The *Brown* Case Transformed American Society

CONSTANCE BAKER MOTLEY

BIOGRAPHICAL STATEMENT

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Born in New Haven, Connecticut, and a graduate of New York University and Columbia University Law School, Constance Baker Motley has had an extraordinary career. From 1945 to 1964, She worked at the NAACP Legal Defense and Educational Fund, Inc. on education desegregation cases involving the universities of Mississippi, Alabama, Florida, Oklahoma, Georgia, and Clemson in South Carolina. She also handled innumerable cases involving public housing; desegregation of places of public accommodation and facilities; sit-ins and criminal justice matters.

As a prominent civil rights attorney, Judge Motley won nine of the ten cases she argued before the U.S. Supreme Court, including the 1962 case in which James Meredith won admission to the University of Mississippi.

In 1964, she was elected to the New York State Senate, where she served as the first African American woman member. Later she was elected and served as President of the Borough of Manhattan, winning endorsements from the Republican, Democratic and Liberal Parties.

In 1966, Constance Baker Motley became the First African American woman to be appointed to the federal judiciary. She became the Chief Judge of the United States District Court for the Southern District of New York in 1982, and assumed senior status in 1986. She continues to serve in this latter capacity.

Judge Motley is the recipient of numerous honors and awards including New Yo rk State Bar Association's 1988 Gold Medal Award, Columbia University Law School's Medal of Excellence, the 20th Anniversary Award from the Association of Black Women Attorneys and the NAACP Legal Defense and Educational Fund's Equal Justice Award. A 1993 inductee into the National Women's Hall of Fame, and a 1998 inductee into Connecticut Women's Hall of Fame, she has re c e i ved honorary degrees from 29 colleges, universities and law schools, including Smith College, Brown, Yale and Princeton universities and Georgetown University School of Law. In 2003, the NAACP named Constance Baker Motley the 88th Spingarn Award honoree.

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In April 2001, the city of Cincinnati, Ohio, lay victim to a week of looting, burning, and violence perpetrated by disaffected Black citizens. The race riot, as usual, had been sparked by the fact that a White police officer had shot and killed a young Black man he was trying to arrest. In the first half of the 20th century, race riots and lynchings were regular occurrences. For example, in 1906, a major race riot occurred in Springfield, Illinois, during a strike by White coal miners. Blacks had been brought in to replace the striking workers. To this day, race riots continue to follow the killing of a young Black man by a police officer.

Following the riot in Springfield, the National Association for the Advancement of Colored People (NAACP) was founded in New York City in 1907. James Weldon Johnson, executive secretary of the group, met an untimely death in 1936 in an automobile accident in Maine. Walter White succeeded him. Both men had only one agenda: They each sought, unsuccessfully, to get Congress to enact an anti-lynching bill. It never happened. During World War II, the NAACP devoted most of its resources to aiding Black servicemen who had been court-martialed and received longer sentences for rape than White servicemen. Black servicemen who served in segregated all-Black units had joined the NAACP in droves during the war. Its membership reached 500,000 in 1945, the highest in its history at that time.

After World War II, the NAACP and its separately incorporated (1939) NAACP Legal Defense and Educational Fund (LDF) decided on a new primary emphasis for the greatly expanded membership organization. It would, directly and unequivocally, challenge the constitutionality of racial segregation in public education in the 11 Southern states and the District of Columbia, as well as the traditional ground that states had failed to provide equal graduate facilities for Black students. The first attack came in 1946 in a suit against the University of Texas Law School,[i] followed by suits against the University of Oklahoma Law School[ii] and Graduate School in 1948.[iii] In each of these cases, the states had failed to provide equal facilities for its Black citizens. In response, the U.S. Supreme Court ordered the immediate admission of the Black plaintiff to the White facility. Success at the graduate level led to the undergraduate level and then, in 1950, to the public school level. At the public school level, a renewed challenge was made to the unconstitutionality of dual school systems, even where facilities were equal.

The first challenge to dual school systems in the U.S. Supreme Court was made in 1938 by Charles Houston, then the NAACP's chief counsel, which the high court ignored. It simply ruled that Missouri could not require Lloyd Gaines to leave the state to get his law degree. The Court ruled that the state could only guarantee equal protection within its own borders.

