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## Teaching Transformative Jurisprudence (film review)

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## Film Review

### Teaching Transformative Jurisprudence

*The Road to Brown.* Produced by William Elwood. Distributed by California Newsreel, San Francisco, 1990. 58 min. \$295.00.

Reviewed by Vincent Robert Johnson

#### I. Special Occasions and Everyday Clothes

Although many court decisions extend or modify established legal principles, most merely apply them. Rare indeed is the transformative decision that fundamentally changes an area of the law or influences the terms of all subsequent debate. Cases falling within this select category quickly come to mind: *Marbury v. Madison*<sup>1</sup>; *Miranda v. Arizona*<sup>2</sup>; *New York Times v. Sullivan*<sup>3</sup>; *Mapp v. Ohio*.<sup>4</sup> Although there are undoubtedly other decisions within the same class, their overall number must be small.<sup>5</sup> As a matter of educational theory, it would be reasonable to argue that transformative jurisprudence merits a different pedagogy from that used in teaching the run-of-the-mill court opinion—a mode of presentation commensurate with the importance of the decision. Most professors, however, teach transformative rulings unimaginatively. They assign lengthy opinions

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1. 1 Cranch 137 (1803) (establishing the principle of judicial review of legislation).
2. 384 U.S. 436 (1966) (holding that police officers must advise an accused criminal of his constitutional rights prior to custodial interrogation).

One of my colleagues, Geary Reamey, speculates that *Miranda v. Arizona* may be the most widely known American case of all time. An expert on American and comparative criminal procedure, he indicates that the decision is so readily recognized abroad that it is sometimes mistakenly thought to be the law of other countries. My own experience tends to confirm the widespread notoriety of the case. While serving as a Supreme Court judicial fellow a few years ago, a visiting professor from Yugoslavia showed me a copy of an article that he had written in his native language discussing the Court's "creative" reasoning in *Miranda*.

3. 376 U.S. 254 (1964) (imposing constitutional limitations on common law defamation actions).
4. 367 U.S. 643 (1961) (ruling that unconstitutionally obtained evidence should be excluded from judicial proceedings).
5. Not all well-known decisions would qualify as "transformative." For example, *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), has been described as "[t]he most famous tort case of modern times—'the most discussed and debated.'" See John T. Noonan, Jr., *Persons & Masks of the Law* 111 (New York, 1976) (quoting Prosser) [hereinafter *Persons & Masks*]. Yet *Palsgraf* neither revolutionized an area of the law nor articulated a new standard that subsequent cases were regularly obliged to take into account. It would be possible to practice tort law for a long time without quoting or citing Cardozo's majority opinion or Andrews's dissent.

for reading, devote extended class time to (often excruciating) doctrinal analysis, and proclaim the importance of the decision. Teaching methodology for transformative cases differs little from that used for lesser rulings. Professors "dress," if at all, for these special occasions by wearing added layers of everyday clothes.

There are other pedagogical possibilities. For example, in teaching the transformative decision, one might focus student attention not merely on doctrine but on the participants in the litigation.<sup>6</sup> Law, in the end, is about people<sup>7</sup>; it is a story of formal human efforts to live with one another. The invisibility of the persons for whom law is practiced to those who exercise power no doubt accounts for many of the injustices perpetrated by the legal system.<sup>8</sup> In various areas of law teaching, there have been efforts to help students see the persons behind the cases. Thus, professors associated with the law and literature movement<sup>9</sup> and with legal storytelling<sup>10</sup> have endeavored to accord individual persons a more central place in the study and practice of law. And many professional responsibility classes have sought to humanize the teaching of legal ethics by studying not merely disciplinary rules but also lawyers caught up in the disciplinary process and

6. For example, Henderson has cogently argued that concrete human stories make possible empathetic understanding and that such understanding enlarges and improves the universe of legal discourse. See Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1577, 1650 (1987). See generally Noonan, *Persons & Masks*, *supra* note 5, at vii–xiii (discussing the central place of the person in any account of the law); Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 Wash. & Lee L. Rev. 123, 126 & n.20 (1990) ("Only by listening to [the voices of the victims of discriminatory speech] can we begin to develop empathy for the nature of their harms"); Julius G. Getman, *Colloquy: Human Voice in Legal Discourse*, 66 Tex. L. Rev. 577, 582–83 (1988):

