LEGAL ESOTERICA

by Gary A. Weissman

Plessy v. Ferguson

Almost any American lawyer knows certain things about the *Brown v. Board of Education of Topeka, Kansas* case::[1] That it was a momentous decision[2], handed down by a unanimous Supreme Court, declaring segregated schools to be unconstitutional; that its author was Chief Justice Earl Warren; that the lead attorney for the plaintiffs was Thurgood Marshall,[3] himself a future Justice of that Court; and that it expressly overruled *Plessy v. Ferguson*,[4] which, under the "separate but equal" doctrine, had held that racial segregation in railroad cars operated by the East Louisiana Railroad was Constitutionally lawful.

Fewer than one attorney in 100, however, is likely to be able to answer even half of the following six questions about the *Plessy* case:[5]

(1) Given that the plaintiff, Homer Plessy, was a light-skinned octoroon (i.e. 1/8th African American), how come he couldn't "pass" as white on the train?

(2) Why did the plaintiff's attorneys join as defendants neither the Railroad nor the conductor who barred Plessy from sitting in the white-only railroad car?

(3) Since the Railroad was not defending, who, then, was Ferguson?

(4) How did Justice Henry Brown (the author of the *Plessy* opinion) happen to coin the term "separate but equal"?

(5) Since *Brown* was about schools, and *Plessy* was about trains, why did the Brown court decide to overrule *Plessy*?

(6) Can you name any of the three cases that the Supreme Court decided against segregated education after *Plessy* but before *Brown*?"

PASSING

Homere Patris Plessy[6] was 7/8 French Creole and 1/8 African-American, among which two groups interracial marriage was common in Louisiana.[7] Plessy looked white and *could* have "passed." However, he purposely identified himself as an octoroon (which under Louisiana law meant that he was "colored"),[8] because he had agreed to serve as a test case for the Citizens Committee to Test the Constitutionality of the Separate Car Law,[9] knowing that the conductor would almost certainly require him to sit in the black-only car.

THE RAILROAD

The East Louisiana Railroad actually didn't like the statute requiring racial segregation: It cost the company additional monies to maintain separate passenger cars. In fact, the Railroad cooperated with the Citizens Committee to enable the test case to reach the courts and had notified the conductor in advance to question Plessy and to have him arrested when he entered the white-only car in June, 1892.[10]

SO, WHO WAS FERGUSON?

John Howard Ferguson was the trial judge (!)[11] There never was a trial because the lawyers for the plaintiff brought a pre-trial motion to declare the Louisiana statute unconstitutional, which Judge Ferguson denied. So, the plaintiff's lawyers then filed aa Writ of Prohibition to the Louisiana Supreme Court, naming Judge Ferguson as the Defendant.[12] Although the case was denominated *Ex parte Plessy* in the Louisiana Supreme Court, once it

reached the Supreme Court of the United States ("SCOTUS"), it acquired the caption of *Plessy v. Ferguson.*.

ORIGIN OF "SEPARATE BUT EQUAL"

"How did Justice Henry come up with that term?" was a trick question: The phrase "separate but equal" appears no where in the majority opinion of *Plessy v. Ferguson*. It shows up in the *dissent*, by Justice Harlan, who labeled the doctrine "pernicious."[13]

WHY DID THE BROWN COURT HAVE TO OVERRULE PLESSY?

Actually, the *Brown* court did *not* explicitly overrule *Plessy v. Ferguson;* it merely held that *Plessy* did not apply to public education.[14] It left to another day whether the principle of equal protection applied to transportation (which had been the subject in *Plessy*);[15] inter-racial marriage;[16] and voting rights in state elections.[17]

So, why mention *Plessy* at all? Earl Warren, the new Chief Justice, knew that a unanimous decision would be important in such a landmark case, and he had inherited a fractious bunch of colleagues. Under his predecessor, Fred Vinson, SCOTUS had attained unanimity in only 26% of cases decided.[18] Stanley Reed did not see how the Court could justify demanding integrated schools and was worried about implementation; and Felix Frankfurter could not find any historical evidence that the Framers of the 14th Amendment intended to outlaw segregation in public schools. Frankfurter was right: At the time of the ratification of the 14th Amendment, not a single Southern state had *any* public schools, integrated or segregated; and the Congress that had approved the 14th Amendment had also legislatively supported segregated public schools in the District of Columbia.[19]

In order to elicit the votes of the doubting Thomases (actually the doubting Stanleys and Felixes), Warren had to draft an opinion that was non-confrontational (for Reed) and which rested on something other than the intent of the 14th Amendment's framers (for Frankfurter). He selected psychology. The laconic opinion cites the works of seven social scientists[20] for the proposition that racial segregation inherently causes feelings of inferiority and damages black children's motivations to learn. But that contradicted the psychological finding of the *Plessy* Court that segregation did not create a badge of inferiority,[21] which impelled the *Brown* Court to expressly disavow that finding in *Plessy*.[22]

PREVIOUS RULINGS ON EDUCATIONAL SEGREGATION

During the 16 years prior to *Brown*, SCOTUS had actually decided three previous cases about segregated educational institutions, in favor of integration: *Missouri ex rel Gaines v. Canada,*[23] *Sweatt v. Painter*,[24] and *McLaurin v. Oklahoma State Regents*.[25]

Gaines (1938)

Lloyd Gaines, an African-American graduate of (all- black) Lincoln University, applied for admission to the University of Missouri law school and was turned down by the Registrar, Cy Canada, because of Gaines's race. Gaines brought a Mandamus action, which was denied, and the Missouri Supreme Court affirmed the denial..[26] SCOTUS, in an opinion penned by Chief Justice Charles Evans Hughes, reversed the Missouri Court's decision, holding that the equal protection clause trumped Missouri's statute, which authorized defraying the tuition of African-Americans to attend law schools in neighboring states that allowed African-Americans to matriculate.

