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The Separate-but-Equal Doctrine and " Jazz"

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America has once again been treated to an outstanding documentary film by filmmaker Ken Burns. This latest work, entitled " Jazz", was a ten-part journey of the musical soul of American culture, from the post-Civil War era of Reconstruction to the present day. The film's photography, musical score, and biographical sketches all reflected the outstanding quality that we have come to expect from this remarkable documentary artist.

There was, however, one segment of the film's first episode which deserves mention out of a concern for factual complete- ness. Specifically, the film's presentation of the historical and social background of the Creole population of New Orleans during the 1880's and 1890's will probably leave most viewers with the impressions that 1) the segregationist " separate-but-equal" doctrine originated in the South; 2) the doctrine first arose as part of the segregationist " Jim Crow" laws and policies that were put in place immediately following the 1877 withdrawal of Northern federal troops that ended the post-Civil War Reconstruction era; 3) the doctrine was first given authoritative judicial recognition in the 1896 United States Supreme Court case of ***Plessy v. Ferguson***; and 4) the institution which spawned the incident and subsequent litigation that ultimately led to this first authoritative judicial endorsement of the " separate but equal" doctrine was the private passenger railroad industry operating in Louisiana. Each of these impressions would be inaccurate.

The " separate but equal" doctrine first arose in the North. It became institutionalized through legislation there during the 1830's. The doctrine was first given authoritative (i.e., highest appellate review) recognition and endorsement by the Massachusetts Supreme Court in the 1849 case of ***Sarah C. Roberts v. The City of Boston***. And the institutional setting that gave rise to the litigation that resulted in this first authoritative judicial endorsement of this blatantly segregationist policy was the Boston public school system, i.e., the nation's first non-sectarian public school system.

Fifty-four years before the State of Louisiana passed legislation in 1890 that required that railway passenger cars have " equal but separate accommodations for the white, and colored races," the nation's first non-sectarian public school system governed by a Board of Education was created by the Commonwealth of Massachusetts in 1836. Various school districts within that system, including the Boston public school district, immediately passed regulations such as those enacted by Boston's Primary School Committee, which stated that:

> " Applicants for admission to our schools (with the exception and provision referred to in the preceding rule) are especially entitled to enter the schools nearest to their places of residence."

The referenced exception applied to " those for whom special provision has been made" in separate schools, that is, children of African descent. In 1849 Sarah Roberts, a five year old African American girl, was denied admission to an all-white public school located only 900 feet from her residence, despite the fact that there were several seats available for additional students in the classroom in question. Sarah's parents were informed that, pursuant to the school district's regulations, Sarah would have to attend a school designated for children of African descent. The nearest such school was slightly less than one-half mile from the family's residence.

Republican abolitionist and civil rights crusader Charles Sumner, soon to become a Senator from Massachusetts, responded to the plea of Sarah's parents for help in the matter, and on December 4th (1849), he argued Sarah's case before the Massachusetts Supreme Court. This was the highest appeal possible at the time, as the federal Constitution's Fourteenth Amendment, making the requirement of the " equal protection of the laws" binding upon the states, was not enacted until 1868.

Sumner's argument to the Court that day remains one of the most inspired, eloquent, and forceful pleas ever presented in the annals of American civil rights litigation. Massachusetts Supreme Court Justice Lemeul Shaw even openly praised Sumner for his outstanding presentation, but then joined a majority of the court that decided the case in favor of the school district's " separate but equal" policy of discrimination. In so doing, the court deferred to a finding and argument by the Boston School Committee that:

> " in excluding colored children from common schools open to white children, the Committee furnish(es) an equivalent."

The court also took note of a School Committee " Majority Report" which explained the grounds for the school district's discriminatory policy with the following statement:

> " It is one of races, not of colors merely. The distinction is one which the Allwise Creator has seen fit to establish; and it is founded deep in the physical, mental, and moral natures of the two races. No legislation, no social customs can efface this distinction."

Hence, the first authoritative judicial endorsement of the " separate but equal" doctrine did not arise from passenger trains in the South in the 1890's, but rather from the nation's first public school system, in the North, in the 1840's.