Successful lawyering requires human understanding far more than it does intellectual rigor. To represent people adequately a lawyer often must use her capacity for empathy in order to comprehend what the case signifies to her clients. . . . [T]he lawyer must develop arrangements that make sense in human terms. In advocacy, being able to convey the client's sense of injury, needs, values, and feelings in a way that elicits understanding and empathy often is far more important than one's ability to cite the relevant rules and argue from them rigorously.

7. Cf. Benjamin N. Cardozo, *The Nature of the Judicial Process* 66 (New Haven, 1921) ("[t]he final cause of law is the welfare of society"). For a thoughtful treatment of related themes, see the discussion of natural law in Robert E. Rodes, Jr., *The Legal Enterprise* 119–23 (Port Washington, N.Y., 1976).
8. See generally Noonan, *Persons & Masks*, *supra* note 5, at vii ("I became increasingly conscious [that] . . . [n]eglect of persons . . . had led to the worst sins for which American lawyers were accountable").
9. See generally Symposium on Law and Literature, 39 Mercer L. Rev. 739–935 (1988), and sources cited in Vincent Robert Johnson, *Law-Givers, Story-Tellers, and Dubin's Legal Heroes: The Emerging Dichotomy in Legal Ethics*, 3 Geo. J. Legal Ethics 341, 344 n.21 (1989) [hereinafter *Law-Givers*].
10. Of legal storytelling, Massaro writes: "One strand of this complex body of thought argues that law should concern itself more with the concrete lives of the persons affected by it." Toni I. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 Mich. L. Rev. 2099–2127 (1989). See generally Symposium on Legal Storytelling, 87 Mich. L. Rev. 2073–2494 (1989); Johnson, *Law-Givers*, *supra* note 9 (discussing storytellers in legal ethics).

lay victims of attorney misconduct.<sup>11</sup> A similar attention to interpersonal dimensions of law practice might be pursued in teaching transformative cases, particularly because it is often possible to gather information from the popular press about the participants in such litigation.

Alternatively, one might teach the transformative ruling by addressing, more than incidentally, the historical context and cultural antecedents giving rise to the decision. Each case is the product of its time, and this is especially true for decisions that substantially reconfigure the law. A well-educated lawyer should understand the political and social forces that influence critical legal choices among competing values.<sup>12</sup> Professors should not assume that students come to law school well acquainted with the currents of history<sup>13</sup> or even with a sense that historical forces play a significant role in shaping the content of the law.<sup>14</sup> Although there is little time for pursuing "law and history" questions in connection with ordinary cases, it might be appropriate to delve into such issues when considering a major ruling.

In addition, one might reasonably elect, in teaching transformative decisions, to focus on litigation strategy—the options available to counsel for achieving a just result, the paths taken, the alternatives foregone. Perhaps contrary to student expectations, transformative rulings are not the unassisted creation of inspired judges on high tribunals. To a very large extent, they are the result of numerous strategic and tactical decisions made by litigation counsel in advising clients, framing issues, and mustering supporting evidence. A professor teaching the major case might ask students to consider in detail the choices that lawyers in the suit were required to make at critical junctures.

Because such nontraditional pedagogies are difficult and time-consuming, it is not surprising that many professors are unwilling to undertake these efforts. Occasionally, however, educational resources are available that make it possible for a law teacher to do justice to the transformative decision by pursuing educational goals greater than those that normally animate law teaching. One such resource is a recent film, *The*

