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Speech: Journey to Justice: Fiftieth Anniversary of Brown v. Board of Education

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EDITOR'S NOTE

JOURNEY TO JUSTICE: FIFTIETH ANNIVERSARY OF *BROWN V. BOARD OF EDUCATION*

The Honorable Robert M. Bell has been on the Court of Appeals of Maryland since 1991 and was named Chief Judge in 1996. Born in Rocky Mount, North Carolina, Chief Judge Bell attended Dunbar High School in Baltimore and graduated from Morgan State College in 1966. He earned his J.D. from Harvard University Law School in 1969 and was admitted to the Maryland Bar that year.

While a student at Dunbar, he participated in a sit-in demonstration in 1960 to protest segregation in Baltimore. About a dozen students were arrested and convicted of trespass after they refused to leave a Baltimore restaurant unless they were served. The court of appeals affirmed their convictions. The case was appealed to the United States Supreme Court, which vacated the judgment and remanded the case to the Maryland courts. The Court of Appeals initially affirmed the convictions for a second time, but eventually reversed after granting a motion for reconsideration. The latter decision was based upon a 1962 Baltimore City ordinance that prohibited owners of places of public accommodations from denying their services to people because of their race.

The following is a speech Chief Judge Bell gave about the demonstration and the appeal to the Supreme Court. The speech was part of a celebration of the fiftieth anniversary of *Brown v. Board of Education* at the University of Baltimore School of Law in the spring of 2004.

JOURNEY TO JUSTICE: FIFTIETH ANNIVERSARY OF *BROWN V. BOARD OF EDUCATION*

The Honorable Robert M. Bell
Chief Judge, Court of Appeals of Maryland
April 14, 2004

I am here, ladies and gentlemen, to talk to you about my experiences during the era after Brown against Board of Education.[1] Certainly, when Brown against Board of Education was decided, I was ten years old. In fact, I became eleven that summer. I was attending at that time an elementary school, Charles C. Carrollton on Central Avenue. It was two years later that I got to Dunbar. At that time, I moved to Dunbar Junior High School, which was an annex to the main building. I didn't get to the main building until 1956, I think it was, and quite frankly when I got to Dunbar, when I was at Charles Carroll of Carrolton, not much changed between April of 1954, May of 1954, September of 1954, or September of 1955 and so forth because the school I went to in 1954, 1955 and so on until I graduated in '56, remained a segregated school. We had at Dunbar, interestingly enough, some integration, I should point that out; there was a history teacher at Dunbar by the name of Herman Bainder, and he was the only white teacher in the school. There were no white students at all. And yet we knew about Brown against Board of Education.

I remember when the decision was announced. I used to sell *Afros*,[2] and I remember the headlines surrounding that case. It was a big deal, and it was a big deal in the school system. In fact, I know of students who were asked to move from their school to another school, a white school, for the sake of integrating that school. It was done very carefully, very controlled. And at one point, not early on, but at some point, I was asked to do the same, but I declined to do so. What I'd like to do is first of all point out that notwithstanding the fact that Brown against Board of Education did not have an immediate impact on my life, it had a significant impact on my life. That may sound contradictory to you, but it's true.

My odyssey began in 1960, and it had to do with the aftermath of *Brown* as opposed to *Brown* itself, obviously. I was elected president of the student government at Dunbar High School in the spring of 1960.

1. 347 U.S. 483 (1954).
2. The Afro-American Newspaper was founded in 1892 and continues to be published today. The Afro-American Newspaper, *About Us*, *at* http://www.afro.com/aboutus.htm. (Last visited Nov. 11, 2004).

As an aside, it might interest you to know the vice presidential candidate on that ticket was a gentleman by the name of Reginald F. Lewis. For those of you who don't know Reginald F. Lewis, he's the fellow who did the leveraged buyout of Beatrice International.[3] He was my classmate at Dunbar. We were student government president and vice president together.

