NYU REVIEW OF LAW AND SOCIAL CHANGE COLLOQUIUM, 2004

RELEARNING *BROWN*: APPLYING THE LESSONS OF *BROWN* TO THE CHALLENGES OF THE TWENTY-FIRST CENTURY

KEYNOTE ADDRESS

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Graduation Day at Yale University in late May of 2002 was blessed with warm, clear weather. It is the hope for such a beautiful morning that enables outdoor commencements to survive the rain-soaked disappointment of those hopes on far too many better-forgotten occasions. Yale's Old Campus was filled with faculty, administrators, soon-to-be graduates, and their well-dressed families and friends. Under the canopy-covered stage, there were ten individuals of significance whose achievements had led to their being designated to receive honorary degrees.

I was there at the invitation of one of those honorees, Robert L. Carter, my mentor and friend for more than forty years. Then eighty-five, a senior judge on the federal district court with thirty years of service, Carter had previously enjoyed a long and distinguished career as an NAACP civil rights attorney and for a few years as a partner in a large law firm. All of these accomplishments are worthy of praise and the warm applause that other candidates received. When, though, Yale University President Richard Levin announced that Judge Carter was an important member of the legal team that planned the strategies and argued the landmark case of *Brown v. Board of Education*,[1] noting that the decision was only two years short of its fiftieth anniversary, the audience leaped to its feet and with great enthusiasm applauded and cheered.

On that happy day, Judge Carter was the recipient of the audience's appreciation for his work in helping litigate a case in which the Supreme Court had held unconstitutional racial segregation in the public schools.[2] The mainly white audience assembled for the commencement exercises at one of the Nation's premier universities was not unsophisticated. For them—and so many others regardless or status or race—*Brown v. Board of Education* evokes awe

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1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2. *Id.*

and respect. If asked, most would agree that the decision was the finest hour of American law. In their view, this long-awaited and now much-appreciated decision had erased the contradiction between the freedom and justice for all that America proclaimed, and the subordination by race permitted by our highest law.

Even as I stood and joined in the applause, I wondered. How could a decision that promised so much and, by its terms, accomplished so little, have gained so hallowed a place among some of the Nation's better-educated and most successful individuals that its mere mention in connection with one of its lawyer-advocates sparked a contained—but very real—demonstration?

I wonder. What exactly was the audience applauding? Surely, not the current conditions in the public schools. Despite literally hundreds of school desegregation suits, many lasting for decades, most black and Hispanic students attend public schools that are both racially separate and educationally ineffective. A study issued in early 2003 by the strongly pro-integration Harvard Civil Rights Project[3] reports that as of the 2000–2001 school year, white students, on average, attend schools where eighty percent of the student body is white.[4]

Those unhappy statistics are what Alexander Bickel, one of Yale Law School's most prestigious faculty members, predicted back in 1970, when he wrote that while the decision would not be overturned, ". . . *Brown v. Board of Education*, with emphasis on the education part of the title, may be headed for—dread word—irrelevance."[5]

Over the decades, the *Brown* decision, like other landmark cases, has gained a life quite apart from the legal questions it was intended to settle. The passage of time has calmed both the ardor of its admirers and the ire of its detractors. Today, of little use as legal precedent, it has gained in reputation as a measure of what law and society might be. That noble image, dulled by resistance to any but minimal steps toward compliance, has transformed *Brown* into a magnificent mirage, the legal equivalent of that city on a hill to which all aspire without any serious thought that it will ever be attained.

Considered within the context of American political, economic, and cultural life, the *Brown* decision is a long-running racial melodrama. As with a film or play, the decision stimulated varying feeling. It energized the law, encouraged most black people, enraged a great many white people, and like so many other racial policies, served the Nation's short-term, but not its long-term

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3. Erica Frankenberg, Chungmei Lee, and Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, THE CIVIL RIGHTS PROJECT HARVARD UNIVERSITY, Jan. 2003, *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

4. *Id.* at 27.

5. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 150 (1970).

interests. Generating an emotionally-charged concoction of commendations and condemnations, the *Brown* decision recreated the nineteenth century's post–Civil War Reconstruction/Redemption pattern of progress followed by retrogression. It stirred confusion and conflict into the always vexing question of race in a society that, despite denials and a frustratingly flexible amnesia, owes much of its growth, development, and success, to the ability of those who dominate the society to use race to both control and exploit most people, black and white.

As had happened in the past, the law, employing the vehicle of a major judicial decision, offered symbolic encouragement to the black dispossessed. The substantive losses so feared by its white adversaries evolved almost unnoticed into advances greater for whites than those gained by the black beneficiaries. And, as now must be apparent to all, the Nation's racial dilemma—modernized and, one might say, "colorized"—a half-century later has become more complex, rather than resolved. The racial disparities, wide and widening in every measure of well-being, overshadow the gains in status achieved by those of us black Americans who by varying combinations of hard work and good fortune are viewed as having "made it."

