

Book Reviews

A Triumph of Law

Simple Justice. By Richard Kluger. New York: Alfred A. Knopf, 1976. Pp. x, 823, xxiii. \$15.95.

Reviewed by Burke Marshall†

Of the attorneys and teachers mentioned in this book, Charles Hamilton Houston brings the vaguest flickers of recognition to white lawyers. Yet he was the first, and among the most gifted, of the extraordinary group who guided the litigation leading to *Brown v. Board of Education*¹ and its enormous progeny of case law. There is a chair named for him at Howard Law School; based on the accomplishments and legacy of its namesake, it deserves to be the preeminent chair in legal education. Consider the exceptional distinction of only some of the black lawyers who worked as his colleagues and his apprentices: Thurgood Marshall, Robert L. Carter, William Henry Hastie, Spottswood Robinson III, James M. Nabrit, Jr. (and later James M. Nabrit III), William T. Coleman, Constance Baker Motley, and Franklin H. Williams. They were, of course, assisted by some white lawyers, including several distinguished legal academics associated with the Yale Law School; indeed, a white man, Jack Greenberg, succeeded Thurgood Marshall as the director of the NAACP Legal and Educational Defense Fund, the organization that spearheaded the litigation. But those white men and women, with the exception of Mr. Greenberg, were dabbling part-time. Credit for the stunning professional success of the strategy and tactics of the litigation culminating in *Brown* rests firmly on the work of black men and women, barred at the time from jobs in the mainstream of their profession, from education in most of the nation's law schools, and, in the states where they did most of their work, from even the simplest conveniences of the life of a litigator on the road, such as a room in a good motel or a meal at a decent restaurant.

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1. 347 U.S. 483 (1954).

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Richard Kluger's book² is a detailed account of the work of these men and women. Based on extensive research of the kind that is possible when many of the actors are still alive, the book is rich in anecdotes about those who did the courtroom work, anecdotes colorful and often funny, probably embellished over the years, and perhaps even apocryphal in part. Compassionately, and sometimes movingly, the author describes the lives and courage of the black people who, as clients of Charles Houston and his colleagues, put themselves and their families out in front of their communities and the society in which they lived, so as to become persons with standing to bring a justiciable case or controversy before a federal court.

As popular, almost contemporary, history, written by a man with the experience and technique of a journalist, *Simple Justice* is justifiably subject to the criticism that it does not reflect a complete understanding of legal processes. This is particularly evident in Mr. Kluger's attempt to describe and analyze the work of the Supreme Court and of various individual Justices.³ Nevertheless, a review of *Simple Justice* should start with an unstinting and unqualified commendation of the book—particularly to lawyers, law students, and anyone considering the law as a profession. Its subject matter, the American struggle for racial and human justice, inexorably reveals the intricate splendor of the American constitutional structure and the creative invention of the process of constitutional litigation that the structure makes possible, indeed necessary. It describes lawyers' work at its pinnacle—intellectually demanding, technically inscrutable, difficult both physically and mentally, focused in the disciplined confines of a judicially permissible record, using the process of law simultaneously to affect the decision of government on great issues and to gain for a client,

2. R. KLUGER, *SIMPLE JUSTICE* (1976) [hereinafter cited by page number only].

3. The section dealing with the *Brown* decision itself includes significant materials from the papers of Justices Burton, Frankfurter, and Jackson, materials that suggest the ebb and flow of the Court's decisionmaking, extending even into the Justices' conference room. Mr. Kluger supplemented this spotty record by using it, in the classic journalistic manner, as a lever to elicit interviews with some law clerks who served during the October 1952, 1953, and 1954 Terms. In this way he obtained a fair amount of original and valuable historical matter concerning the views of individual Justices on the school segregation issue. The most controversial bit of evidence of this sort, however, concerns the views not of a Justice but of one of the law clerks, William H. Rehnquist, who was then clerk to Justice Jackson. In a lengthy footnote (pp. 606-09), Mr. Kluger argues that a memorandum written by Mr. Rehnquist to Justice Jackson, urging reaffirmance of *Plessy v. Ferguson*, 163 U.S. 537 (1896), reflected Mr. Rehnquist's own views on the cases, rather than those of the Justice. If so, this would conflict with Mr. Rehnquist's testimony on the point during his confirmation hearings in 1971. But Mr. Kluger's evidence does not seem compelling. In my judgment, an equally plausible interpretation corresponds to Mr. Rehnquist's testimony: that the memorandum was requested by Justice Jackson so that he could evaluate the strongest argument to be made in favor of *Plessy*.

and an enormous number of other people in the same situation, the relief to which he is entitled. As the foreword points out, the nature of the lawsuit that the book chronicles, the story that it has to tell, requires an imposing length; yet Kluger writes with an ease that makes its reading a pleasure, and he describes events that ended, after all, in a triumph of law.

Simple Justice does, however, have serious limitations, for Mr. Kluger writes as a journalist, not as a legal scholar. An underlying problem is apparent in the title, so apt a phrase for Mr. Kluger's own assessment of *Brown* and related decisions that it seems deceptively inevitable.⁴ The justice that was done in *Brown* can be fairly described by the adjective "simple" in one of its meanings—that of "[a]bsolute, unqualified."⁵ The trouble is that Mr. Kluger plainly also believes the adjective is accurate in another sense—that of "[n]ot compound, consisting of only one element, . . . not analysable."⁶ From that belief stem serious limitations on the book's scholarship, for the justice dispensed by *Brown*, whatever else it is, is not in that sense simple.