The Supreme Court's decision in 1954 in *Brown v.*

Board of Education of Topeka, Kansas[iv] is a 20th-century landmark. Although the court concluded the intent of the framers of the 14th Amendment in 1868 was not clear on the issue,[v] it construed, for the first time, the amendment's equal protection clause, as well as our national public policy, related to governmentally enforced racial segregation in education. The Fifth Amendment to the Constitution prohibited the national government from denying any U.S. citizen the right to life, liberty, or property without due process of law.[vi] The 14th Amendment was added to make these prohibitions applicable to state governments,[vii] but it also prohibited states from denying any persons within their jurisdictions the "equal protection of their laws."[viii] In 1955, the Supreme Court's remedy decision regarding *Brown I* was handed down.[ix] It provided for the implementation of *Brown I* "with all deliberate speed." This language in the 1955 decision rendered *Brown I* impotent, which the Supreme Court ultimately acknowledged in 1968 and essentially abandoned.[x]

In1886 in the *Civil Rights Cases,*[xi] the Supreme Court held the 14th Amendment did not apply to individual business proprietors, only to state governments. This limitation on the reach of the amendment presented a significant legal obstacle to the development of an expansive interpretation of the civil rights protections provided by the 14th Amendment. Indeed, in 1896, the Supreme Court ruled 9-1[xii] in *Plessy v. Ferguson*[xiii] that Louisiana could legally require "colored" persons to ride in separate first-class railroad car accommodations.[xiv] Homer Plessy claimed to have only one-eighth Black blood. In retrospect, the *Plessy* decision represented a major political compromise between the North and the South. It sought to bring the South along after years of resistance to equality for former slaves. The Supreme Court thus placed its judicial imprimatur on disparate treatment of Black Americans: Separate but equal was legitimate constitutional policy.

The institutional racism and political and social apartheid legitimated by the court in *Plessy* remained evident in all areas of American society through the middle of the 20th century. It infected public schools, private schools that had previously admitted Black students, and the armed forces. However, in 1948, at the urging of William Henry Hastie,[xv] President Harry Truman abolished racial segregation in the armed forces, perhaps the most prominent symbol of racism in American society at the time.[xvi]

Brown I exposed the wounds that *Plessy* inflicted on the hearts and minds of our youngest citizens. After the Warren court's epochal decision in *Brown*, staff lawyers and their associates and supporters at the LDF, led by Thurgood Marshall, continued their relentless campaign to eliminate segregation in public education as well as in all other public institutions. Following *Brown I,* in a series of decisions from 1954 to 1964, the Supreme Court barred state enforcement of racial segregation in all other public spaces.[xvii] The court even barred a state's attorney from addressing a Black female witness by her first name.[xviii]

The *Brown* decision was the catalyst that in December 1955 inspired Rosa Parks to refuse to move to the back of the bus so a White man could have her seat. Her bravery sparked a grassroots revolution, moving Black students in North Carolina to "sit in" at a "Whites only" lunch counter in 1960. It led the Freedom Riders into Alabama

and Mississippi in 1961. These brave freedom fighters suffered grave insults and physical abuses on their journey and ended up in Mississippi's horrendous prison system. Hundreds of other student protestors throughout the South were similarly jailed. It took the ad hoc maneuvering of Justice Brennan and a bitterly divided court to reverse the criminal trespass convictions of young civil rights protestors in *Bell v. Maryland* in 1964.[xix]

In 1968, after Martin Luther King Jr.'s untimely death, Congress enacted the Fair Housing Act, as a kind of tribute to him,[xx] barring racial segregation in public and private housing. King's rise to national leadership, beginning in December 1955, was manifest through his conscious departure from the ubiquitous legal strategy of LDF and the negotiation policy of the Urban League. Instead, King adopted Gandhi's strategy of massive nonviolent resistance to governmental oppression.

After a half-century of litigation, sit-ins, marches, and increasingly robust civil rights legislation enacted by Congress in 1964, 1965, and 1991, the question remains: Has the *Brown* decision generated significant and lasting change? The answer is "yes" with respect to any public facility or service and "no" with regard to *de facto* segregation in schools and housing.

Racial segregation remains a hallmark of large, urban public school systems throughout the Country, resulting largely from residential segregation. The gerrymandering of school district lines and other allied practices, including vouchers, have likewise played a major role in continuing racial segregation in public schools.

