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The Conception of Brown

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Cover Page Footnote


Senior Judge, S.D.N.Y.; B.A., Lincoln University, 1937; J.D., Howard University School of Law, 1940; LL.M., Columbia Law School, 1941; NAACP Legal Defense Fund, 1944-1968; appointed to the federal bench of the S.D.N.Y. in 1972 by President Nixon; co-founder of the National Conference of Black Lawyers (NCBL). Carter argued and won twenty-one of twenty-two cases before the Supreme Court as counsel for the NAACP. Among his most notable cases are *Brown v. Board of Education*, *NAACP v. Alabama*, and *NAACP v. Button*. As a staff attorney and later general counsel for the NAACP Legal Defense and Education Fund, Carter crafted and litigated a number of seminal civil rights cases which ultimately transformed the law and eliminated institutional segregation.

THE CONCEPTION OF *BROWN*

*Robert L. Carter**

*Brown v. Board of Education*¹ is celebrated throughout the nation on its fiftieth anniversary as having changed the face of America, and is called the country's most significant twentieth century decision. Most analysts seem to hail *Brown* for what it has already done. I do not join that school of thought. *Brown* has flowered the growth of a large black middle class, but whether this group can seize levers of economic power to prevent its members from being reduced to the working poor when the economy sours, a status most of them occupied before *Brown*, is a critical question for future resolution. Officialdom can no longer have a hand in ordering, fostering, or maintaining racial discrimination or color barriers of any kind. Yet old habits and practices of racial stereotyping, patronization of white supremacy, and the subordination of people of color still define the country. Only if the veil that presently separates the white world from that of people of color comes down will *Brown* have effected its full potential.

I was born in Florida, but my family was part of the first great migration of blacks from the rural hobbling South to the less restrictive urban North. Six weeks after giving birth to me, my mother took me to Newark, N.J. to reunite with her husband and family. My parents were among the first generation of blacks born free. My father died suddenly after a year's residence in Newark. My mother had above average educational skills for a black woman of her era. She could read and write, and she kept up with the news by close reading of local newspapers, augmented in time by radio

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

and television.

It had been a crime to provide slaves with access to educational skills and therefore the first generation of free blacks was largely illiterate. My mother had not planned to work outside the home, but as her husband had died leaving her children to raise, she had to seek outside employment. Being an indifferent cook, her only income-producing alternative was washing other peoples' clothes. When I was about twelve years old our economic fortunes improved, enabling us to afford a middle class lifestyle. I was an excellent test-taker, which at the time was considered evidence of intellectual talent. Thus, I was skipped through grammar school, finished high school at age sixteen, and moved on to college at Lincoln University. I later attended law school at Howard University and then Columbia Law School for a Masters in Law degree.

The year at Columbia was not the unalloyed joy I had hoped it would be. The head of the graduate law school program denigrated whatever evidence of scholastic capability I had shown in college and law school because the institutions I had attended were not on Columbia's level. By contrast, a number of colleagues from small law schools in Ohio, Washington State, and Oregon were received with open arms. The First Amendment fascinated me, and in my master's thesis I explored the extent to which preservation of this amendment was needed to maintain a democratic society. I chose as my faculty advisor Noel Dowling, because we had used his case book in my constitutional law class. Had I known that Dowling was from Alabama, I might have paused to reconsider.

Dowling had only negative comments on my thesis, but I would not let him get away without questions. "What are your suggestions?" I would ask. He would proffer none. This was his first time dealing with a putative black intellectual on a one-to-one basis. Believing that blacks were deficient in intellectual ability, his first approach was to discourage me so that I would drop out. Instead, I forced him to re-examine his own integrity. He approved the partially completed thesis, allowing me to proceed in securing the Masters in Law degree. After praising me for my fortitude and refusal to be discouraged, he said revealingly: "I hope you don't think I made negative remarks about your work because I am from Alabama."

I had been headed for the academy, but the Columbia experience was unsettling. I was certain that racism was a dominating element in my relationship with Dowling, evidenced by the guilt he apparently voiced in our last meeting (in effect asking forgiveness). But, a little voice would now make me question whether I was as good as I thought I was, undermining my confidence. In the long run, this ugly experience probably

did more good than harm. I would now dot all my “i’s”, cross all my “t’s” three times before releasing a product as finished. When a challenge was posed, there was no question that I was well-equipped to meet it.

I was drafted into the armed services in August of 1941. My years as a soldier were marked by a series of confrontations with white soldiers reared and defined by a racist culture in which blacks were inferior non-persons to whom whites did not have to accord courtesy or respect. Racism was so pervasive, raw, and crude, that when I returned to civilian life I was determined to find a way to use my talents to rid the country of race and color differentiation. This led me to Thurgood Marshall and about twenty-five years as a civil rights strategist and litigator for the NAACP.