11. See Johnson, *Law-Givers*, *supra* note 9, at 344 (discussing professional responsibility professors who "endeavor to focus on the interpersonal dimensions of law practice . . . through the use of . . . videotapes which bring lawyers and clients into the classroom").
12. See generally Address by Justice John Paul Stevens, Thomas E. Fairchild Inaugural Lecture at the University of Wisconsin (Sept. 9, 1988) (available from the Public Information Office of the Supreme Court of the United States) (calling for greater attention to the relationship between law and history); Noonan, *Persons & Masks*, *supra* note 5, at xi ("cases must be rooted in the historical process to contribute to the moral education essential to the professional preparation of lawyers, who are to be formed less as social engineers than as charitable creators of values").
13. Cf. Allan Bloom, *The Closing of the American Mind* 56 (New York, 1987) ("Students now arrive at the university ignorant and cynical about our political heritage, lacking the wherewithal to be either inspired by it or seriously critical of it"); Vincent Robert Johnson, *The Declaration of the Rights of Man and of Citizens of 1789, The Reign of Terror, and the Revolutionary Tribunal of Paris*, 13 *B.C. Int'l & Comp. L. Rev.* 1, 3–4 (1990) ("knowledge of history—our own or that of others—is not an American strength").
14. On the influence of history on the content of the law, see generally Cardozo, *supra* note 7, at 51–58.

*Road to Brown*.<sup>15</sup> It deals with that most transformative of rulings, *Brown v. Board of Education*,<sup>16</sup> the case many regard as the most important pronouncement ever made by a United States court. *The Road to Brown* offers law professors a superb vehicle for bringing to the classroom the attention to persons, sense of history, and focus on litigation strategy that a great decision demands.

## II. Enriching the Spirit

Produced with broad support from PBS, the University of Virginia, nonprofit foundations, governmental entities, and individuals, *The Road to Brown* provides a rich socio-legal-historical perspective on the events that culminated in the 1954 Supreme Court ruling barring racial segregation in public elementary schools. The program briefly traces relevant developments from the introduction of slavery at Jamestown in 1619 to the Supreme Court's 1896 ruling on segregated rail accommodations in *Plessy v. Ferguson*.<sup>17</sup> It then considers in detail the road leading from *Plessy*'s adoption of the "separate but equal" doctrine to *Brown*'s rejection of the doctrine almost sixty years later.

In large part, *The Road to Brown* is the story of Charles Hamilton Houston, the dean of Howard University Law School who was a principal architect of the NAACP struggle to overturn *Plessy*.<sup>18</sup> Born in 1895 to a well-to-do black family, and the victim of racial discrimination as an officer in the segregated U.S. Army during the first World War, Houston made it his life's work to achieve racial justice in the United States. At the time of his death in 1950, the end of segregated public education was in sight, due in no small measure to the series of cases litigated during the 1930s and 1940s by Houston, Thurgood Marshall, and others.

Houston recognized that the judicial system "functioned in relation to precedent . . . [and] judicial restraint, [and that] there would not be an immediate decision on the part of a Supreme Court justice to overturn precedent . . . [or] rule that something was unconstitutional, unless . . . groundwork had been laid."<sup>19</sup> Thus, to reverse *Plessy*, Houston developed

15. *The Road to Brown* is distributed by California Newsreel, 149 Ninth Street, No. 420, San Francisco, CA 94103 (415-621-6196). It is available on ½-inch VHS videotape in two versions. The PBS version, on which this review is based, runs approximately fifty-eight minutes. The film is sold to educational institutions for \$295; individual purchasers acquiring the tape for home use are charged less. Rentals of the film may also be arranged. A shorter version of the film, intended for use in high schools and introductory college courses, runs forty-six minutes and omits much of the detail on the cases that preceded *Brown*. *The Road to Brown* was awarded a blue ribbon at the 1990 American Film and Video Festival.

16. 347 U.S. 483 (1954).

17. 163 U.S. 537 (1896).

18. For a brief treatment of Houston's career, see Thomas L. Shaffer, *American Legal Ethics: Text, Readings, and Discussion Topics* 546-55 (San Francisco, 1985) (containing excerpts from Genna Ray McNeil's chapter on Charles Hamilton Houston: Social Engineer for Civil Rights, in *Black Leaders of the Twentieth Century*, ed. John Hope Franklin and August Meier, 221-240 (Urbana, 1982)).