Noted commentators have cited the *School Segregation Cases* as a source of extensive White flight from the central cities of America in the second half of the 20th century, making racial segregation in public schools, in many instances, greater than before 1954.[xxi] For example, in 1954, the public school system in Atlanta, Georgia, was 40 percent Black. Today, it is about 90 percent Black.[xxii] This disturbing trend toward resegregation has been evidenced in public school systems throughout the country.[xxiii] But in places like New York City, White flight began long before 1954. For example, after World War II, the Federal Housing Administration's mortgage insurance program enabled returning White servicemen to purchase affordable houses in places such as Levittown, New York, about 50 miles from New York City, from which Blacks were barred. These mortgages often contained legally enforceable, racially restrictive covenants, held legally unenforceable by the Supreme Court in 1948.[xxiv] White flight from cities also resulted from Blacks migrating to the Northeast during World War II in search of employment in defense industries. In 1945, Stuyvesant Town, a large middle-class housing development in New York City, received a 25-year tax exemption for the City Council of New York, although the housing development refused to admit Blacks. In response to protests, Metropolitan built a separate housing development, Riverton, in Harlem.

However, the expansion of Black housing areas in major U.S. cities has produced many other results. For example, the development of intellectual and political capital in urban areas has led to the election of Blacks as mayors in cities such as New York, Cleveland, Detroit, and Atlanta. During the 2002 mid-term election, a Black man named Carl McCall received the Democratic Party's nomination in

the race for governor of New York. There presently are 39 Black representatives in Congress. Four of these representatives are from Georgia. At the end of Reconstruction, 16 Black representatives served in the Congress. The most notable development in connection with the current rise of Black political power is another interesting phenomenon. Whites are voting for Black candidates in increasing numbers in both the North and the South.

Race and class discrimination are riding the same track in our cities and large metropolitan areas. Class discrimination is a reality we Americans refuse to discuss. Middle-class Blacks in Atlanta live in Black middle-class suburbs, just as the White middle class resides in White middle-class suburbs throughout the country.

Despite major social, political, and economic progress among Blacks since 1954, racism is still the greatest concern facing most Blacks. Yet at this juncture, well-established 20th-century civil rights organizations such as the NAACP and the Urban League seem to have dropped off the radar screen. Civil rights are no longer at the top of the national agenda, muted by civil rights advances made in the second half of the 20th century, economic depression, and war with Iraq. On the other hand, discrimination against other non-Whites in the 21st century, as a result of war with Iraq, may revive these seemingly moribund 20th-century organizations or give dramatic rise to new ones. Some Muslims in all-White middle-American communities have begun to return home.

As a result of the efforts of Blacks to end segregation and discrimination in the 20th century, current civil rights laws and Supreme Court decisions of the past have provided other discrimination victims with powerful redress tools. Women, Hispanics, Native Americans, and other minorities have resorted to use of the courts to end discrimination and segregation, exhibited most prominently in *Brown*, as a key strategy. And like Blacks, they also have ushered their grievances into the political arena.

Blacks' success in using the courts in the school segregation cases to secure their rights inspired many young Americans to go into the legal profession. Indeed, the second half of the 20th century witnessed the emergence of more lawyers than at any prior time in our nation's history. This development, in concert with new causes of action vis-à-vis civil rights legislation such as Title VII of the Civil Rights Act of 1964, has transformed us into a nation of litigators.

The *Brown* decision and its progeny not only are responsible for ending government- enforced racial segregation in public education but also generated dramatic societal changes in various areas of American life. *Brown* led to the Civil Rights Act of 1964, barring discrimination in businesses affecting interstate commerce. That act strengthened and expanded post-Civil War legislation enacted by the Reconstruction Congress from 1865 to 1868. The major addition was that Congress enabled our national government, through the Justice Department, to bring statewide class-action lawsuits to expedite desegregation of long-segregated public colleges and graduate schools as well as public schools. The Civil Rights Act of 1964, which was amended in 1991, established the Equal Employment Opportunity Commission, now a major federal government agency engaged in extensive civil rights litigation. Many states have similarly busy anti-discrimination agencies where remedies must first be exhausted before resorting to the

federal courts.

In 1992, the Supreme Court held in *U.S. v. Fordice*[xxv] that in order to comply with Title VI of the Civil Rights Act of 1964, as amended, states may not simply adopt race-neutral policies as a putative corrective for a previously segregated, dual system of public university education. Rather, states must affirmatively eradicate policies and practices, traceable to the prior *de jure* dual system, that continue to foster segregation. Mississippi then located its new addition to Jackson State (formerly all Black) in the center of Jackson so Whites would attend. Jackson State is located in a residential area of Jackson that had become all Black.

