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# Charles L. Black, Jr. and Civil Rights

Louis H. Pollak<sup>†</sup>

Barbara Black has asked that I talk about Charles and civil rights. I've decided that the best way to do that is to let Charles do most of the talking. He always did most of the talking.

In 1979, in a reminiscence and rumination that appeared in the *Yale Review*,<sup>1</sup> Charles looked back twenty-four years to an enchanted evening:

In the middle of May 1955, at the Savoy Ballroom on Lenox Avenue in Harlem, a philanthropic organization in the black community gave a reception in honor of the thirty or so lawyers who had worked on the case of *Brown v. Board of Education* . . . . Thurgood lined us all up in front of the orchestra to receive the applause of the whole crowd, Margaret Truman, Averell Harriman, everybody. I turned and looked, a little wistfully, at the trumpet-player in the orchestra, a young black; "I wonder," I thought, "whether I wouldn't rather have been honored in the Savoy Ballroom for trumpet-playing?" Then I heard Thurgood, moving down the line, ". . . Charlie Duncan. And next over there is Charlie Black, a white man from Texas, who's been with us all the way."

All the way. Yes, I guess so, if you can say that about something without beginning or end. I looked at Barbara, out at our table; no knight reaching to take the garland of victory ever saw eyes more glowing than hers as they fixed mine.<sup>2</sup>

But for once in his life that good lawyer Charles Black misstated the facts. There had indeed been a beginning; it was an evening twenty-four years before the evening at the Savoy. Indeed, one of the chief points of Charles's piece in the *Yale Review* was to identify, describe, and explain that beginning evening. It happened when Charles was a freshman at the University of Texas, in Austin, his hometown. Charles recalled it this way:

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1. Charles L. Black, Jr., *My World with Louis Armstrong*, 69 *YALE REV.* 145 (1979), reprinted in 95 *YALE L.J.* 1595 (1986).

2. *Id.* at 1595.

In September 1931, posters appeared in Austin advertising four dances, October 12 through 15, to be played by one "Louis Armstrong, King of the Trumpet, and His Orchestra," at the old Driskill Hotel. I was entirely ignorant of jazz, and had no idea who this King might be; hyperbole is the small coin of billboards. But a dance at the Driskill, with lots of girls there, was usually worth the seventy-five cents, so I went to the first one.

... [S]ince that evening, October 12, 1931, Louis Armstrong has been a continuing presence in my life. . . .

....

He was the first genius I had ever seen. . . . It is impossible to overstate the significance of a sixteen-year old Southern boy's seeing genius, for the first time, in a black. We literally never saw a black, then, in any but a servant's capacity. . . . I liked most of the blacks I knew; I loved a few of them—like old Buck Green, born and raised a slave, who still plays the harmonica through my mouth, having taught me when he was seventy-five and I was ten. Some were honored and venerated, in that paradoxical white-Southern way—Buck Green again comes to mind. But genius—fine control over total power, all height and depth, forever and ever? It had simply never entered my mind, for confirming or denying in conjecture, that I would see this for the first time in a black man. . . .

That October night, I was standing in the crowd with a "good old boy" from Austin High. We listened together for a long time. Then he turned to me, shook his head as if clearing it—as I'm sure he was—of an unacceptable though vague thought, and pronounced the judgment of the time and place: "After all, he's nothing but a God damn nigger!"

The good old boy did not await, perhaps fearing, reply. He walked one way and I the other. Through many years now, I have felt that it was just then that I started walking toward the Brown case, where I belonged.<sup>3</sup>

When Charles started walking he could have had no notion of the destination. For most Southerners, white and black, segregation was the way it was. In 1931, Jim Crow was another way of saying "equal protection of the laws," and had been for thirty-five years since Mr. Justice Brown and six of his colleagues had so carefully explained "separate but equal" in

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3. *Id.* at 1596-97.

*Plessy v. Ferguson*.<sup>4</sup> Only the NAACP had difficulty absorbing the catechism. Some in the NAACP had the idea that endemic underfunding of black public schools might mean that such schools were not “equal” to white schools and hence a suit might lie to compel equal funding. But in 1931, the Margold Report pointed the NAACP’s way to a more spacious vista:

It would be a great mistake to fritter away our limited funds on sporadic attempts to force the making of equal divisions of school funds . . . [W]e should be leaving wholly untouched the very essence of the existing evils.

On the other hand, if we boldly challenge the constitutional validity of segregation if and when accompanied irremediably by discrimination, we can strike directly at the most prolific sources of discrimination.<sup>5</sup>

In 1931, the NAACP was not ready to put Margold’s vision at the top of the legal agenda. Instead, lawyer-in-chief Charles Houston, aided by his protégés Thurgood Marshall and William Hastie, devoted the 1930s and the first half of the 1940s to attacking intermediate targets—whites-only graduate schools in state universities, whites-only primaries, and segregated buses and trains—and they prevailed. But in the latter half of the 1940s, after the close of World War II, the time was at last ripe to take Margold’s blueprint out of the files and go to work. With Houston ailing and Hastie on the bench, the single leader was Thurgood Marshall, head of the NAACP Legal Defense and Educational Fund—“LDF,” we call it today; the “Inc. Fund” in Thurgood’s day. And so the campaign got under way. At the center were Thurgood and his principal deputies—the remarkable trio of Robert Carter, Constance Baker Motley, and Jack Greenberg. Ringed around them were the gifted lawyers who had tried the five school cases from four states and the District of Columbia that were heading to the Supreme Court—lawyers such as Spotswood Robinson, Oliver Hill, Harold Boulware, Louis Redding, James Nabrit, Jr., and George Hayes. And then there was the cohort of youthful and dedicated volunteers—practitioners like William T. Coleman, Jr. and professors like Jack Weinstein, William R. (“Bob”) Ming, and Charles Black.