It was interesting that right after that I was contacted by Morgan students. They were planning a sit-in demonstration, picketing in the City of Baltimore, to be held on the last day of school in 1960. That would have been June the 17th. And they were going to do something a little bit different. They were going to involve, in addition to college students, they were going to involve high school students. And so one of the Morgan State College[4] students came to Dunbar High School. We met and discussed what my role would be. My role was simply to get the word out and to recruit students to fill a bus so that we could go downtown on the last day of school and engage in picketing and some sit-in demonstrations should the occasion arise.

The idea was to have students who were able to get their parents' permission, obviously, and students who were not going to be disruptive in the sense that once you got involved in a picket situation, you couldn't have students who would retaliate or react to what was being said or done to them, students who would be able to follow the dictates of the nonviolent movement. Also, a requirement was that because we were going to do some sit-ins, and because we were going to be attempting to buy some goods, you had to have some money and be prepared to spend money in the event that you were served. So my job was to amass that group of students and get them to sign permission slips, and then we would take the bus that day. And I got a busload of students.

Now, as another aside, I should point out that in 1960, I was beginning my junior year. So that meant that I was sixteen years old, and that was the case of most of the students who were recruited, they were sixteen years old or older. Some of them happened to be seniors already and were finishing school so those students might have been seventeen. But for the most part the high school students were under eighteen years old. I don't know whether anybody gave much thought to that or not. It might have been a great strategy if a sixteen-year-old in Baltimore city had been a juvenile, because you could have had the arrest for picketing done, and you would only go to juvenile court without having to run the risk of a criminal offense or a criminal

3. TLC Beatrice Int'l Holdings, Inc. v. CIGNA Ins. Co., 2000 U.S. Dist. LEXIS 2917, *3 (S.D.N.Y. 2000).

4. Morgan State College became Morgan State University in 1975. State Agency Histories at the Maryland State Archives, *at* http://www.mdarchives.state.md.us/msa/refserv/staghist/html/sh62.html. (Last visited Nov. 11, 2004).

conviction. But in Baltimore in those days, if you were sixteen years old, you were not a juvenile, you were an adult, and you were tried as such. The anomaly is, of course, that if you lived in Baltimore County, or Montgomery County, or some other county other than Baltimore city, you were a juvenile. And so that's just another sidelight to this thing, because some years later, of course, that issue was corrected because there was a lawsuit brought and, under equal protection grounds, that disparity of treatment was corrected.

In any event, we went downtown to Baltimore Street. And the first stop was Reeds Drugstore. By the way, everybody knows that in February of 1960, there were sit-ins in Greensboro, North Carolina, at A&T, four students at A&T. A lot of people believe that that was the first sit-in demonstration. It was not. The first one occurred in the '40s, at a Jack Sprat restaurant in Chicago, and it was conducted by Jim Farmer and George Houser.[5] And indeed, Baltimore had sit-in demonstrations occur in the '50s. And as a result of that, there were a couple of chains that integrated. The '50s was the beginning of the attempt to integrate Gwynn Oak Park and other amusement centers. That took a number of years from the '50s to succeed. In fact, when I was at Morgan, it was still going on. Sit-ins were going on at Gwynn Oak Park, it was going on at shopping centers, and the movie theaters. So the sit-in demonstration itself as a strategy was not new to Greensboro. It was not the original idea of the A&T students. It had already been tried. It did not take hold. It did not get the attention that the sit-in demonstrations got once they started in Greensboro and moved their way up the east coast.

It has been suggested that part of the reason for the notoriety had to do with the fact that a lot of the sit-in demonstrations occurred in the South and generated a great deal of reaction to it of a negative sort, which reaction was seen on the evening news. And it caused the American people to focus on that situation, to see some of the inhumanity and some of the violent treatment of the supporters of sit-in demonstrators, and to have a good deal of sympathy for them. That's one suggestion. Another suggestion is that it had something to do with the Sharpsville massacre in South Africa, which also was a demonstration of man's inhumanity to man. I have my own theory.

