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BEFORE ROSA PARKS: SELECTED CASE STUDIES ON THE IMPACT OF SEPARATE BUT EQUAL ON AFRICAN-AMERICANS

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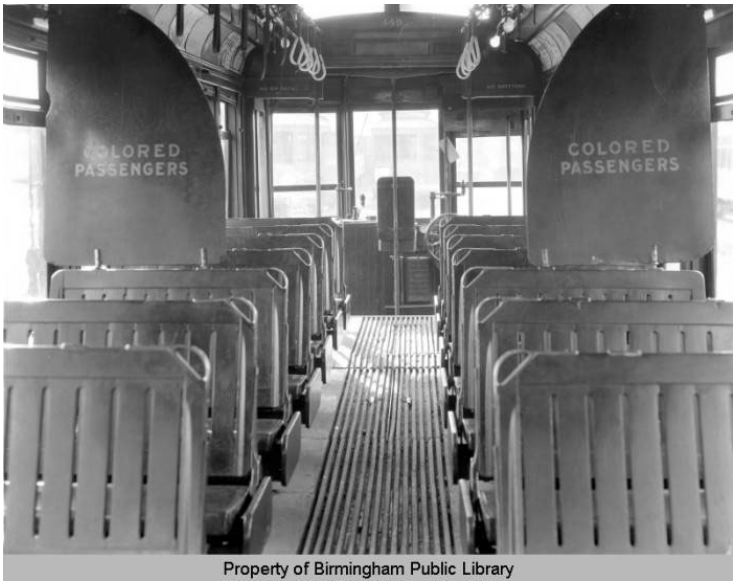

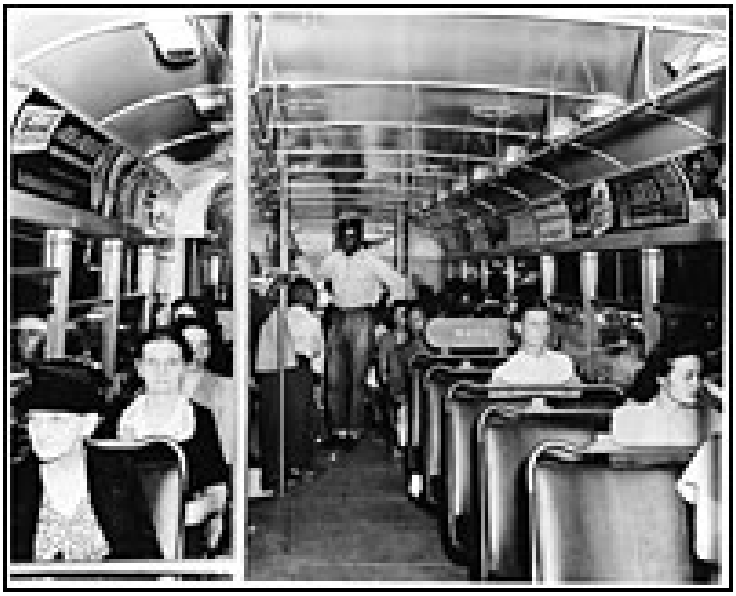

INTRODUCTION

The answer to the question of how far have we come on civil rights is always "not far enough." But this is Black History Month and it is appropriate to look to the past to understand the African American community's struggle for equality.

We all know the famous landmark cases on the road to civil rights, from *Plessy v. Ferguson* to *Brown v. Board of Education* and beyond. I enjoy researching and reading old law cases, not so much for the legal principles, but for what these cases tell us about the society of the times. After all, history starts out as current events.

This selected study of certain case histories focuses on the first 50 years or so after the Civil War. In certain southern states, a major subject of case law was segregation in public transportation, which back then was referred to as separate but equal facilities for white and colored. Education, of course, was also segregated.

I was shocked to read case after case where blatant racism masqueraded as legal scholarship. These cases are not random one-offs. They come from the Supreme Courts of Alabama, Mississippi, Florida, Georgia and Texas. I was also astounded to find that a number of these cases relied on a legal precedent from the state of Pennsylvania.

I thought it would be interesting and historically significant to review a few of these case studies. These are not famous cases, and in my mind they are significant precisely because they are <u>not</u> famous; they are typical of the times. They show how the segregated South used law to justify separate but equal in public transportation.