Indeed, although it did not achieve what its supporters hoped for, historians and other social scientists, safely removed from the fray, may come to view *Brown* as the Perfect Precedent. As a dictionary would define perfect, it was: pure, total; lacking in no essential detail; complete, sane, absolute, unequivocal, unmitigated; an act of perfection.

They will have a point. In law, perfection in the social reform area is a legal precedent that resolves issues in a manner that: (1) initially or over time gains acceptance from broad segments of the populace; (2) protects vested property in all its forms through sanctions against generally recognized wrongdoers; (3) encourages investment, confidence, and security through a general upholding of the status quo; and (4) while recognizing severe injustices, does not disrupt the reasonable expectations of those not directly responsible for the wrongs. Such reform, of seeming necessity, is arranged within the context of a silent covenant. That is, the policymakers who approve the policy do so with the knowledge, unspoken, but clearly understood, that they—or those who follow them—stand ready to modify or even withdraw the reforms where adverse reaction or changed circumstances threatens any of the first three components.

Arguably, the *Brown* decision eventually met each of these standards. The question is whether another approach than the one embraced by the *Brown* decision might have been more effective and less disruptive in the always-contentious racial arena. The claim that the perfect is the enemy of the good sounds like a bureaucratic excuse for failing to do what needed to be done. At least in the first *Brown* decision, the Supreme Court did not settle for the pragmatic approach. Overcoming fears of predictable resistance, the Court sought to change society with one swift blow. A year later, the Court in

Brown II,[6] reacting to the outraged cries of "never" coming from the South, and the absence of support from the executive and legislative branches, backed away from its earlier commitment. In evident response to the resistance, the Court issued a fall-back decision that became prelude to its refusal to issue orders requiring any meaningful school desegregation for almost fifteen years.

In gauging the continuing impact and influence of the *Brown* decision as melodrama, we can begin with that prestigious gathering at Yale's commencement. It was a striking illustration of the strong sense possessed by so many people that racial injustices could be overcome through peaceful litigation. This country, after all, was a good place. Surely, blacks once benighted by racial discrimination could now throw off the shackles of segregation and get down to work. Soon, we would no longer even consider race save as an unhappy, better-forgotten historic relic of genocide, slavery, and segregation.

Professor Michael Seidman explains how *Brown* brought about a transformation without real change.[7] He reminds us that the Court in *Brown* faced a massive contradiction between the Nation's oft-cited commitment to equality and the great value whites placed on the racial preferences and priorities given tacit approval by the Court in *Plessy v. Ferguson*,[8] the decision that approved segregation. Given their lack of political and economic power, it appeared that the black demand for equality could never be satisfied. As Seidman puts it, though, the contradictions in the ideology of the separate-but-equal doctrine were permanently destabilizing and threatened any equilibrium.[9]

By purporting to resolve those contradictions, *Brown* served to end their destabilizing potential. The Court, Seidman claims,

> resolved the contradictions by definitional fiat: separate facilities were now simply proclaimed to be inherently unequal. But the flip side of this aphorism was that once white society was willing to make facilities legally nonseparate, the demand for equality had been satisfied and blacks no longer had just cause for complaint. The mere existence of *Brown* thus served . . . to legitimate current arrangements. True, many blacks remained poor and disempowered. But their status was no longer a result of the denial of equality. Instead, it marked a personal failure to take advantage of one's definitionally equal status.[10]

Brown, then, served to reinforce the fiction that, by the decision's rejection of racial barriers posed by segregation, the path of progress would be clear. Everyone can and should make it through individual ability and effort. One would have thought that this reinforcement of the status quo would placate—if not please—even the strongest supporters of segregation. To the contrary, the

6. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

7. *See* Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673 (1992).

8. 163 U.S. 537 (1896).

9. Seidman, *supra* note 7, at 717.

10. *Id.* at 717.

Brown decision provided politicians with a racial issue through which to enrage and upset large groups of white people, initially in the South, but far more generally as efforts to implement the decision moved across the country.

In effect, they demanded the name of segregation as well as the game of racial preference. Courts initially responded to this resistance with caution intended to give time for the process to work, and later with a series of stronger and more specific orders intended as much to uphold judicial authority as to effectively carry out the mandate of *Brown*. These orders were carried out eventually, but the fear of sending their children to desegregated schools led many white parents either to move to mainly white school districts or to enroll their children in private, all-white schools. With their departure went the primary reason for racial balance remedies.

Beyond the schools, resistance to desegregation of public facilities included forcible refusal by elected officials to comply with court orders and violent response by portions of the public to peaceful civil rights protestors. The coverage of this resistance by the media in general and particularly by television, showed the nation that it was intimidation and violence that enabled the segregationists to boast that Negroes were the contented beneficiaries of the southern way of life. Paradoxically, the major value of the *Brown* decision may have come as a result of well-publicized forms of white resistance that appalled many who otherwise would have remained on the sidelines. Clearly, the Civil Rights Act of 1964[11] and 1965 Voting Rights Acts[12] were responses to the courage of thousands of black people and their white allies who refused to be intimidated by segregationist violence and disorder.