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4. 163 U.S. 537 (1896).

5. Nathan R. Margold, Preliminary Report to the Joint Committee Supervising the Expenditure of the 1930 Appropriation by the American Fund for Public Service to the N.A.A.C.P. 93 ([1931]), *microformed on* Papers of the NAACP, Part 3 The Campaign for Educational Equality, Series A, Reel 4 (Univ. Publ’ns of Am.), *reprinted in* RICHARD KLUGER, *SIMPLE JUSTICE* 133-34 (1975).

When, today, we look back half a century and reread the principal Inc. Fund brief in *Brown*, what can we confidently separate out as the special contribution of the harmonica-player, the devotee of Greek and of Old and Middle English, the scholar-proctor in admiralty, and the life master of the Constitution? The best answer, I think, is to be found in occasional sentences that stand out in dazzlingly bold relief from the surrounding serviceable prosaic prose—sentences that could have flowed only from the pen of one of the handful of great prose stylists writing law in the twentieth century. Consider Charles's explanation of why, if the Court should determine segregation in public schools to be unconstitutional, the Court should direct prompt relief undiluted by specious invocation of equitable doctrines of so-called balance of convenience applicable in untangling the status quo in very different contexts. This is how Charles put the matter:

These infant appellants are asserting the most important secular claims that can be put forward by children, the claim to their full measure of the chance to learn and grow, and the inseparably connected but even more important claim to be treated as entire citizens of the society into which they have been born. We have discovered no case in which such rights, once established, have been postponed by a cautious calculation of conveniences. The nuisance cases, the sewage cases, the cases of the overhanging cornices, need not be distinguished. They distinguish themselves.<sup>6</sup>

The Court's leaden answer to Charles—"all deliberate speed"—was not apposite in logic, or, as it turned out, in experience.

In the years following the Court's sequential decisions in *Brown*, Charles continued to serve as a senior adviser to Thurgood and, after Thurgood's appointment to the Second Circuit, to his successor as head of the Inc. Fund, Jack Greenberg, in the endlessly ramifying skein of litigation required to implement *Brown* and to extend its reach. Concurrently, Charles counseled Bob Carter in the important litigation Bob conducted as general counsel of the NAACP before he, too, became a federal judge. And in 1960 Charles confounded *Brown's* last remaining academic critics—few but influential—in his brilliant essay, *The Lawfulness of the Segregation Decisions*,<sup>7</sup> one of the small number of enduring legal writings that have given life to the words "equal protection of the laws."

A decade later, Charles took the Constitution abroad. The story is told in the lecture—*The Overseas Trade in the American Bill of Rights*—

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6. Brief for Appellants at 191, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10), reprinted in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 481, 704 (Philip B. Kurland & Gerhard Casper eds., 1975).

7. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

delivered at Columbia Law School in 1988, during the deanship of Barbara Black, by Anthony Lester Q.C. (Lord Lester of Herne Hill, as he now is), England's leading civil rights and civil liberties lawyer.<sup>8</sup> Weaving *Strauder v. West Virginia*<sup>9</sup> and Harlan's *Plessy* dissent into the prohibition against degrading treatment contained in Article 3 of the European Convention on Human Rights, Charles helped Lester persuade the European Commission on Human Rights that the British Parliament could not lawfully bar the entry into England, on the basis of race, of upwards of 100,000 British citizens of Asian ancestry. These citizens were being expelled, on grounds of race, from the East African nations, formerly British colonies but now independent, in which they had long resided.<sup>10</sup>

One morning in the early 1960s, as I was sitting in my office at the Yale Law School, I got a phone call from a reporter in the Washington Bureau of the *New York Herald-Tribune*. He had just attended a press conference called by Senator Jacob Javits to announce a voting rights bill that the Senator had just filed. Senator Javits had explained that in drafting the bill he and his staff had received assistance from three Yale faculty members—Thomas I. Emerson, Charles Black, and me. The reporter phoning me knew all about Professor Emerson—coauthor of the first casebook on civil rights<sup>11</sup> and also a leading First Amendment scholar—but he knew nothing about Professor Black, except that he had grown up in Texas and had a substantial interest in civil rights. Was Professor Black, my interlocutor started to inquire—but had great difficulty getting to the end of the question—“a—um, ah, um, ah—a Negro?” I said that Charles was white—and immediately, and for months thereafter, kicked myself for not responding, “Gee, I don't know, but if you'll hold on for a moment I'll try to find out.” Some ten years later, when Richard Kluger's extraordinary book, *Simple Justice*,<sup>12</sup> appeared, I learned that I had misinformed the *Herald-Tribune* reporter. Kluger disclosed that one day in the fall of 1953—it must have been after the great brief was filed but before the arguments in December—Thurgood Marshall said to Charles Black, “You are a Negro.” Charles had been knighted.

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8. Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988); see also Anthony Lester, *Thirty Years On: The East African Asians Case Revisited*, PUB. L., Spring 2002, at 52, 59 & n.25.

9. 100 U.S. 303 (1880).

10. *East African Asians v. United Kingdom*, App. No. 4403/70, 3 Eur. H.R. Rep. 76 (1973).

11. THOMAS I. EMERSON & DAVID HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (1952).

12. KLUGER, *supra* note 5.

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