become widespread in the North and South. Blacks were being denied the right to vote. Concurrent with this, in 1895, Booker T. Washington delivered the "Atlanta Compromise," which

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[22] Barton J. Bernstein, "Case Law in Plessy v. Ferguson," *Journal of Negro History* 47 (July 1962): 193-196.

[23] Bishop, 130-131.

[24] Maidment, 130.

[25] Barton J. Berstein, "Plessy v. Ferguson: Conservative Sociological Jurisprudence," *in Black Southerners and the Law: 1865-1900*, ed. Donald G Nieman (New York: Garland Publishing, Inc., 1994), 8-10.

projected the idea that segregation should be accepted by black people.

Justice Henry Billings Brown wrote the majority opinion and the Louisiana segregation law was held constitutional. Brown wrote that the validity of the law depended on its reasonableness. Laws could be created that carried on the people's "usages, customs, and traditions . . . with a view to the promotion of their comfort, and the preservation of the public peace and good order."[26] Brown added that segregation did not make blacks inferior to whites. That idea only became present in the views of black people. Blacks and whites were created differently and legislation could not make those differences disappear. As long as facilities are equal, the law has done all it can because the people are all equal under the law.[27] Justice Brown explained:

> The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have generally, if not universally, recognized as within the competency of the state legislatures in the exercises of their police power.[28]

In short, Brown said the Fourteenth Amendment did not require the races to be equal socially, just under the jurisdiction of the law.

Justice John Marshall Harlan, a Kentuckian who had opposed secession and fought in the Union Army, wrote the

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[26] Woodward, 102.

[27] Ibid., 101-102.

[28] Otto H. Olsen, ed., *The Thin Disguise: Turning Point in Negro History, Plessy v. Ferguson: A Documentary Presentation* (New York: Humanities Press, 1967), 108-109.

dissenting opinion. Harlan had opposed the emancipation of the slaves and early civil rights laws, but the extremism of the Ku Klux Klan led him to renounce his views and become an outspoken champion of civil rights. Harlan wrote that the Louisiana law conflicted with the Thirteenth Amendment because segregation was a burden or badge of slavery and servitude. Segregation also violated the equal protection of dignity and liberty in the Fourteenth Amendment. The law was a way to assert white supremacy over blacks. Harlan also wrote that he believed the decision would be as destructive as the one in the *Dred Scott Case*.[29]

Barton J. Berstein wrote of the *Plessy* case that "Neither the history of the Fourteenth Amendment nor the available case law supported that infamous decision."[30] The decision had a large impact on the development of American society in the twentieth century. The *Plessy* decision allowed the color line to be legally drawn, and segregation moved into all areas of life. To uphold the segregation laws, state courts frequently cited *Plessy v. Ferguson*. The highest court in the land had given the go-ahead to segregation.[31] Justice Harlan predicted the future when he wrote that the decision would stimulate "aggressions, more or less brutal or irritating, upon the admitted rights of colored citizens. What can more certainly arouse race hatred?" [32] Race relations, as a result, did become aggressive and brutal towards blacks.

In Louisiana, the future of blacks changed as harsher segregation laws emerged. Black voters dropped from forty-five percent to four percent of eligible voters and blacks disappeared from the legislature. Southern states provided little funding for black schools and overall race relations worsened.[33] Segregation reigned and nothing could stop it until the Supreme Court reversed itself, on May 17, 1954, with *Brown V. Board of*

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[29] Woodward, 101-103.
[30] Berstein, 198.
[31] Woodward, 103.
[32] Berstein, 11.
[33] Medley, 116-117.

Education. It just took one day shy of fifty-eight years to reverse the wrong it had done.[34]

After contributing to one of the most important cases in American history, Homer Plessy went back to court on January 11, 1897, and was given a $25 fine for riding in a white car five years earlier.[35] The *Plessy* case had finally come to a close, but the decision lived on for years. The effects are still being played out because race relations today arise from this past. *Plessy v. Ferguson* helped mold that past into one of segregation when the United States Supreme Court ruled that separate but equal was constitutional.

[34] Woodward, 103.
[35] Medley, 116.