19. *The Road to Brown*, *supra* note 15 (comments of Genna Ray McNeil, Houston's biographer).

a two-part strategy: "Rather than challenge the separate but equal principle directly, Houston would first file precedent cases demanding that black schools be made absolutely equal to white schools. Only then would he attack the principle of separateness itself."<sup>20</sup> In developing this strategy, Houston used Howard University Law School as a laboratory, testing issues and arguments on students and faculty.

Mindful of Houston's heuristic, *The Road to Brown* walks the viewer through several pre-*Brown* cases that were prosecuted not only to secure relief for named plaintiffs but to gradually erode support for the *Plessy* doctrine in education, the area in which Houston believed it to be most vulnerable. In those decisions, courts compelled the admission of blacks to white law schools (*Murray v. Maryland*,<sup>21</sup> *Gaines v. Missouri*,<sup>22</sup> *Sipuel v. Oklahoma Regents*,<sup>23</sup> and *Sweatt v. Painter*<sup>24</sup>), barred discrimination against blacks attending predominantly white programs (*McLaurin v. Oklahoma State Regents for Higher Education*<sup>25</sup>), and required equal pay for black teachers at black public schools (the *Teacher Salary Cases*<sup>26</sup>). The film also mentions other work by Houston, including his suits to protect the rights of black railroad employees (*Steele v. Louisville & Nashville Railroad Co.*<sup>27</sup>) and to integrate the armed forces and defense industries, his service on Roosevelt's Fair Employment Practices Commission, his column for the Baltimore *Afro-American*, and his testimony before Congress. Against this rich background, *Brown* is then considered. The film focuses primarily on opposing counsel in the case and on public reaction to *Brown*. Southern resistance to implementation of the Supreme Court's mandate is chronicled, as well as subsequent efforts by each of the three federal branches to reaffirm or extend the *Brown* decision.

20. *Id.* (comments of unidentified narrator).

21. In *Murray*, the Maryland Court of Appeals ordered the admission of a black applicant to the University of Maryland Law School because there was no black law school in the state. The case is discussed in Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality 187-94* (New York, 1976) [hereinafter *Simple Justice*]. Officially *Pearson v. Murray*, 169 Md. 478, 182 A.2d 590 (1936), the case has become known as *Murray v. Maryland*. See Kluger, *Simple Justice*, *supra*, at 189.

22. 305 U.S. 337 (1938) (holding that a state could not create separate educational programs for blacks by requiring them to attend out-of-state schools if they wanted to pursue particular courses of study). Although the case is described as *Gaines v. Missouri* in the film, it is officially *Missouri ex rel. Gaines v. Canada*. The origin of the official name is discussed in Kluger, *Simple Justice*, *supra* note 21, at 203 n.\*.

23. 332 U.S. 631 (1948) (ordering admission of a black woman to only law school in state).

24. 339 U.S. 629 (1950) (holding that the legal education offered at a law school for blacks is not equal under the *Plessy* doctrine to the legal education afforded to whites at a different state university when there are substantial disparities between the faculties, libraries, alumni, and traditions of the institutions).

25. 339 U.S. 637 (1950) (holding that a black student admitted to a white program leading to a doctorate in education could not be required to sit in a hallway adjacent to the classroom or at separate tables not used by whites in the library and dining room).

26. The generic reference in the film to the "Teacher Salary Cases" presumably refers to such decisions as *Mills v. Board of Education of Anne Arundel County*, 30 F. Supp. 245 (D. Md. 1939); *Morris v. Williams*, 149 F.2d 703 (8th Cir. 1945); and *Freeman v. County School Board*, 82 F. Supp. 167 (E.D. Va. 1948).

27. 323 U.S. 192 (1945) (holding that a union may not negotiate to give jobs that blacks previously held to whites merely because the jobs had been made easy by advances in technology).