These cases show how deeply this flawed structure was ingrained into southern society, which made Rosa Park' decision all the more courageous.

PUBLIC TRANSPORTATION – SEPARATE BUT EQUAL IS ANYTHING BUT

A. The Alice Bowie Case – Using God to Justify Segregation

It was a hot June morning in Birmingham and Alice Bowie already had her hands filled. An experienced schoolteacher, Alice knew how to handle groups of children, but today was something special. She and a few of her fellow teachers were taking close to 100 Sunday school children on a picnic.

This was a special picnic, because the group had bought tickets and were going to ride the train to the nearby town of Eastlake. The trains were much like some of the CTA cars we see today. The back of the seats were against the railcar, so there were two long rows of seats where the passengers would be looking at one another across the aisle.

Alice loaded all of the kids on the train. When Alice finally got on board, she moved her way to the back of the train and sat down on one of the very last vacant seats in the row. She looked forward to a brief rest before arriving at the picnic grove.

But there was no rest to be had because it was Alabama in 1900, Alice was black, and "there were two or three white ladies and one or two white men seated upon the seat of the car which was facing the one upon which Alice started to sit."[1] Just as Alice settled in, "the conductor of the car stepped up on the running board of the car at the end of the seat where Alice was about to sit and told her not to sit there,

[1] When I quote from these court opinions, I'm going to use names rather than "Plaintiff" or "Defendant" for ease of reading. I will supply legal citations on request.

but to get out from between those seats and walk to the opposite end of the car and take a seat there."

Alice explained to the conductor that she had "just helped to pack the car with Sunday school children and every other seat in the car she knew to be taken and that she would sit where she had started to sit." The conductor would have none of this resistance. He "commanded Alice to get out from the seat where she was about to sit and find a seat in the front end of the car." Alice replied that "if you will show me a seat, I will go to it, but otherwise I will sit here."

That was too much for the conductor. He grabbed Alice by the arm and tried to pull her out of her seat. Alice resisted. Ultimately, the motorman joined the conductor, "and together they pushed and pulled her off the seat onto the running board where she would have fallen to the ground had she not been caught by Brown, the colored Sunday school superintendent who prevented her from falling." Nevertheless, Alice suffered a severe leg injury, and she filed suit against the railroad to recover for her personal injuries.

The case reached the Supreme Court of Alabama, and the issue was whether this unwritten rule and custom of the railroad "requiring white passengers to occupy seats provided in the rear of the car and requiring colored passengers to occupy seats provided in the front of the car was a reasonable regulation." Remember this is not a state law or government rule, but a purely private regulation of the railroad.

The Alabama Supreme Court ruled in favor of the railroad. It relied on an 1876 decision of the Pennsylvania Supreme Court, which in turn relied on . . .believe it or not… God. Here is the controlling language:

> The question remaining to be considered is whether there is such a difference between the White and Black races within this state resulting from nature, law and custom as makes it a reasonable ground of separation. . . Why the Creator made one black and the other white we know not; but the fact is apparent and the races distinct each producing its own kind and following the peculiar law of its constitution. . . . God has made them dissimilar with those natural instincts and feelings which He always imparts to his creatures when He intends that they shall not overstep the natural boundaries He has assigned to them.

This language was used in future cases to uphold laws prohibiting such acts as inter-racial marriages. Thus, the Alabama Court continued:

> The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right . . . It is not prejudice nor caste nor injustice of any kind, but simply to [allow] men to follow **the law of races established by the Creator** himself and not to compel them to intermix contrary to their instincts . . .

Not content with its repeated invocation of God, the Court found further evidence to justify this rule, failing to mention that the "separation" used to justify segregation was a product of unconstitutional laws:

> By uninterrupted usage, the blacks live apart, visit and entertain among themselves, occupy separate places of public worship and amusement, and fill no civil or political stations; not even sitting to decide their own causes. . . Law and custom having sanctioned a separation of races, it is not the province of the judiciary to legislate it away.

Based on this horrible line of "reasoning", the Court found that the segregation rule was reasonable, and therefore, the force used by the conductor and motorman to separate Alice from her Sunday school children and yank her off the train was also reasonable.