Middle-class Blacks who formerly lived in Northern suburbs like Westchester County in New York State have begun returning to the greatly expanded metropolitan areas of the South. The new, Black, upper-middle class suburbs surrounding Atlanta, Georgia, come to mind. These Black families have expressed a preference for living in such communities, as opposed to being the only Black family in an upper-middle class Northern suburb, affirming that racism is still an everyday reality.

Although it is still generating litigation, the *Brown* case and its progeny have transformed American society in the second half of the 20th century.

NOTES

i. *Sweatt v. Painter*, 339 U.S. 629, 710 S.Ct. 848, 94 L.Ed. 1114 (1950).
ii. *Sipuel v. Board of Regents of University of Oklahoma et.al.*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247 (1948).
iii. *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950).
iv. *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954) (hereinafter referred to as "Brown I").
v. After the first oral argument in Brown, Justice Felix Frankfurter called for reargument on the issue of the original understanding of the 14th Amendment with respect to racial segregation. Frankfurter assigned his law clerk, Alexander M. Bickel, future Yale Law School professor, to conduct extensive historical research on the issue. The memorandum that Bickel drafted on the issue was later published as *The Original Understanding and the Segregation Decision.* Bickel essentially argued that while the framers probably did not intend to abolish racially segregated schooling, the meaning of the equal protection clause ought to be guided by notions of changed circumstances, or a living Constitution. This interpretation of the 14th Amendment was central to Chief Justice Warren's opinion in Brown. See Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 85-86 (Hill & Wang, 1998).
vi. See U.S. Const., amend. V. ("No person shall . . . be deprived of life, liberty, or property, without due process of law.").
vii. See U.S. Const., amend. XIV. (" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").
viii. *See Brown I,* 347 U.S. 483.
ix. *Brown v. Board of Education,* 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (hereinafter referred to as "Brown II").
x. *See Green v. County School Bd. of Kent County, Va.*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed. 716 (1968).
xi. *In re Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883).
xii. Justice Harlan's lone dissent in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) formed the basis of our legal arguments to end segregation in public school education. See Constance Baker Motley, *Equal Justice Under Law,* 102 (Farrar, Strauss & Giroux 1998).
xiii. *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).
xiv. Homer Plessy claimed to have one-eighth Black blood. *Plessy,* 163 U.S. at 541, 16 S.Ct. at 1139. The court's decision in *Plessy* thus provided institutional legitimation for the so-called "one drop" theory of racial identification. *See, e.g.,* Orville Lee, *Legal Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society,* 26 Law & Soc. Inquiry 847, 884 (2001). ("In Plessy the Court merely took 'judicial notice' of what qualified a person as 'black.' However, while *Plessy* indirectly affirmed the constitutionality of racial classifications on the basis of the rulings of individual states, it is generally read as having codified the 'one drop' rule."). *See also* Kenneth Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation,* 43 U.C.L.A. L. Rev. 263, 299 (1995) ("Homer Plessy had been socially identified as black by a rule of law that survives today as a rule of custom: the rule that 'one drop' of 'black blood'-that is, one identifiable black ancestor-is enough to make someone black.").
xv. Hastie was appointed by President Roosevelt as civilian aide to Secretary of War Henry L. Stimson in 1940. Hastie endeavored in that capacity to end the practice of segregation in the armed forces, but finding his efforts frustrated by the intransigence of others in the administration, he ultimately resigned from his post on January 31, 1943. Hastie's biography credits his resignation for bringing attention to the issue of discrimination in the military. *See* Gilbert Ware, *William Hastie: Grace Under Pressure,* 130-33 (1985).

xvi. *See, e.g.*, Morton J. Horwitz, *The Warren Court and the Pursuit of Justice: A Critical Issue* (1st ed. 1998).

xvii. *See generally, Adams v. Lucy*, 351 U.S. 931, 76 S.Ct. 790, 100 L.Ed. 1460 (1956) (university desegregation in Alabama); *Cohen v. Public Housing Administration,* 358 U.S. 928, 79 S.Ct. 315, 3 L.Ed.2d 302 (1959) (housing desegregation); *Boynton v. Virginia*, 361 U.S. 958, 80 S.Ct. 584, 4 L.Ed.2d 541 (1960) (interstate transportation facilities, terminal restaurant); *Bailey v. Patterson,* 368 U.S. 346, 82 S.Ct. 282, 7 L.Ed.2d 332 (1961) (interstate and intrastate transportation); *Watson v. City of Memphis*, 371 U.S. 909, 83 S.Ct. 256, 9 L.Ed.2d 169 (1962) (public parks and recreational facilities); *City of Jackson v. Bailey,* 376 U.S. 910, 84 S.Ct. 666, 11 L.Ed.2d 609 (1964) (transportation, common carriers).

