IN THE

Supreme Court of the United States

October Term, 1948

No. 667 44

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *ET AL.*

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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REPLY BRIEF FOR PETITIONER.

The brief for the respondents in opposition to the petition for writ of certiorari filed herein is based upon two main points. It is claimed that the "separate but equal" doctrine first advanced in the case of *Plessy* v. *Ferguson,* 163 U. S. 537, has not only been uncontroverted by later decisions of this Court, but is controlling in this case to the extent of precluding the petitioner from challenging the validity of the segregation statutes of the State of Texas as applied to this case. This argument is followed by the contention that the only issue to be determined is the question of a comparison of the physical facilities of the two law schools.

The record in this case presents to this Court for the first time, the issue of the validity of state segregation statutes as applied to a Negro student seeking a legal education. The record in this case similarly presents for the first time, expert testimony which established the unreasonableness of racial classifications as applied to graduate and professional education.

I.

Under the theory advanced by the respondents, the states can with impunity, use race alone as the basis for classification for governmental purposes. Respondents further claim that such racial classifications cannot be challenged under any circumstances. The theory also carries with it the proposition that the effect of the enforced segregation of one racial group of law students is not a factor to be considered in deciding whether equal facilities are offered within the meaning of the Fourteenth Amendment.[1] If this position is correct, then all state statutes enforcing racial segregation in governmental functions are beyond challenge.

The right to be free from racial discrimination is one of the most important guaranties of personal freedom which our Constitution secures. This right cannot be protected by the use of a formula which seeks to evade rather than enforce equal protection. The petition for certiorari and brief in support thereof shows that later decisions of this Court have all but expressly overruled *Plessy* v. *Ferguson* and have consistently repudiated the *ratio decedendi* on which the separate but equal doctrine rests. Our position in this case holds that the racial discrimination inherent in the separate but equal doctrine of *Plessy* v. *Ferguson* is in the same position as was the doctrine of judicial fact of *Crowell* v. *Benson* in the case of *Estep* v. *United States* where Mr. Justice FRANKFURTER stated: "In view of the criticism which that doctrine as sponsored by Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285, brought forth and of the attritions of that case through later de-

[1] "Prior to the trial, the power of the State to classify, and the reasonableness of the classification as applied in this case, had been settled as a matter of law by this Court. Based thereon, evidence on the point was properly limited by the trial court." Point Three of Respondents' Brief, page 55.

cisions, one had supposed that the doctrine had earned a deserved repose." (337 U. S. 114, 142.)

On the other hand, respondents assert that the decisions of later cases including the *Gaines* case, 305 U. S. 337, the *Sipuel* case, 332 U. S. 631, and the *Fisher* case, 333 U. S. 147, have reemphasized the separate but equal doctrine. The validity of the segregation statutes of Missouri were not in issue in the *Gaines* case. In the *Sipuel-Fisher* case, this Court made it clear that the petition for certiorari in that case "did not present the issue where a state may not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes". The case was returned to the Oklahoma District Court where the issue was clearly raised and evidence was produced by experts, including recognized leaders in the field of legal education from all sections of the country, who gave their reasons why it is impossible for a Negro to obtain an education in a separate law school equal to that available in the regular law school. While this case was on appeal to the Supreme Court of Oklahoma, Mrs. Fisher was admitted to the law school of the University of Oklahoma and the appeal was dismissed as being moot.[2]

Respondents in their brief in this Court for the first time make an effort to show a basis for the racial classification in this case. In the development of the third point of respondents' brief, emphasis is placed upon such extraneous matters as the "Report of the State-Wide Survey of Public Opinion" of January 26, 1947. The inconclusiveness of such matters is emphasized by the reaction of the student body of the University of Texas as exemplified by recent

[2] A certified copy of the transcript of record of the Retrial of this case has been deposited with the Clerk of the Court.

articles appearing in the campus newspaper of the University of Texas.[3]

II.

Point two of respondents' brief raises the procedural question brought about by their theory of the meaning of the equal protection of the laws clause of the Fourteenth Amendment. This point is:

> "The fact question of whether Petitioner was offered equal facilities is not properly before this Court because Petitioner did not present it to the Texas appellate courts for review. But assuming the issue to be properly before the Court, there is ample evidence to support the trial court's findings of fact and judgment."