One of my theories is that it had something to do with the decision which said that state-sanctioned segregation is illegal and unconstitutional. I think *Brown* had something to do with the willingness of these young people to go at it hammer and tongs, so to speak, to attempt to move *Brown* to the next step. One will recall, of course, that Charles Hamilton Houston's theory was that you would attack segregation with an idea of ultimately getting rid of discrimination. You'd

5. Richard Severo, *James Farmer, Civil Rights Giant in the 50's and 60's, is Dead at 79*, N.Y. TIMES, Jul. 10, 1999, at A1.

start by making it too expensive to continue the separateness, he would continue until he was able to get rid of separate but equal altogether, and then get rid of discrimination. It was interesting that during the time of the *Brown* decision, one of the cases, a Virginia case,[6] one of the rationales for maintaining segregation was that the segregated schools prepared the students for the life they would face outside of school.[7] That is to say, if we desegregated the schools, what we have really done is to give black students false hope because what would be happening outside the walls of the school was that you would be in a segregated society. All we would be doing, the Virginia court said, is preparing these young people to deal with what reality is going to provide for them.[8] So I think that this was the natural progression from *Brown*, to begin to try to break down some of these barriers, one of which was public accommodations.

When one thinks back [one] realizes that not being able to have access to public accommodations was a real sore spot for African Americans who wanted to go on vacation. Back then, if you were African American, you would leave Baltimore going south, and would drive, and don't stop at a hotel or stop at a restaurant to have food, you just drove. You would take your greasy bag with you, with your chicken in it, and would take sodas in a cooler. You stopped only for gas or you stopped in a town where you knew somebody who would put you up; you couldn't stop in a town with a hotel even though they may have vacancies, because the hotel would not provide you with accommodations. So it was an issue for African Americans throughout the entirety of their history of being free and their history of attempting to do those things which everybody else did: find a little recreation while on vacation, go back home from time to time.

In any event, I do digress. I really want to get to what it was like. We went downtown and we stopped at the Reeds Restaurant—the Reeds Drug Store—and we picketed that particular establishment. Now that was the first time I had ever really experienced the overt, the vicious, racism. Because when we picketed that establishment, there was a counter-picket. People gathered, they watched. But they did more than watch. You had epithets being thrown about. You had a few students being hit. And you had a continual stream of chatter, which had to do with the physical characteristics of the students who were involved and threats as to what could, or would, happen to them. And that continued for the entirety of the time that we were on the picket line. That lasted for about forty minutes.

Then we decided, a group of us, to peel off and go to see if there was a restaurant that was open and, if there was, we would sit in at the

6. Davis v. County Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952), *rev'd*, 349 U.S. 294 (1955).
7. *See id.* at 339.
8. *See id.*

restaurant. Now, we had been there for about forty minutes, and most of the stores along the street—we're on Baltimore Street—most of the stores along the street had closed. They shut their doors. And they had decided to take the loss as it were, except for one. That was Hooper's Restaurant, at the corner of Charles and Baltimore. We went in and the hostess greeted us and indicated what the policy was: We do not serve African Americans. She said, "We do not serve colored in this store." And when questioned about it a little more closely, she said that was the policy that had been given to her by the manager, and the manager subsequently came out and indicated that was the policy of the owner of the business, Mr. Hooper, who, by the way, was there.

As we were talking to the hostess, some of us moved around her as she tried to block the door and we sat at various tables. Now, one of the instructions we were given was when you got into the place, each of you sit at a different table and ask to be served. So there were twelve people in the group, and so we took up as many of those tables as we could.