Because of my scholarly credentials—the masters degree in law—I was given a small corner office to myself and charged with finding the means for outlawing the separate-but-equal doctrine and expanding the law’s reach in eliminating racial discrimination in all areas of American life. In *Sipuel v. Board of Regents*,² *Sweatt v Painter*,³ and *McLaurin v. Oklahoma State Regents*,⁴ the barriers against qualified blacks being admitted to state university, graduate, and professional schools had been struck down on various grounds—public perception, prestige of the alumni, and the need for a free intellectual intercourse to learn one’s profession. While moribund, the separate-but-equal doctrine survived.

In *Brown* we turned to the secondary and primary grades. What had been effective in professional and graduate schools would not work at lower school levels. In my readings to find a winning strategic tactic to employ, I came across a study by Otto Klineberg, then a professor of psychology at Columbia University. The study showed that each successive year that blacks from segregated schools in the South stayed in the Philadelphia desegregated school system, they scored higher on intelligence tests. I interpreted this study as showing that segregation had a deleterious effect on the ability of black children to learn.

This seemed to be what I needed, and I asked Klineberg to testify as an expert witness in a case we were preparing that sought to outlaw segregation in the grade and secondary schools in Clarendon County, South Carolina. He declined to help, but referred me to Kenneth and Mamie Clark, both of whom had doctorates in psychology. Kenneth was a professor at New York City University and Mamie operated Northside Center for Child Development, a facility in Harlem which treated disturbed

2. 332 U.S. 631 (1948).

3. 339 U.S. 629 (1950).

4. 339 U.S. 637 (1950).

children and their families.

The Clarks had devised a test to measure the impact of discrimination on black children in the South Carolina case by the use of dolls—a black doll and a white doll.⁵ The children equated all bad qualities with the black doll and all good qualities with the white one. When asked which doll was most like them, the black children would point to the white doll. The data, augmented by later expert testimony, allowed me to argue in briefs and orally that segregation adversely affected these youngsters. Because the African-American children had rejected the “all bad” black doll and picked the “all good” white one as the most like them in order to feel positive about themselves, we urged that segregation robbed these children of self-respect and therefore inhibited their ability to learn. Professor Klineberg later testified in the Delaware desegregation cases, by which time he had learned enough about our operation to be satisfied of its legitimacy.

* * *

Let me back up to tell how *Brown* came about. Charles Hamilton Houston became Dean of Howard Law School in 1929. He left the law school to become chief counsel for the NAACP, but his ideas about the training of black lawyers remained a fixture of the school’s mission during my attendance from 1937-1940. Courses in civil rights were at the core of Houston’s approach. Eventually, all the major law schools in the country began offering civil rights classes. In 1896, the Supreme Court had handed down *Plessy v. Ferguson*, involving a black man who complained about being placed in a railroad car set aside for black passengers.⁶ The Court dismissed the complaint, holding that separate facilities could be provided for blacks as long as they were substantially equal to those for whites. This established the separate-but-equal doctrine, validating racial segregation. While the separation was maintained, the courts paid little attention to the equality requirement.

In 1938, Houston argued *Missouri ex rel. Gaines v. Canada* in the Supreme Court and, for the first time, the equality part of the doctrine was emphasized and became a prerequisite for the maintenance of racial separation.⁷ After arguing *Gaines*, Houston left the NAACP and turned the

5. See Kenneth B. Clark, Effect of Prejudice & Discrimination on Personality Development (Midcentury White House Conference on Children and Youth 1950).

6. 163 U.S. 537 (1896).

7. 305 U.S. 676 (1939).

chief counsel job over to Thurgood Marshall. Marshall won significant victories, one of the most important being *Smith v. Allwright*, which opened the Democratic Party primary to African-Americans and made their right to vote meaningful.⁸ This accomplishment is miraculous considering that he did this without support staff, a library, or other services that most lawyers have in taking on a project of such magnitude.

After my troubled armed services experience, I returned to civilian life bitter and enraged at the mistreatment of blacks and the rampant discrimination practiced in and out of the armed forces, and was determined to eliminate segregation and discrimination from American society. Before going into the army, I had led the life of a scholar and believed that the First Amendment was the most essential ingredient in the preservation of democracy. My army encounters forced a change in priorities. The most important task now was dismantling segregation.

Although Thurgood Marshall had begun to make a name for himself, I had never heard of him before joining the staff in 1945. My LL.M. degree gave me the trappings of a scholar, and I was hired and encouraged to think outside the box. In *Brown*, we made a special effort to have “separate but equal” explicitly overruled. The argument was that the *Plessy* doctrine had been applied in a railroad case and its applicability to education had never been examined by the Court. It was simply assumed that a prior Court had found the doctrine applicable to education, but that assumption was in error.