It would be possible, of course, to cover much of the same ground with reading assignments<sup>28</sup> and class discussion, but the educational impact would be less. In a style reminiscent of the much-heralded PBS *Civil War* miniseries, *The Road to Brown* blends together snapshots, news footage, artistic renderings, and music of the times; recollections of participants in the litigation struggle; and present-day commentary by judges, historians, and others. The result is a visual presentation that conveys more than information. It reaches the viewer on an affective level, offering to renew the spirit as well as inform the mind. It is difficult not to be moved by the film footage Houston shot throughout the South in 1934 to document the inequality of educational facilities for blacks and whites,<sup>29</sup> or by the pictures of blacks lynched in army uniforms or roped off at the dedication of the Lincoln Memorial, or by the signs that less than a lifetime ago designated inferior facilities "COLORED."

The interviews with persons whose lives were affected by *Brown* have a similar emotional impact. Recalling the Supreme Court's ruling in *Brown*, one District of Columbia woman states with unforgettable pride and joy in her voice:

[On] May 17, 1954, I was downtown, and over the radio came [the news that] a unanimous Supreme Court voted today that racial segregation in the public schools is inherently unequal and unconstitutional. I was so thrilled—it was like being born again. It was tremendous, and the people were coming out into the streets. They couldn't believe that we had won.<sup>30</sup>

In another vignette, a man tells of how his house was twice bombed when he and others sought to integrate local schools in accord with the *Brown* decision. The film ends with a hauntingly grainy tape recording of Houston's voice forecasting a successful end to the civil rights struggle in America and challenging blacks to ensure that the American system guarantees justice and freedom to everyone.

### III. The Limits of Time

As with any film that tries to compress a great subject into less than an hour, it is possible to quibble with editorial decisions. For example, the treatment of the Supreme Court is arguably one-dimensional.<sup>31</sup> The viewer is given the impression that the membership of the Court never changed during the two decades that Houston pursued his litigation strategy and

28. See, e.g., Henderson, *supra* note 6, at 1593–1609 (discussing the role that empathic narrative played in the litigation and decision of *Brown*). See also Getman, *supra* note 6, at 584–85 (recounting Charles Black's discussion of *Brown* in *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421 (1960)).

29. In a sense, *The Road to Brown* serves an educational purpose analogous to that performed by Houston's "home movies" of school facilities in the South. The film makes immeasurably more vivid facts that could be reduced to writing.

30. *The Road to Brown*, *supra* note 15 (comments of Juanita Kidd Stout).

31. A. Leon Higginbotham made a similar point when he spoke on a program at the 1991 AALS Annual Meeting at which the film was shown. In the course of the discussion, Chief Judge Higginbotham remarked that "in our teaching, we want to get a little more focus on Earl Warren, a little more focus on the jurists who made a difference." Joint Program of the Sections on Minority Groups and Constitutional Law, AALS Annual Meeting, January 6, 1991, Washington, D.C. (audiotape) [hereinafter Joint Program].

that individual justices on the Court played no significant role in engineering the demise of *Plessy*.<sup>32</sup> Indeed, the film never mentions the rather significant fact that *Brown* was argued twice in the Supreme Court before the 1954 decision, the second argument coming after Earl Warren, a nascent liberal, was appointed Chief Justice on the death of Fred Vinson, a jurist of considerably different views.<sup>33</sup> The rarefied, impersonal presentation of the Supreme Court is a stark contrast to the film's rich and personal portrayal of Houston. In dealing with Houston, *The Road to Brown* makes a vivid case for the proposition that an individual can have a tremendous impact on the rectification of social injustice. But from its treatment of the Court, one would think that it made no difference who was sitting behind the bench.

Nevertheless, the merits of the film considerably outweigh its shortcomings.<sup>34</sup> Besides justly recognizing Houston as an authentic Amer-

32. Between December 1938, when *Missouri ex rel. Gaines v. Canada* was decided, and the 1954 ruling in *Brown*, eleven new appointments were made to the Supreme Court. See David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 323–26 (New York, 1986).