Our leader was a gentleman by the name of John Quarles. John Quarles conversed with the hostess, and after the hostess had called the manager, he conversed with the manager and ultimately, he conversed with the owner of the establishment. While early on, the manager went out and got police officers and they came in and they did what they were supposed to do: They read to each of us the trespass statute and demanded that we leave. We of course refused to do so. And they asked the police officer—before that, Mr. Hooper sat down with John Quarles, and he tried to reason with him. His point was: "Look, I'm not personally a bigot, I don't discriminate myself. However, my customers will not abide having African Americans served in this establishment. And so it's a business decision, it's a matter of economics. If I serve you, then I lose customers, and you all are not going to be able to keep me open. And by the way, I hire a lot of black folk, they're all in the kitchen, they're my cooks. And please go back and talk to them and they will tell you that I do a good job, that I'm good to them, that they would like for you to go away and not do this." And of course Quarles declined.

And so the police were asked to arrest us. The police declined to make the arrest. They said you have to swear out a warrant. And of course, while we were sitting there, Mr. Hooper went down to the central district police station which was about three or four blocks away, and he went down, he swore out the warrant. And he came back and it was at this point that I realized how good a negotiator John Quarles was. John Quarles said to him, "You've got the warrant." He said to the police officer, "Why don't we do this: Why don't we let these students, these young people, go home." This is a Friday afternoon, the last day of school on that particular year was a Friday. "Let them go

home and they will report to you at the station house on Monday morning." And they discussed that for a time and agreed that we would not actually, physically, be arrested. We would be allowed to go home and report on Monday morning.

And that's what happened. We were released to go home we went on Monday morning and at that time we were fingerprinted, we were photographed. The charges were filed. We were given copies and were given a court date. The trial was to be held in the municipal court. The case was scheduled for the municipal court. We were refused trial in the district court, the case was sent down to—in those days it was called the Supreme Bench of Baltimore.

Now, the group that sponsored the sit-in demonstration and the picketing was not only Morgan State College students, but it was also the Civic Interest Group. They supplied us with lawyers. The lawyers that we were supplied with were Robert Watts, Juanita Jackson Mitchell, and Tucker Dearing. The case was tried in the Supreme Bench of Baltimore, right in the courthouse downtown on the second floor. If anyone has been in that courthouse, if you came in on the St. Paul Street side and you make a left-hand turn, the first courtroom on the left is the courtroom in which the case was tried.

The case was presided over by Joseph Byrnes. Joseph Byrnes is the father of John Carroll Byrnes and Norris Byrnes. They're both judges now. An interesting sideline to that is when I was appointed judge in '75, the state senator representing my district was John Carroll Byrnes. And he was the one who stood for me and vouched for me and got me confirmed.

There was a rule on witnesses invoked, which means that the defendants remained outside of the courtroom for the bulk of the trial. The testimony that was presented was presented by the hostess who testified as to the manner in which we behaved when we got there; the manager [who] testified to his attempts to divert us away from the place; and Hooper, who interestingly enough testified to his conversation as "negotiations with Quarles."

And on the flip side, we had Quarles who testified, and one or two other students testified. I don't have the slightest idea how they chose the students who testified. The bulk of the testimony however was to the effect that we were there in an attempt to be served, that we were prepared to pay for what we were served, and that we were not trying to cause any trouble. And the reason we didn't leave is because we had not been served. So it was fairly standard testimony. I didn't notice at the time, but the idea was to set up a scenario where the issue that was presented to the court was a legal issue, a very straightforward legal issue. And that [issue] was whether or not state action by enforcing a criminal statute could be found such that it would offend the Constitution in the context where the person using the state resources

is discriminating against a segment of the society. That was the whole point.

Joseph Byrnes was troubled by the case. He decided that he had no choice but to find each of us guilty. And he was absolutely right. We did go on private property; we did refuse to leave when requested to do so after having had the statute read to us. It was straightforward, factual. The predicate was there. And yet, he sought to find a way to moderate the punishment. He imposed a fine of ten dollars and he suspended it. In the course of doing so he pointed out to us that we were not criminals and he expressed some remorse himself for having to do what he felt he was compelled to do.