Now for the first time, the Court had an opportunity to hold that the separate-but-equal formulation has no place in education and should be overruled. Chief Justice Warren’s opinion adopted the language offered in our oral arguments and briefs. *Plessy* was rejected, disabling state authorities from mandating, supporting, or continuing segregation. This is what makes *Brown* so significant. It effected a revolutionary change in American life. It has made for a more aggressive, demanding black community and greatly expanded the black middle class. And, it can be the basis for increased white support for a final drive to eliminate racial and ethnic barriers to equal treatment.

While I realized that the *Brown* decision was a very important one because it required equal educational opportunity for black children, I did not see it at the outset as the significant case it is now. *Brown* has established itself as one of the most important icons of American law. The decision handed down on May 17, 1954, means that black people have the same rights as whites; they do not have to rely on the kindness of whites to

8. 322 U.S. 718 (1944).

secure and utilize rights that are theirs as citizens and residents of this country. They could no longer be relegated to an unequal status by any local, state, or federal law or regulation differentiating among groups because of race. Many thought the civil rights fight was over, but of course that optimistic view was false. The concept of white supremacy and black subordination was too embedded in the culture of this country to be snuffed out with one decision, no matter how powerful.

The target had been segregation. We thought that segregation was the evil that had to be bested and with segregation put beyond the pale, African-Americans would no longer be hobbled and scarred by racial discrimination. When we succeeded in securing that objective with the *Brown* decision, however, we found that we had misjudged the target. Segregation was but a symptom of the disease we had to best. Eliminating the concept of white supremacy had to be our target if we were to succeed in freeing people of color from the burden of racial bias.

Even the *Brown* decision was not free of bias. When the Court in its next term decided on the remedy, its decision was tainted. The Justices ordered that the dual school systems throughout the South be transformed into unitary systems with “all deliberate speed.”⁹ When one is held entitled to a constitutional right, it vests immediately, but the Court was trying to make it easier for the South to comply by giving it time to do so. The formula proved to be a mistake that emboldened resistance.

Nonetheless, *Brown* has transformed race relations. People no longer admit to harboring racial bias. When distaste for a person of color is manifested, the distaste is said to be for reasons other than race. There are very few whites in the country who would admit to supporting racial discrimination, and that is a radical change from attitudes fifty or more years ago. *Brown* drastically changed the attitude of blacks and other colored minorities about their status in the country. The decision confirmed their equality as a constitutional entitlement. As a result, minorities are more insistent that equal rights and equal justice be a reality and not an unenforced abstraction. In my book, these are the significant forces that the decision in *Brown* has brought to life.¹⁰

Yet *Brown*, apart from its “all deliberate speed” corruption, is marred in another extremely vital aspect. *Brown* was instituted to secure implementation of equal educational opportunity. It has failed to meet that objective. There are more segregated secondary and primary schools today

9. *Brown v. Bd. of Educ.*, 394 U.S. 294 (1955).

10. ROBERT L. CARTER & JOHN HOPE FRANKLIN, *A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS* (forthcoming Feb. 2005).

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than existed before *Brown*. What is more disheartening, the schools are no longer largely in the South but blight the landscape in every major urban center in the country with the same characteristics as the old style segregated institutions.

Today, schools are generally 90-100% black or white, and the black schools are grossly unequal in facilities, offerings, funding, educational environment, and in every other respect one uses to evaluate educational institutions. It should be noted that there is also one positive element in each of the districts with racially disparate educational institutions: usually at least one of the black schools shines, turning out students with high educational potential, many of whom are college-bound. These successful schools are not the ones which solely house middle-class or upper-class youngsters. Some have children forced to live under dire economic circumstances but have intellectual gifts or the potential for developing such gifts. Too many of these children are not discovered and end up lost. This fight has to be undertaken now. Public schools have to be made into institutions that turn out students with a firm educational base.

Brown is the product of black legal and intellectual vision. It was conceived by Charles Houston who sought to end segregation at the university level by having qualified African-Americans apply to every university, school, or facility that was closed to them. Looking at the current assessments of *Brown's* greatness, I wonder if these commentators realize that they are talking about the legal skill and insight of Charles Houston and of Thurgood Marshall who provided me with the encouragement to think outside the box and the protection to conceive *Brown*. I contended that segregation inhibited the black child's ability to learn, and this was my contribution to the *Brown* legacy, which has denuded government of the power to mandate race discrimination. *Plessy* is gone, and *Brown's* expression of America's highest aspirations must be built upon to secure equal opportunity and to end the racial separation that still mars this society.