33. On the significance of the change in chief justices, see Philip Elman interviewed by Norman Silber, *The Solicitor General's Office*, Justice Frankfurter, and Civil Rights Litigation, 1946–60: An Oral History, 100 *Harv. L. Rev.* 817 (1987):

Vinson was clearly for leaving the Constitution as it was. *Plessy* and separate but equal had been the law of the land for over a half-century, and he was not ready to change it. Let them amend the Constitution or let Congress do something, but Vinson was not going to overrule *Plessy*. . . . A few weeks after the *Rosenberg* case, the word came that Vinson had died, very suddenly. . . . The Justices all came back to Washington to attend the funeral services. I met Frankfurter, I think at Union Station, and he was in high spirits . . . . Frankfurter said to me, "I'm in mourning," sarcastically. What he meant was that Vinson's departure from the Court was going to remove the roadblock in *Brown*. As long as Vinson was Chief Justice, they could never get unanimity or anything close to it. . . . [W]ith that viselike grip of his, [Frankfurter] grabbed me by the arm and looking me straight in the eye said, "Phil, this is the first solid piece of evidence I've ever had that there really is a God." . . . God won *Brown v. Board of Education*, not Thurgood Marshall or any other lawyer or any other mortal. God intervened.

*Id.* at 829, 840.

A related point of interest, also not mentioned in the film, concerns the health of counsel for the state of South Carolina in *Brown*, John W. Davis. Davis, then well on in years, had served as U.S. Solicitor General, had run unsuccessfully for the presidency in 1924 (losing in the general election to Coolidge), and had argued more cases in the Supreme Court than any other contemporary. According to his biographer, Davis's reargument of *Brown* was affected by his age and health. Of Davis' second argument, William Harbaugh writes:

Flashes of his old grace, eloquence, and precision had marked many passages, but the sustained brilliance of the first argument had been lacking. His voice, though still sonorous and authoritative, had lost carrying power over the year. . . . The powerful memory had also begun to fade. "He read from notes much of the time," Thurgood Marshall recalled. "He didn't used to do that. He was over the hill."

William H. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* 515–16 (New York, 1973).

34. An imprudent decision by the producers of *The Road to Brown* concerns terminology. Without ever defining the term, the film makes repeated references to "Jim Crow" (for instance, it speaks of "*Plessy* and the era of Jim Crow" and describes Houston as "the man who killed Jim Crow"). Some viewers may not understand the slang expression as a



ican "legal hero," an individual whose life can serve as an inspiration to those who continue to fight on behalf of the disadvantaged, the film subtly makes the point that law schools can play an important role in achieving social justice. *The Road to Brown* does as much as a film can do to accurately locate a great case within its historical context, chart its litigation strategy, and vividly present its human dimensions. Law professors who cover *Brown* should use the film in class or require students to view it as an out-of-class assignment.<sup>35</sup> *The Road to Brown* offers great potential for effectively teaching transformative jurisprudence.

reference to "the systematic practice of segregating and suppressing Negro people." See *The American Heritage Dictionary of the English Language* 704 (New York, 1973) (defining the term). Even if that meaning may be deduced from the numerous invocations of the term, the absence of a definition is distracting.

35. At the 1991 Annual Meeting of the Association of American Law Schools in Washington, D.C., A. Leon Higginbotham, Chief Judge of the United States Court of Appeals for the Third Circuit, made the following remarks at a program during which *The Road to Brown* was shown:

I was shocked this afternoon when I talked to the chairman of the Constitutional Law Section, who said to me that he really wondered whether a film like this should be used in a law school. . . . Maybe he could explain to you . . . why the number one representative of the Constitutional Law professors of the Association of American Law Schools would find that maybe this film would not provide as much in one hour as any other hour which is used in teaching Constitutional Law students. I felt that this [film] was absolutely essential . . . . It was George Santayana who once said, "He who does not know the lessons of history will be doomed to repeat its worst mistakes." I am unfortunately . . . old enough to see the cycle repeating itself. . . . To some extent, what I think we need is a generation of Constitutional Law scholars—law professors—who have this historic insight, so that they can stop some of the repetition which, at least in my view, takes place.

Joint Program, *supra* note 31.