Now Tucker Dearing, immediately after the pronouncement of the sentence, indicated to the court that he was going to appeal the judgment. And, in fact, that's what happened. The case was appealed to the Court of Appeals. Now, there was no intermediate appellate court in those days. You went from the trial court to the Court of Appeals. And so, the case was heard in front of the Court of Appeals about a year or so later.[9] And the issue presented was whether you could use a trespass statute to enforce a discriminatory policy when you are opening your private concern, establishment, for public accommodations.[10] The Court of Appeals had no trouble with that particular proposition. It ruled fairly quickly that there was no state action.[11]

The case was presented for *cert.* to the Supreme Court, which granted certiorari.[12] It's an interesting interplay here. The Supreme Court granted *cert.* about a year after the decision in the Court of Appeals,[13] which is unusual. Normally, you get the *cert.* grants a little quicker than that. And it took them–after they granted *cert.*–and the arguments were heard–it took them another eight months or so to decide the case[14] because there was a real split on the Court.

Before this case, most of the civil rights cases had been decided unanimously. Earl Warren had been pretty good about getting a unanimous court.[15] But here, when you're dealing with private property, there was really a lot of heat generated. One person who had always been fairly liberal in terms of civil rights was Black, Hugo Black.[16] And Hugo Black was a champion of private property inter-

9. Bell v. State, 227 Md. 302, 172 A.2d 771 (1962), *rev'd*, 378 U.S. 226 (1964).
10. Bell v. State, 227 Md. at 304, 172 A.2d at 771.
11. *Id.*
12. Bell v. Maryland, 374 U.S. 805 (1963).
13. *Id.*
14. Bell v. Maryland, 378 U.S. 226, 242 (1964) (Douglas, J., concurring).
15. *See, e.g.*, Wright v. Georgia, 373 U.S. 284, 285 (1963) (unanimous decision).
16. *See, e.g.*, Baird v. State Bar of Ariz., 401 U.S. 1, 6 (1971) (holding that the First Amendment prevented the Arizona State Bar from refusing to admit a woman based on her membership in the Communist Party).

ests.[17] Earl Warren wanted very much to get to the constitutional issue and decide that you cannot use a trespass statute in a public accommodations context to enforce the private discrimination on the part of the storeowner. So too did most of the people who follow the history of the Court, so too did Douglas. Brennan, interestingly enough, was trying to forge a majority. The way this case came out on the first vote was five to four to affirm the Court of Appeals. But Tom Clark from Texas switched his vote. And when he switched his vote, we ended up with a Court that was evenly divided. There were three justices, Douglas, Goldberg, and Warren who wanted to reach the constitutional issue and to reverse.[18] There were three justices, Black, Harlan, and White, who wanted to reach the constitutional issue and affirm.[19] And three, Stewart, Clark, and Brennan, who wanted to decide the case on a more narrow issue.[20]

The case was never decided on the constitutional issue. It was sent back to the Maryland Court of Appeals for its review, because in 1963 Baltimore city passed a public accommodations law, and as a result of that law, what we had done was no longer a crime.[21] In fact, we had the right to do it; it would have been a crime for the restaurant owner to have refused to serve us.[22] So a right had been substituted in that situation. Brennan reasoned that, generally, if a law is repealed before the conviction becomes final, the result is that the conviction is reversed unless there is a savings clause that specifically says that the repeal will not affect the conviction which is already in place.[23] He suggested that the Court of Appeals ought to be given the opportunity to look at the situation again, and he suggested that they ought to reverse the case.[24]

Douglas was totally upset by that; Douglas said, a whole lot is going on out here in this world today, and people are waiting for a resolution of this particular issue.[25] In fact, he pointed out that there were about four or five cases before the Court, that term, which they had reversed on narrow grounds. There was the consideration by the United States Congress of a public accommodations law—a civil rights act—and there was no reason to suspect that young people and others would not, from that time forward, attempt to do exactly the same thing: to picket and to sit-in at these various restaurants to gain equal-

17. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (holding that the President did not have the authority to direct the Secretary of Commerce to take possession of the nation's steel mills).
18. Bell v. Maryland, 378 U.S. at 286 (Goldberg, J., concurring).
19. *Id.* at 318 (Black, J., dissenting).
20. *Id.* at 228.
21. *Id.* at 228-30.
22. *Id.* at 228-29.
23. *Id.* at 231-32.
24. *Id.* at 237, 241-42.
25. *Id.* at 243 (Douglas, J., concurring).

ity in the public accommodations area.[26] So we ought to, he said, we ought to decide this case.[27] We can't put our heads in the sand and hope it goes away.[28] Black took the same position except he took it on the other side.[29] He said that we need to decide the case so that everybody knows the deck with which they are playing.[30]

Of course, because there was no clear-cut majority, the narrow ground prevailed and the case was sent back to the Court of Appeals.[31] The Court of Appeals affirmed the convictions.[32] It did not buy Brennan's formulation of the issue.[33] It bought his formulation of the issue, but it did not buy Brennan's analysis.[34] It believed that the savings clause did in fact save the convictions.[35] And that was a six to one decision with Rubin Oppenheimer writing a dissent.[36]

So you say to yourself, why are you here? How can you be Chief Judge of the Court of Appeals [of Maryland] with a conviction on your record? Well the answer is there was a motion for reconsideration filed within a month of the decision by the Court of Appeals, and the court granted the motion, which is a terribly unusual thing for the court to do.[37] We rarely grant motions for reconsideration. And without an opinion, some five or six months later, the court reversed the convictions.[38]

Now, I thought I had a problem, quite frankly, as I was going back and refreshing myself on some of this. I looked at the case and the opinion was issued on October the 22nd, 1964.[39] The motion for reconsideration was filed November 23rd, 1964.[40] So I went back and I got onto Google and I found a 1964 calendar and I wanted to make sure that the 22nd was a Sunday. And it was. So I'm okay.

The unfortunate thing is that that issue—whether you can use a state trespass statute to enforce private discrimination in the public accommodations context—has never been decided by the Supreme Court. It has never been decided by the Supreme Court for a couple of reasons, one of which I suspect is that the Civil Rights Law had a

26. *See id.* at 243-45 (Douglas, J., concurring).
27. *Id.* at 242-43 (Douglas, J., concurring).
28. *See id.* at 244-45 (Douglas, J., concurring).
29. *See id.* at 321-23 (Black, J., dissenting).
30. *See id.* at 322-23 (Black, J. dissenting).
31. *Id.* at 242.
32. Bell v. State, 236 Md. 356, 368-69, 204 A.2d 54, 60-61 (1964).
33. *See id.*
34. *See id.*
35. *Id.*
36. *Id.* at 369, 204 A.2d at 61.
37. *Id.* at 356, 204 A.2d at 54.
38. *See id.*
39. *See id.*
40. *See id.*

provision for public accommodations.[41] And so there was no occasion to get that issue back.

I subsequently, and this is just something that happened, I happened to run into Brennan when he was giving a lecture at NYU back in the late '80s. And so I walked up to him . . . after he had given his talk and I introduced myself to him. And I said my name is Robert M. Bell, and I'm the Robert Mack Bell in Bell against Maryland. And he remembered the case. And the one thing he said to me was, he said the one thing he did regret was that he had never the opportunity, and he could not get that particular case decided. It has been suggested that Brennan was trying to avoid the issue, but he confirmed that that's not the case. What he was trying to do was to amass a majority and he did not have a majority, nobody had a majority for any one position. The only way you could get Tom Clark was by the narrow grounds. The only way he could get Stewart and Clark was by the narrow grounds, although Brennan himself would have voted with the Chief Justice and the other two and would have reversed. So there was one vote short and they could never reach that result.

Indeed, it turns out, of all of those cases before the Court, the only one that had the possibility of presenting that issue squarely, or that did present that issue squarely, was this case. But it also points out very clearly how divisive this issue of private property can be.

41. 42 U.S.C. § 2000a-1 (2001).