# Torture and Truth

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By 1936 the Supreme Court was so unpopular for its decisions invalidating progressive legislation that the Justices were caustically labeled "[t]he nine old men."[1] Yet even in the last full year of the *Lochner* era, this caricature of the Justices as aging reactionaries was misleading. In 1936 those "nine old men" decided *Brown v. Mississippi*,[2] a decision so progressive that after more than a half century it remains one of the Court's great opinions.

We could consider *Brown* a great opinion because it broke new ground in constitutional law. *Brown* was the first case in which the Supreme Court reversed state court criminal convictions that rested upon confessions coerced from the defendants.[3] *Brown* triggered the development of an entire area of constitutional law by establishing that the Due Process Clause of the Fourteenth Amendment limited the force state and local government officials could use to persuade suspects to confess, and that federal judges could enforce those limits. In the thirty years following *Brown*, the Supreme Court decided about three dozen cases in which it grappled with the problem of coerced confessions, and this series of decisions culminated in another landmark opinion, *Miranda v. Arizona*.[4] But this is not why *Brown* is a great opinion.

We could consider *Brown* a great opinion because it marked a different kind of milestone in the evolution of Fourteenth Amendment doctrine.

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1. DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN (1936). The label stuck. *See, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW 445 (12th ed. 1991) (discussing how the "reaction against the excessive intervention of the 'Old Men' of the pre-1937 Court strongly influenced the judicial philosophies of their successors").

2. 297 U.S. 278 (1936).

3. Applying the Fifth Amendment privilege against self-incrimination, the Court had reversed federal convictions on this ground in the previous century. *See, e.g.*, Brain v. United States, 168 U.S. 532 (1897) (holding that the defendant's confession was involuntary and reversing his murder conviction).

4. 384 U.S. 436 (1966). *Miranda* rested upon the Fifth Amendment privilege against self-incrimination. In *Brown*, neither the Fifth Amendment privilege nor the Supreme Court's earlier decisions interpreting it were controlling. The Court would not incorporate the Fifth Amendment privilege into the Fourteenth Amendment Due Process Clause and impose it upon the states for almost thirty years—only two years before *Miranda*. *See* Malloy v. Hogan, 378 U.S. 1 (1964).

In 1936 the Court was in the final full year of the epoch in which it frequently applied substantive due process standards to strike down legislation regulating economic activity. Yet on the eve of the *Lochner* era's demise, *Brown* confirmed that due process protected other forms of liberty from government misconduct, and helped preserve this concept for future decades. But this is not why *Brown* is a great opinion.

*Brown* is a great opinion because the Court confronted two profound moral issues and resolved them honorably. It is a great opinion because it used language possessing the rhetorical power of truth to justify the Justices' unanimous decision. Ultimately, it is a great opinion because of its terrible facts.

*Brown* was a murder case. Within a *week* of the crime, three black men were arrested, tried, convicted, and sentenced to death for the murder of a white man. The defendants all confessed, and "[a]side from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury."[5] These confessions were the product of torture. Here is an example.

Shortly after the murder was discovered, two of the defendants, Brown and Shields, were arrested and jailed. A deputy sheriff named Dial, assisted by other law enforcement officers and a group of white men, brutally whipped the two suspects until they confessed:

> [T]he two . . . defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.[6]

The prosecution's witnesses did not dispute defense claims that the defendants had been subjected to these acts of torture. Indeed, several of the State's witnesses confirmed the truth of these allegations.[7] For

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5. *Brown*, 297 U.S. at 279. Some physical evidence potentially linking the defendants to the crime existed. But this evidence was minimal, and the Supreme Court's conclusion that without the confessions the evidence was insufficient to justify a conviction appears to be correct. *See* Transcript of Evidence at 18-20, 28-30, 40, 52-53, 57-58, 60, 84-86, 91-96, 115-17 (reporting testimony about a bloody jumper, an ax, a pocket knife, and fingerprints).

6. *Brown*, 297 U.S. at 282. In addition to being whipped, the third defendant, Ellington, was hung by the neck from a tree limb. *Id.* at 281-82.

7. The prosecution called three law enforcement officers in rebuttal of the defendants' testimony. Each officer admitted that the physical abuse occurred, that the defendants denied any guilt before they

example, after the defendants had described their brutal interrogations, the prosecutor called deputy Dial in rebuttal. The deputy not only admitted whipping the defendants, but in his testimony concerning the whipping of one defendant, "and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a negro; not as much as I would have done if it were left to me.'"[8]

Despite these undisputed facts, the trial judge admitted the confessions into evidence. Despite the uncontroverted record, the Mississippi Supreme Court held—over a strong dissent—that the defendants had received due process of law, and affirmed their convictions and death sentences.

The longer one works in the law, the more one comes to expect litigated cases to present fact disputes and moral ambiguity. In *Brown* the Supreme Court was confronted with neither. The stark clarity of the facts and the moral issues permitted—no, demanded—an unequivocal response from the Court. Ironically, the State's attempts to deny the legal significance of the facts may have helped prod the Supreme Court into taking a strong position.

The State of Mississippi employed a classic legal argument to avoid the most obvious moral issue raised by the facts. Mississippi never explicitly claimed the right to torture its citizens until they confessed and then to use these words as the basis for convicting them of heinous crimes. But that was the effect of the State's legal argument in *Brown*. Mississippi asserted that its courts could admit these confessions free from any interference by the national government: "[A]ssuming, [but] not conceding that the confessions in this case were coerced," the decision by the state courts admitting the confessions into evidence "cannot be reviewed by the United States Supreme Court."[9] This was a tenable argument under the theories of federalism accepted at that time.[10] The State cited dozens of federal and state judicial opinions supporting its legal argument that "nothing in the Federal Constitution . . . is infringed by the use in state courts of coerced confessions."[11]

The Supreme Court rejected the State's argument and reversed the convictions, holding that the convictions and sentences "were void for want

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were tortured, and that the confessions followed the acts of torture. Transcript of Evidence, at 102, 105-07, 111-15.