On remand, Missouri decided to establish a (very inferior) law school for African-Americans in St. Louis. When the NAACP re-argued the case in 1939, the defendant was able to successfully bring a motion to dismiss because Gaines disappeared and was never heard from again.[27]

Sweatt (1950)

The President of the University of Texas, Theophilus Painter, wrote to the Attorney General of Texas, seeking counsel: An applicant named Heman Sweatt was qualified for admission to law school, except for one thing – "he is a Negro." The A.G. wrote back, saying that, notwithstanding state statutes mandating segregated educational facilities, Texas didn't have a law school for Negroes, so UT should admit him.[28] Instead, Texas decided to create a "University of Texas Law School for Negroes." However, as SCOTUS found, the new law school was wholly inferior, with no full-time faculty, no librarian, and books that hadn't arrived.[29]

SCOTUS ordered that the University of Texas admit Mr. Sweatt, which it did. However, Sweatt dropped out in the middle of his second year, becoming ill after suffering humiliation and intimidation from white students. Someone, never identified, burned a cross next to his car and slashed his tires. [30]

McLaurin (1950)

George McLaurin had a Masters degree and applied for admission to the doctoral program in education at the University of Oklahoma at a time when Oklahoma law provided that if a separate instructional facility were not available, public institutions could admit African-Americans but had to provide instruction "on a segregated basis."[31] So they gave him a desk in

an anteroom next to the classroom, assigned him a special table in the library, and allowed him to eat in the student cafeteria but only if he sat at a designated table by himself. SCOTUS determined that the arrangement violated the Equal Protection Clause of the 14th Amendment.[32] The High Court also declined the invitations from Appellant to reverse *Plessy v. Ferguson* and from Respondent to confirm it.[33]

Virtually forgotten today, these three cases all involved graduate level instruction and did not necessarily implicate the desegregation of elementary and high schools. Nevertheless, they all served as logical precursors to and predicates for *Brown v. Board of Education*. To be sure, in all three instances, there was just a single plaintiff seeking admission to an educational facility; but if the equal protection clause applies to law students and doctoral candidates, how would it *not* apply to elementary and high school students?

Not incidentally, the lawyer for all three plaintiffs was Thurgood M arshall.

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ENDNOTES

1. *Brown v. Board of Education*, 347 U.S. 483 (1954).
2. The locution is that of Justice Steven Breyer, *Making Our Democracy Work* (2011) at 50.
3. Nick Kotz, *LBJ, MLK, Jr., and the Laws that Changed America,* (2005) at 427.
4. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

5. Of course that ratio will change owing to careful readers of this column.
6. He changed his middle name and dropped the "e" from his first name and in order to appear more assimilated, but he pronounced his surname the French way, Ple-SSY. From his birth certificate, cited by Mark Weiner, *Black Trials* (2004) at 395, endnote 20.
7. *Id*. .at 223.
8. Although Louisiana characterized people of color by the quantum of African blood ("mulattos, quadroons, octoroons, and FMCs {Free Men of Color}," the state deemed all of them as "colored" when it enacted Jim Crow laws, requiring racial separation in public facilities.
9. Louisiana Railway Car Act of 1890, C. 111 (a/k/a "the Separate Car Act").
10. *Black Trials, supra* note 6, at 21.
11. *See Wikipedia*, "John Howard Ferguson."
12. *Ex parte Plessy*, 45 La. Ann. 80 (1893).
13. Mr. Justice Harlan's dissent is set forth in 163 U.S. beginning at 552.
14. *Brown v. Board of Education*, *supra* note 1, at 495.
15.*Gayle v. Browder*, 352 U.S. 903 (1956)
16. *Loving v. Virginia*, 388 U.S. 1 (1967)
17. *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*. 377 U.S. 573 (1964)
18. James T. Patterson, *Brown v. Board of Education* (2001) at 47.
19. *Id*. at 39.
20. *See Brown v. Board of Education*, 347 U.S. 483, footnote 11.
21. *Plessy v. Ferguson*, *supra* note 3, at 551.
22. *Brown v. Board of Education*, supra note 1, at 495.
23. *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938).
24. *Sweatt v. Painter*, 339 U.S. 629 (1950).
25. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950)
26.113 S.W. 2d 713.

27. Patterson, *supra* note 18, at 26. Ironically, the University of Missouri Law School awarded Gaines an honorary law degree (presumably posthumously) in 2006. *Wikipedia, "Lloyd Gaines."*
28. National Public Radio, "Sweatt v. Painter," Oct. 10, 2012.
29. *Sweatt* case, *supra* note 24.
30. NPR story, *supra* note 28; Patterson, *supra* note 26, at 18-19.
31. 70 Okla. Stat. section 455 *et seq*.
32. *McLaurin* case, *supra* note 25.
33. *Id.*