xviii. *See Hamilton v. Alabama,* 376 U.S. 650, 84 S.Ct. 982, 11 L.Ed.2d 979 (1964) (reversing judgment of contempt against a Black witness who refused to answer questions posed by the state's attorney, who insisted on referring to her by her first name).

xix. *Bell v. Maryland,* 378 U.S. 226, 84 S.Ct. 1814, 12 L.Ed.2d 822 (1964).

xx. See http://www.hud.gov/offices/fheo/aboutfheo/history.cfm ("From 1966-1967, Congress regularly considered the fair housing bill but failed to garner a strong enough majority for its passage. However, when the Rev. Dr. Martin Luther King Jr. was assassinated on April 4, 1968, President Lyndon Johnson utilized this national tragedy to urge for the bill's speedy Congressional approval.") (Last visited Dec. 5, 2003).

xxi. *See, e.g.*, Peter W. Cookson Jr. & Sonali M. Shroff, *School Choice and Urban School Reform 6* (ERIC Clearinghouse on Urban Education, Institute for Minority and Urban Education, Urban Diversity Series No. 110, Dec. 1997), http://eric-web.tc.columbia.edu/mono/UDS110.pdf ("To understand school choice, it is important to return to *Brown v. Board of Education* . . . In fact, the first choice schools were 'white flight' academies. In their panic to avoid sending their children to school with African-American students, white parents throughout the South withdrew from the public school system and established private academies that were often indirectly publicly funded"). *See* also Jack M. Balkin, *What Brown v. Board of Education Should Have Said 89* (2001) (referring to "inevitable demographic shifts" that resulted from federal enforcement of *Brown*). *See also* James S. Coleman et al., *Trends in School Segregation,* 1968-73, at 77-80 (1975) (arguing that school desegregation was causing residential segregation in cities and increasing city/suburban residential segregation); David J. Armor, *Forced Justice: School Desegregation and the Law* 12-13, 68, 70-72, 174-80 (1995) (discussing the controversy over the existence and the extent of White flight). But see Thomas F. Pettigrew & Robert L. Green, *School Desegregation in Large Cities: A Critique of the Coleman "White Flight" Thesis,* 46 Harv. Educ. Rev. 1, 46-52 (1976) (criticizing the notion that school desegregation causes White flight).

xxii. *See* http://www.brook.edu/dybdocroot/es/urban/atlanta/Schools.htm ("The segregation of public schools in the region escalates in the higher grades. In the City of Atlanta, 9 of the 14 high schools were at least 98 percent African-American in the 1997-98 school year; in Gwinnett County, every high school was at least 90 percent white. An indicator of the trend towards increased segregation (and of the wealth of whites) in the City of Atlanta is the rising percentage of the city's white children enrolled in private schools, which grew from 11.4 in 1970 to 54.3 in 1990") (citing Mary Beth Walker, *A Population Profile of the City of Atlanta: Trends, Causes, Options 27* (1997). See *also* Michael Leo Owens, *Why Blacks Support Vouchers,* N.Y. Times (Feb. 26, 2002) ("In 2000, blacks made up 78 percent of the Atlanta system's central office administrators, 95 percent of its school principals and 82 percent of its teachers.").

xxiii. *See generally* Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts, The Civil Rights Project,* Harvard University (Aug. 2002), http://www.civilrightsproject.harvard.edu/research/deseg/resegschools02.php (Last visited Dec. 5, 2003).

xxiv. *See Shelley v. Kraemer* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

xxv. *U.S. v. Fordice,* 505 U.S. 717, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992); *But see Belk v. Charlotte-Mecklenburg Bd. of Ed.*, 269 F.3d 305 (4th Cir. 2001), *cert. denied*, 535 U.S. 986, 122 S.Ct. 1537, 152 L.Ed.2d 456 (2002) (affirming the district court's holding that the Charlotte-Mecklenburg Schools had achieved unitary status, and vacating the district court's injunction of the School Board from considering race in the future assignment of students or allocation of educational resources).