One example of these limitations is Mr. Kluger's notion that constitutional litigation is entirely a political process, with issues being manipulated by the Justices solely to achieve preconceived substantive ends. In his foreword, Mr. Kluger refers to the Court as "these insulated nine men [to whom] the nation has increasingly brought its most vexing social and political problems,"⁷ a loose but not outrageous description of the process. But he then goes on to say that the problems "come in the guise of private disputes between only the litigating parties," even though "everybody understands that this is a legal fiction and merely a convenient political device."⁸ To traditional scholars of constitutional and Supreme Court history this characterization of the process contains not only loose but fighting words. It ignores the entire development, starting in 1792, of the restriction of the Supreme Court's role to the decision of "cases and controversies" in a constitutional sense.

The frame of mind, not just the language used in a short introduction, is the problem. The author's approach to the case law that grew from the *Civil Rights Cases*⁹ and *Plessy*¹⁰ to *Brown* is almost totally

4. Mr. Kluger uses the phrase "simple justice" to describe the decision itself on the occasion of its rendering. P. 710.

5. THE CONCISE OXFORD DICTIONARY 1189 (4th ed. 1951).

6. *Id.*

7. P. x.

8. *Id.*

9. 109 U.S. 3 (1883).

10. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

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result-oriented, conceding not even a presumption of principled good faith, much less careful analysis, to the grounds advanced by the Court for its decisions. An example will suffice. *Cumming v. Richmond County Board of Education*¹¹ hardly qualifies as a masterpiece of judicial craftsmanship, but it did involve a serious problem of remedy. The school board was maintaining separate school systems, in which the whites had a high school but the blacks did not. The plaintiffs at first sought relief against the tax collector for permitting public funds to be expended in that fashion, but they did not appeal from the denial of that specific prayer for relief by the Georgia courts. Nor did they attack the separate school systems as such, except, apparently, in oral argument before the Supreme Court. In any event, *Plessy* had just been decided, and the separate-but-equal issue was not really open. The question as framed by the Supreme Court on the record before it was whether the Fourteenth Amendment required the Georgia court to close the white high school. The Court held that it did not, finding no “hostility” to the blacks, but also stressing its reluctance to grant the particular kind of relief requested.¹² In his opinion for the Court, Justice Harlan, a hero in other pages of *Simple Justice* for his dissents in the *Civil Rights Cases* and *Plessy*, wrote that the case would have been a different one if the plaintiffs had sought to compel the school system to maintain a black high school as well, and if the element of “hostility” had been present.¹³ But even if so framed, the issue of relief ultimately would have involved the complex question of the power of the federal courts to compel the states to tax for a particular purpose. A similar question was raised after *Brown* by the closing of the schools in Prince Edward County, Virginia in 1959;¹⁴ resolution took five years of litigation. The *Cumming* decision may be plainly wrong, but “grievous pettifoggery”¹⁵ it is not.

Even more serious, Mr. Kluger fails to recognize the enormous significance of the decision by the NAACP lawyers to ground the challenge to separate school systems in part on educational theory. The Court’s apparent adoption of an educational theory as the doctrinal underpinning of *Brown* has raised problems of legitimacy and relief

11. 175 U.S. 528 (1899).

12. *Id.* at 545.

13. *Id.*

14. *Griffin v. County School Bd.*, 377 U.S. 218 (1964).

15. P. 83. Mr. Kluger elsewhere calls the unanimous decision in *Grovey v. Townsend*, 295 U.S. 45 (1935), “judicial sophistry at its most flagrant.” Pp. 167-68. *Grovey* upheld the exclusion of blacks from voting in Texas Democratic primaries because conducting the primaries was a party function and did not constitute state action. The opinion does not represent modern state action analysis, but it was joined by Justices Brandeis, Cardozo, and Stone, and at the time was not considered to be a radical departure from doctrine.

that were brilliantly examined by the late Alexander Bickel.¹⁶ Mr. Kluger is evidently oblivious to the jurisprudential significance of the Court's seeming reliance on the NAACP's educational theory; he describes it, admittedly at great length, only as an element of litigation strategy.¹⁷

But that is what this book is about—the litigation that led to *Brown* and the lawyers who conducted it. In spite of the book's scholarly shortcomings, Mr. Kluger tells this triumphant story masterfully. After reading *Simple Justice*, most good lawyers will wish that they too had been a part of the process it describes.

16. See A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 119-66 (1970). I say "apparent adoption" by the Court because its use of per curiam opinions and memorandum orders in subsequent cases, involving such varied state facilities as golf courses and swimming pools, simply cannot be explained on the ground of an educational theory.

In brief, the underlying educational theory identified by Professor Bickel as "another element" in *Brown* is that black children do not distinguish between de jure and de facto reasons for their segregated schooling, and since separation "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954), the public schools, as instrumentalities of the state, have a constitutional obligation to give black children a racially integrated education. The Court's use of the word "solely" and of implicit state action concepts makes unclear, at least to me, that the Court actually had this theory in mind. Yet the opinion is imprecise and certainly susceptible of that interpretation. The decision then would have rested in part on an unproved and really untested theory as to the educational effect of racial school segregation (which, absent a dual school system, simply reflects a society segregated residentially, economically, and socially). See, e.g., J. COLEMAN *et al.*, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1965); Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 *YALE L.J.* 409, 409-21 (1973) (citing numerous studies of the impact of public school finance systems on educational quality). This interpretation of *Brown* is still an underlying issue in current school litigation. Cf., e.g., *Keyes v. School Dist. No. 1*, 413 U.S. 189, 196 (1973) (noting district court's use of racial statistics "to signify educationally inferior schools" but not "to define a 'segregated' school in the de jure context").

17. Pp. 315-45, 396-425.