While we in the civil rights movement worked to remove the most obvious symbols of segregation, we gave little attention to major changes in the economic outlook of a great many black people. Living in inner-city areas across the country, they were finding it increasingly difficult to find jobs. Employers were moving to the suburbs, where public transportation was almost nonexistent, but discrimination in hiring was rampant. Without work, family instability followed. Those able to leave the old neighborhoods did so, taking with them the stability of middle-class educations and aspirations. Public services in the inner-cities—including schools, hospitals, and community centers—all but collapsed under the burden. For those left behind, joblessness and hopelessness were eased with alcohol and drugs, sedatives that quickly worsened conditions for individuals and their communities. Neither the *Brown* decision nor our efforts to give it meaning had any relevance to the plight of those whom we had not forgotten, but had no real idea how to help.

President Lyndon Johnson launched his War on Poverty in the mid-1960s,

11. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h-6 (2000)).

12. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971–1974e (2000)).

and Dr. Martin Luther King came to recognize that desegregated facilities meant little to those unable to afford their cost. Johnson's campaign was sidetracked by the Vietnam War, and Dr. King's Poor Peoples Movement ended with his assassination. Through it all, we continued our striving for racial equality, even as resistance to our efforts stiffened and elected officials and those who hoped to gain election found other issues more attractive, more likely to gain the support of whites even if they ignored the needs of blacks and working class whites.

During this time of transition, the anniversary of *Brown* on May 17 became the "Flag Day" of the civil rights movement. A time to gather, renew our commitment, and join in the strains of "We Shall Overcome." The decision itself became an archetype of a landmark decision. Landmark decisions are, at bottom, designed through reference to constitutional interpretations and supportive legal precedents to address and hopefully resolve deeply divisive social issues. They are framed in a language that provides at least the appearance of doing justice without unduly upsetting large groups whose potential for non-compliance can frustrate relief efforts and undermine judicial authority. For reasons that may not have even been apparent to the members of the Supreme Court, their school desegregation decisions achieved over time a far loftier place in legal history than they were able to accomplish in reforming the ideology of racial domination that *Plessy v. Ferguson* represented.

The state-mandated racial segregation that was the subject of the *Brown* litigation did not suddenly appear, as a former student, Nirej Sekhorn, put it, like a bad weed in an otherwise beautiful racial garden, a weed the Court sought to eradicate with a single swing of its judicial hoe. Segregation was rooted in beliefs far deeper than those reflected in a legal precedent that had outlived its usefulness. Segregation provided whites with a sense of belonging based on neither economic nor political well-being, but simply on an identification with the ruling class based on race and a state-supported and subsidized belief that, as whites, they were superior to blacks. Those beliefs would not be easily surrendered and were readily championed by politicians who recognized that with a promise to fight integration, they would gain support even though everything else they did would be contrary to the needs of those whites obsessed with maintaining their sense of racial dominance.

Brown teaches that advocates of racial justice should rely less on judicial decisions and more on tactics, actions, even attitudes that challenge the continuing assumptions of white dominance. History as well as current events call for realism in our racial dealings. Traditional statements of freedom and justice for all, the usual fare on celebratory occasions, serve to mask continuing manifestations of inequality that beset and divide people along lines of color and class. These divisions have been exploited to enable an uneasy social stability, but at a cost that is not less onerous because it is all too obvious to blacks and all but oblivious to a great many whites.

Underlying these fairly apparent manifestations of racial reaction and

interaction, I perceive more subtle but far from invisible occurrences that influence both racial progress and racial retrogression. First, from the Nation's beginnings, policymakers have been willing to sacrifice even blacks' basic entitlements of freedom and justice as a kind of political catalyst that enables whites to reach compromises that resolve various and potentially damaging economic and political differences. And second, policymakers recognize and act to remedy racial injustices when, and only when, they perceive that such action will benefit the Nation's interests without significantly diminishing whites' sense of entitlement.

These seemingly diverse policies are actually two sides of the same coin, each promoting in its own way the maintenance of white dominance. Blacks are not neutral observers in their subordinate status, but even their most strenuous efforts seldom enable them to break free of a social physics in which even the most blatant discrimination is ignored or rationalized until black petitions find chance harmony with white interests. Racial justice, then, when it comes, arrives on the wings of racial fortuity rather than hard-earned entitlement. Its departure, when conditions change, is preordained.

The landscape for meaningful racial reform is neither smooth nor easily traveled. History's lessons have not been learned and even at this late date may not be teachable. Racial reforms that blacks view as important, many whites oppose as a threat to their status, an unfair effort to make them pay for wrongs committed by neither they nor theirs. Colorblindness, now as a century ago, is adopted as the easy resolution of issues of race with which the Nation would rather not wrestle, much less try seriously to resolve. It is an attractive veneer that obscures flaws in the society that do not correct themselves by being hidden from view. *Brown v. Board of Education* was a dramatic instance of a remedy that promised to correct deficiencies in justice far deeper than the Court was able to understand. Understanding those deficiencies more fully and suggesting how we should address them is the challenge of this issue.