This line of reasoning permeates case after case considering similar issues.

B. Don't Stay In That Whites-Only Railroad Car One Minute Longer Than Necessary

In 1900, Mr. Brown was riding an excursion train from Savannah to Macon. He and the other "colored passengers were assigned to two of the cars composing the train and the white passengers to another of them." Unfortunately for Mr. Brown, the Whites-Only car was "placed between the two cars" provided for the African-American passengers.

Mr. Brown left the rear car seeking to go to the front car. He cut through the Whites-Only car and was arrested for "remaining in the car" assigned to whites even though he was just cutting through. The case went to the Supreme Court of Georgia in 1900. The verdict – guilty as charged.

C. The White Sheriff's Dilemma

For as disconcerting as this Alabama case is, some of the other cases border on the absurd. The amount of time and effort spent by the judges on some issues would be comical if not so shameful. We lawyers are used to comparing the law of Illinois to the law of other states on particular issues. For example, Illinois may allow the parents of teenagers who are injured as a result of being allowed to drink alcohol at

a friend's house to sue the parents of that friend for damages. Iowa or Indiana may not allow such lawsuits. We are used to comparing and contrasting.

But I could not believe the judicial time and effort from different states which went into analyzing this "challenging" legal dilemma: A white sheriff is transporting a black prisoner to jail by train. Naturally, the sheriff needs to maintain control and custody over his prisoner. Where do they sit in a segregated rail car?

Believe it or not, this was the stuff of lengthy court opinions and considerable disagreement. One court would consign the white sheriff to the Negro compartment, because while the separate accommodation law "equally protects whites from the presence of Negroes and Negroes from the presence of whites in their respective coaches, yet it is well known that the leading purpose of this statute was to protect the white race from the presence of negroes while traveling on trains."

A second case held that since the black prisoner was little more than baggage, he could accompany the white sheriff in the Whites-Only compartment. Yet another case left the resolution of this "sticky problem" to the discretion of the railroad conductor on a case-by-case basis.

Page after page of these opinions struggle with this question, with no recognition of the inherently abhorrent nature of the inquiry.

D. Is It Slander to Call a White Man a Black Man?

Separate-but-equal in public transportation found its way into the law of defamation. In a 1907 case, a Georgia railroad found itself liable for slander against a passenger. Nathan Wolfe boarded a Georgia railway electric company train, with

his sister. They sat in the front area of the train reserved for whites, but a short time later, were ordered by the conductor to move to the rear of the car.

When Mr. Wolfe asked why, the conductor responded, "Haven't I seen you in colored company?" Nathan's sister jumped in: "Do we look like colored people?" The conductor replied that "he might be mistaken, but that he had thought he had seen Nathan with some colored people." This argument was loud enough for other passengers to hear.

The central issue of the case for the Georgia Supreme Court "is whether it is insulting to publicly call a white man a Negro." The Court was confronted with what we lawyers call a question of first impression:

> The question has never heretofore been directly raised in this state as to whether it is an insult to seriously call a white man a Negro, or to intimate that a person, apparently white, is of African descent.

The Court initially gave lip service to the proposition that to "recognize inequality as to the civil or political rights . . . is repugnant to every principle underlying our republic and form of government." The Court also endorsed the principle that "every man is the architect of his own fortune."

But look at this 180-degree pivot:

> But the Courts can take notice of the architecture without intermeddling with the building of the structure. It is a matter of common knowledge that viewed from the social standpoint, the negro race is in mind and morals inferior to the caucasian.

The Court concluded in upholding Mr. Wolfe's right to sue the railroad:

> . . . To wrongfully, though unintentionally, accuse a white man with being of Negro descent, and of trying to put him in that portion of the car where by law he is forbidden, thus illegally causing mortification and pain, **creates an injury for which the law allows reparation. . .**

The Georgia Supreme Court was not alone in this conclusion. In 1910, the Supreme Court of Florida reached a similar conclusion – a white woman sued the railroad, because one of the railroad agents said to the white woman – "Don't you belong over there?" indicating the "seats in the car set apart for Negroes and designated by a sign."