8. *Brown*, 297 U.S. at 284.

9. Brief of Respondent at 4 (No. 301).

10. *Id.* at 4-29 (arguing that the Fifth Amendment does not limit the states, that a state can entirely withdraw the privilege against self-incrimination without violating the federal Constitution, that state laws govern the conduct of criminal trials and do not implicate federal law as long as the trials do not violate fundamental rights—and the privilege against self-incrimination is not a fundamental right imposed on the states under the Fourteenth Amendment, and that all proceedings and rulings in the state courts complied with the requirements of Mississippi law).

11. *Id.* at 4.

of the essential elements of due process."[12] But legal arguments did not decide this case, moral revulsion did. In justifying the Court's decision, Chief Justice Hughes wrote that "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners."[13]

To properly appreciate this opinion, we must remember that in 1936 the legal conclusion flowing from this assessment of the facts was not as obvious as it is today. Today the legal conclusion seems obvious because we now have a long tradition of judicial decisions, including *Brown* itself, in which the Court has established that some conduct by those acting in the name of government—whether state or federal—is intolerable in our constitutional system. Today we have decades of case law outlawing police interrogation by physical abuse and affirming the right of federal courts to enforce that prohibition upon the states. But in 1936 the Court had not yet established these principles of due process in constitutional law.

And in 1936—forty years after *Plessy v. Ferguson*[14] and almost twenty years before *Brown v. Board of Education*[15]—the Court had not yet begun the process of dismantling the system of racial segregation created and enforced by law. Thus it is not surprising that Chief Justice Hughes never directly confronted the obvious role that race played in the *Brown* case. But the opinion's repeated references to the race of the murder victim, the race of the defendants, and the race of their attackers do more than merely demonstrate a general awareness of the institutionalized racism existing in that time and place. They inform the reader that the Justices recognized that these men were physically abused before trial and mistreated by the state's legal system because of their race. It was no accident that the opinion quoted the deputy's revolting testimony that the whipping was "[n]ot too much for a negro; not as much as I would have done if it were left to me." The Court's message is inescapable: In any civilized society, in any system of justice, this is intolerable.

The intertwining of these two evils, torture and racism, supplied the moral power necessary to overwhelm mere legal arguments. Consider one additional example. Mississippi argued that it should prevail because of a procedural error: defense counsel had not filed a motion to exclude the

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12. *Brown*, 297 U.S. at 287.

13. *Id.* at 286. Some commentators have suggested that this opinion may rest upon fears that coerced confessions are unreliable. *See, e.g.*, WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 295 (2d ed. 1992) (asserting that *Brown* "might be read as announcing a due process test for excluding confessions obtained under circumstances presenting a fair risk that the statements are false"). Obviously, these confessions were unreliable, but the Supreme Court never mentioned that issue in *Brown*. Its analysis focused upon the use of torture to deprive the defendants of their due process rights. Its analysis focused not upon whether evidence was trustworthy, but rather upon how the government had violated a fundamental, moral dimension of justice.

14. 163 U.S. 537 (1896).

15. 347 U.S. 483 (1954).

confessions after they were admitted at trial. Chief Justice Hughes responded that this argument misconceived "the nature of the petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void."[16] The Supreme Court agreed. The trial, conviction, and death sentence were all a sham because they rested upon two moral wrongs—torture and racism.

*Brown* is also a great opinion because of its rhetorical power. This power is most notable in the passages describing the defendants' torture. The methodical, understated, matter-of-fact language employed in these passages only amplifies the horror of the deputies' acts. Hyperbolic adjectives and histrionic arguments were unnecessary. Nothing was needed but the facts. These facts, presented simply and directly, were more persuasive than any legal argument ever could be. Ultimately, the truth of the facts is the source of the opinion's rhetorical impact—and its moral authority. Ironically, no member of the United States Supreme Court wrote these chilling passages. Instead, Chief Justice Hughes wisely and modestly chose to quote from the dissent written by a member of Mississippi's highest court.[17]

Finally, the *Brown* opinion offers provocative commentary about the behavior of lawyers, including lawyers who are prosecutors and judges. The Supreme Court implicitly rebuked the prosecutor, who knew how the confessions had been acquired, if only by listening to the trial testimony, yet persisted in using the confessions and in resisting defense efforts to exclude them. The Court explicitly criticized the trial judge, who "was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence."[18] The Justices rightly demanded a higher standard of behavior from prosecutors and judges, the lawyers charged with the duty of overseeing our criminal justice system. They cannot simply look away when confronted with such injustice. They cannot try to exploit it to win a case. They must do what they can to correct it, and to prevent it from happening again.

The Supreme Court's judgment in *Brown* embodies much of what is best in our legal tradition. Go read the opinion. It will make you proud of those nine old men. It will make you proud of the law. It might even make you proud to be a lawyer.

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16. *Brown*, 297 U.S. at 286. These procedural issues arising under Mississippi law are discussed in RICHARD C. CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI: THE SUPREME COURT AND *BROWN V. MISSISSIPPI* 29-30, 49-58 (1986).

17. *Id.* at 281.

18. *Id.* at 287.