Petitioner filed his exceptions to the findings and judgment of the trial court (R. 441). On appeal to the Court of Civil Appeals of Texas, petitioner included the following point:

> "The error of the Court in holding that the proposal of the State to establish a racially segregated law school afforded the equality required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and thus justi-

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[3] A copy of the latest reaction to the admission of qualified Negroes to the professional schools of the University of Texas is set forth in the Appendix.

fied the denial of appellant's petition for admission to the law school of the University of Texas."[4]

This point was preserved in the motion for rehearing in the Court of Civil Appeals (Points IV and VII, R. 462-463); in application to Supreme Court of Texas for a writ of error (Points IV and V, Respondents' Brief, p. 107); and in the motion for rehearing in the Supreme Court of Texas (Points IV and V, R. 469).

The issue in this case was properly raised and has been preserved throughout this litigation. Petitioner, believing that this is a question of great public importance, has made every effort to present as complete a record as is legally possible. Respondents' brief demonstrates an unwillingness to have these issues determined.

Conclusion.

Access to public education is vital to our democratic way of life. Legal education is training for service to the state. Implicit in the meaning of democracy, is that its rights and obligations apply to all citizens without regard to race, color, creed or national origin. The petition for certiorari and brief in support thereof and respondents' brief in opposition thereto, when read together establish the overwhelming importance and significance of the issues raised in this case.

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[4] Rule 418—Rules Civil Procedure of Texas provides that: "Such points will be sufficient if they direct the attention of the Court to the error relied upon."

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the court below, should be granted.

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Appendix.

DAILY TEXAN—September 18, 1949

MARK BATTERSON—

STUDENT BARNETT GLADLY WELCOMED

There hasn't been much said about it one way or the other, but a big step toward putting an end to one of Texas's most vicious evils is being taken in Galveston this week.

About the same time students here at the University start moving into classrooms, a 23-year-old man from Austin will go to his first classes at the medical branch at Galveston. His previous grades will compare favorably with those of any other student at the school, he will study just as hard as anyone else there this fall, and on the whole he would probably be a good example of an average medical student, except for one thing.

Herman Barnett, the student, is a Negro.

It's true that he will be there only on a temporary basis, but the fact remains that Barnett is the first of his race to finally make it into the same Texas classrooms as his fellow citizens. And no matter how he got there, it's a big step in a state abounding in superstition on the subject of races.

Later, non-segregation in education is going to spread until Negroes go to school here on Forty Acres.

And still later, Negroes will enter Texas high schools and grammar schools.

This won't come about by any sudden enveloping feeling of liberalism on the part of Texans as a whole, but will evolve simply through financial necessity. Texas can't

afford to maintain equal and separate institutions for its Negro population, and eventually it will have to drop the barriers.

What's more, there won't be any riots. On the contrary, we think that when the time comes, students who don't already see it will realize that capability doesn't depend on skin color, and discover that Negroes will hit the honor rolls in the same ratio as the white students.

They'll learn to sit down at the same tables with Negroes over at the Commons, and one day they'll use the same knives and forks that fed fellow Negro students the day before.

In spite of what they've been taught by superstitious parents, they'll find out that all of this won't contaminate them, and that Negroes are humans, with the same individual faults or merits that humans bear.

Higher institutions of learning are the logical places for segregation to begin its wilting process. Students are supposed to be on the whole of a higher mental caliber, and whether they really are or not, the fact remains that they at least have more of a chance to sharpen their reasoning processes enough to whittle down discrimination based on a medieval-like their subconscious.

In spite of what a lot of the more fiery brand of liberals seem to think, many white people simply can't help having the feelings they have on the subject of race. They have been raised to believe in their superiority, and even when their reasoning protests against it, they still have a hard time getting things straight in their subconscious.

We don't believe many people are purposely vicious in their attitudes, but it amounts to the same thing as far as the Negro is concerned. All of this is what makes it a

problem that will take time, patience, and a working abundance of common sense to solve.

The Galveston branch is lucky in getting a student like Barnett, just as his race is fortunate in having a representative of his caliber. Barnett is an honor graduate from Samuel Huston College, and he was an Air Corps officer during the war.

He was one of thirty-five Negroes who asked admittance to the University graduate school, the dental school at Houston, and the Galveston medical branch last fall. At the time, they were denied admittance.

Until someone shows us differently, we think that Barnett will come out all right at the Isle branch.