The Florida Supreme Court found that to charge a white person, even indirectly, "in this part of the world with being a Negro is an insult which must of necessity humiliate and may materially injure the person to whom the charge is applied." The Court ordered the railroad to pay the white woman $250.00, which equates to about $8,300.00 today.

E. A Vicious Hate Crime – Who Pays and Why?

It is hardly any real consolation, but my research uncovered one case where an African-American actually prevailed in a personal injury suit arising out of a vicious race-based beating on a bus. She prevailed…but not for the reasons you might think, because this case comes out of Mississippi in the 1930s.

Jessie Lee Gardner got on a bus operated by Mississippi Power & Light Company. On the back of one of the seats, attached to the top of the seat was "a little sign, 4 by 8 inches wide with the words 'White' on one side and the word 'Colored' on the other side." Ms. Gardner boarded the bus at a bus stop "in front of Sutton's Ice

Cream Parlor," and after paying her fare, "retired to the extreme rear and took the very last seat in that section designated by this small sign as being reserved for the colored race." A little later, the bus began to fill up. The white section was full and several white men were standing.

A white man approached Ms. Gardner – who was already in the back of the bus – and ordered her to give him her seat. She told the man she was unable to stand but she would soon be getting off. At this point, the "white passenger struck Ms. Gardner once about her left eye and once over her mouth, knocking her violently to the floor of the bus and throwing her against another seat." Ms. Gardner, who was pregnant at the time, suffered a number of injuries and miscarried.

Ms. Gardner filed a lawsuit seeking damages. In the normal world, one would expect that the lawsuit would be against her attacker. After all, she was already sitting in the back of the bus, and the attacker must have known she was sitting in the colored section. But Ms. Gardner did not sue the attacker. Instead, in what I consider to be an example of brilliant lawyering in the context of the times, she sued Mississippi Power & Light. Why? I guess we could call this a "failure to notify" case.

The company was subject to a Mississippi law which required "equal but separate accommodations for the White and Colored races." The law further required that the bus or railroad company either provide separate compartments on each vehicle "or by dividing the vehicle by a partition constructed of metal, wood, strong cloth or other material so as to distinguish the separate sections for the separate accommodation of the races."

The Mississippi Supreme Court found that the bus company violated the state law, because the little signs were inadequate partitions. The Court explained that the purpose of the law was "to so completely and effectually separate or screen passengers of one race from passengers of the other on street cars that there would be no association in any way of one race with the other."

Because the bus company didn't provide a full partition, that failure somehow facilitated the attacker's move to the back of the bus and his attack on Ms. Gardner. But certainly the attacker knew Ms. Gardner was sitting in the colored section where she had a lawful right to be, and there was not a single word in the opinion about the responsibility of the attacker.

What this case boils down to is a decision in favor of a black woman for the inherently racist reason that the bus company did not adequately assure the separation of the races. Accordingly, the Court upheld the damage award for Ms. Gardner, an award of $1,000.00.

F. Education – Are Asians Included in the Definition of "Colored" or "White" for Separate But Equal?

In 1925, the Mississippi Supreme Court was called upon to interpret that state's 1890 Constitution, which required that "separate schools shall be maintained for children of the white and colored races." What about Asian-Americans living in Mississippi back in 1925?

The Mississippi Supreme Court concluded that "the policy of this State [is] to have and maintain separate schools and other places of association for the races so as to prevent race amalgamation. Race amalgamation has been frowned upon by

southern civilization always, and our people have always been of the opinion that it was better for all races to preserve their purity."

Based on this abhorrent view of racial purity, the Mississippi Supreme Court held that the state is not compelled "to provide separate schools for each of the colored races," and accordingly, the Asian-American child, a citizen of Mississippi, "may attend the colored public schools of her District," but she "is not entitled to attend a white public school."

CONCLUDING REMARKS

These decisions are not the product of any great legal research on my part. Indeed, they appear to be run-of-the-mill cases coming out of the Supreme Courts of various southern states in the early part of the 20th century. But in my mind, they show how deeply the separate but equal regime was woven into the fabric of southern society.

During this month the name of Rosa Parks will be often invoked, as it should be. The court cases discussed above illustrate how extraordinarily courageous Ms. Parks' December 1, 1955 decision really was.

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